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MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 236 OF 1912.

February 23, 1915.

Present:—Sir John Edward Power Wallis, KT., Chief Justice, and Mr. Justice Trotter.

C. T. N. NARAYANAN CHETTIAR AND OTHERS—DEFENDANTS NOS. 2 TO 4 AND 11 TO 13—APPELLANTS

versus

V. S. V. LAKSHMANAN CHETTIAR, DECEASED, AND OTHER—PLAINTIFFS AND DEFENDANTS NOS. 5, 6 AND 8 TO 10—RESPONDENTS.

Limitation Act (IX of 1908), Sch I, Arts. 91, 124—Suit to recover possession of trust properties—Management of temple transferred under agreement—Agreement found to be void—Suit to recover possession—Suit to set aside agreement, whether to be brought within three years—New issue framed at close of case—Fresh evidence, production of, right of—Expenditure incurred by de facto trustee during management, whether ground for retaining possession until payment of expenses.

The Limitation Act merely prescribes within what periods suits must be brought, and cannot be construed as of itself creating an obligation to sue where none exists. [p. 2, col. 2.]

Sales which are *ab initio* void cannot become valid if not set aside within three years by suit. [p. 3, col. 1.]

Sidhu Sahu v. *Gopi Charan Das*, 18 Ind. Cas. 969; 17 C. L. J. 233; *Malkarjun* v. *Narhari*, 25 B. 337; 2 Bom. L. R. 927; 5 C. W. N. 10; 27 I. A. 216; 10 M. L. J. 368 (P. C.); *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*, 23 M. 271; 27 I. A. 69; 4 C. W. N. 329; 2 Bom. L. R. 597; 10 M. L. J. 29, referred to.

A suit to recover possession of a temple from the managers, in whose hands its management was vested under an agreement, is in time if brought within 12 years and more than three years from the date of the agreement, though no suit to set aside the agreement was brought under Article 91, Schedule I of the Limitation Act. [p. 3, col. 1.]

Mere permission to raise an issue at a late stage of the case does not imply that the party on whose behalf it is raised is at liberty to let in evidence on issues already closed. [p. 3, col. 2.]

In the case either of public or private charities the Court is not bound to leave the trust estate in possession of a person not entitled to the character of a trustee, merely because he expended money on it while acting as trustee. On the other hand, it is the duty of the Court, especially in the case of public charitable trust to take the trust property out of the possession of persons not entitled to hold it, while making due provision for any claims which they may have in respect of the expenditure incurred in connection therewith. [p. 4, col. 1.]

Where a plea as to improvements is raised merely as a pretext to keep back possession, effect ought not to be given to such plea. The proper course is to direct the defendants trustees to deliver possession, and then direct accounts to be taken as between the *de facto* trustee and the temple in order to ascertain the amount to be allowed to him for expenses incurred by him in the course of such management. [p. 4, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge of Ramnad, in Original Suit No. 58 of 1911.

FACTS.—Suit to recover possession of a temple and its endowments from the defendants. Disputes existed between the trustees of the Nattukottai Chetty temple at Aryapudi, and while the disputes were pending settlement the trustees handed over the management of the temple to one Krishna Chetty and another under an agreement. The disputes were settled and the trustees sued to recover possession of the temple. The Sub-Judge of Ramnad decreed in favour of the plaintiffs for possession and disallowed the defendants' claim for improvements effected by them while in management. The defendants appealed.

Messrs. *K. Srinivasa Aiyangar* and *A. Krishnasami Aiyar*, for the Appellants, contended

that (1) the trustees having executed a document in favour of the defendants, vesting the management of the temple in them, that document was not set aside within three years under Article 91, Schedule I, of the Limitation Act, and the present suit brought more than three years from the date of document is barred by limitation. (2) The defendants are entitled to a sum of Rs. 20,000, money spent by them in repairing the temple and constructing Vahanms, etc.

Mr. *C. V. Anantha Krishna Aiyar*, for the Respondents, contended that (1) it was previously held by the High Court that the alienation of the trust property was void and that a void agreement need not be set aside, and the suit brought is within time. (2) As to the improvements it is clear that the defendants cannot by spending large sums, out of their sweet will and pleasure, make it a charge upon the temple, and thus render it imposssible for the trustees to recover possession. The temple enjoys an income of only about Rs. 5,000 a year, and the defendants cannot compel the trustees to pay them the value of the gold Vahanams which they have made (3). The improvement effected must be commensurate with the income of the temple.

This appeal coming on for hearing on the 11th and 15th of February 1915, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.—This is an appeal by some of the defendants against a decree in favour of the plaintiffs in a suit brought by certain trustees as *hukdars* of a temple to recover possession of the temple properties from the defendants (appellants) to whom the trustees had made over the management of the temple under an agreement, Exhibit I, dated 21st June 1901. Four questions were argued before us. In the *first* place it was said that the suit is bad for non-joinder, as, though all the *hukdars* including the 9th and 10th defendants were impleaded, the plaintiffs in paragraph 16 of the plaint stated that these defendants had lost the office owing to their neglect to discharge its duties, and that they were joined merely because they asserted a right to it. At the trial this contention was abandoned by the plaintiffs, and a decree was passed in favour of the 9th and 10th defendants with their consent as well as of the other defendants. In these circumstances, I do not think the decision in *Kokilasari Dasi* v. *Mohunt Rudranand Goswami* (1) cited for the appellants has any application. In that case the plaintiff persisted both in the original and the lower Appellate Court in denying the joint trusteeship of his minor brother whom he had made defendant; and it was only after this issue had been finally decided against him, that he applied in the second appeal that a decree might be passed in favour of himself and this defendant jointly. Here the contention was abandoned during the trial and the title of the defendants Nos. 9 and 10 as trustees was admitted.

The *second* contention was that the suit was barred by limitation under Article 91 of the Indian Limitation Act, as the plaintiffs did not sue within three years to set aside the transfer, Exhibit I. The High Court having already held that this transfer was void, Exhibit G, and this being so, it does not require to be set aside. The Limitation Act merely prescribes within what periods suits must be brought and cannot be construed as of itself creating an obligation to sue where none existed. In *Malkarjun* v. *Narhari* (2) their Lordships of the Judicial Committee clearly distinguished between sales which were a nullity and sales which were only voidable and valid until set aside. At page 350 after pointing out that the words "to set aside an adoption" in one of the articles were incorrect as an adoption may be declared invalid but cannot be set aside, their Lordships observed that there is no such difficulty in the case of suits to "set aside a sale" in the same Act, "because a sale valid until set aside can be legally and literally set aside; and anybody who desires relief inconsistent with it may and should pray to set it aside." See also *Sidhu Sahu* v. *Gopi Charan Das* (3). This is a more recent decision of their Lordships than *Gnanasambanda Pandara Sannadhi* v.

(1) 5 C. L. J. 527.
(2) 25 Bom. 337; 5 C. W. N. 10; 10 M. L. J. 368; 2 Bom. L. R. 927; 27 I. A. 216 (P. C.).
(3) 18 Ind. Cas. 969; 17 C. L. J. 233.

Velu Pandaram (4) which is relied on by the appellants. In that case two persons Nataraja and Chockalingam shared the management of a religious endowment, and successively transferred their respective rights of managemant by registered instruments to a third party in 1868 and 1869, Chockalingam, who was a minor, being represented by his mother. In 1892 Velu, the son of Nataraja, sued to recover the trusteeship joining Chockalingam as defendant, as he was apparently unwilling to sue. Their Lordships held that Article 124 of the Indian Limitation Act was applicable and that, as the defendants had held adversely to the plaintiff's father, Nataraja, for more than twelve years, the plaintiff's suit was barred. They did actually rule, as contended by the appellants, that the suit was barred under Article 91 of the Indian Limitation Act because Nataraja had failed to set the transfer aside in three years which is what is now contended. Adverting to the case of the defendant Chockalingam, who was a minor at the date of the sale of his share, their Lordships, with a view of showing that his claim was also barred, observed that he attained majority in 1880 "and had by Article 44 of the Act three years for setting aside the sale by the guardian." Mr. K. Srinivasa Aiyangar relies on the fact that, although their Lordships might have simply said that Chockalingam had a further period of three years to sue under section 7, they expressly stated that he had three years under Article 44 which is for suits to set aside a sale by a guardian, although the sale was one which in an earlier part of the judgment they had held to be void; and he invites us to hold on this authority, that sales which are void *ab initio* become valid under the provisions of the Limitation Act if not set aside within three years by suit. Such a view, as already pointed out, appears to be inconsistent with another part of the same judgment and to be opposed to the rulings of their Lordships in the later case in *Malkarjun* v. *Narhari* (2), and we are not prepared to accept it as correctly representing what their Lordships intended to lay down. This very decision of their Lordships is express authority that Article 124 is the Article applicable, and under that Article the suit is not barred. The other cases cited were cases of sales by guardians which were not void and have no application to the present case.

The *third* point is as to the alleged improper rejection of evidence. It appears from the B diary that, after the evidence had been closed and during the arguments for the defence, it was observed that no issue had been framed about the validity of the agreement, Exhibit I, and leave was given to the plaintiffs to ask for a further issue on 11th April 1912. This, the 7th issue, is as follows:—

"Is the agreement and arrangement mentioned in the plaint as the one under which the defendants got into possession illegal and void in law, having regard to its nature, the circumstances and the objects for which it was made and are the plaintiffs entitled to all or any of the reliefs asked for; and if it is valid and legal under special circumstances and for special objects, are the circumstances and objects such as to make it valid and good?"

Reading this with the pleadings and with Exhibit I, the agreement in question, it would appear that the question intended to be raised was whether such an agreement of this nature, even if ordinarily void, might in special circumstances be valid and, if so, whether such special circumstances existed in the present case. At the further hearing, when the defendants wanted to call evidence as to the practice of the temple, the Subordinate Judge objected that this evidence should have been given at the trial of the other issues and that the question of usage did not arise on the seventh and other additional issues. We think the special circumstances mentioned in the issue referred to the recitals in Exhibit I as to the circumstances in which that document came into existence. It says nothing about a usage under which Exhibit I could be supported and we think the Subordinate Judge was justified in refusing to allow a defence of this kind to be raised at this late stage of the case.

The *fourth* question relates to the form of the decree which makes the appellants liable to account for what may be found due from

(4) 23 M. 271; 27 I. A. 69; 4 C. W. N. 329; 2 Bom. L. R. 597; 10 M. L. J. 29.

them but gives them no right to recover anything that may be found due to them for expenses properly incurred out of their own pockets in the course of *de facto* management. It is contended that they are entitled to be reimbursed and to retain possession of the temple properties until they are so reimbursed. The decision, as yet unreported, in Appeal Suit No. 148 of 1910 on which the appellants rely, does not on examination support the proposition but rather the reverse, as it is mentioned in the judgments and appears from the printed papers that the *de facto* trustee in that case had in an earlier suit claimed to retain possession of the temple properties until he was reimbursed and that this claim was rejected by the District Judge whose decree was affirmed by this Court in Appeal Suit No. 147 of 1902. There is no reason for allowing trustees of public charitable endowments any larger rights against the trust property than are recognized in the case of private trustees by section 32 of the Indian Trusts Act. That section says that a trustee is entitled to reimburse himself all expenses properly incurred in connection with the trust and that he has a first charge enforceable only by prohibiting any disposition of the trust property without previous payment of such expenses not, that is to say, in the ordinary way by sale of the property subject to the charge. No authority has been cited before us to show that in the case of either private or public trusts the Court is bound to leave the trust estate in possession of a person not entitled to the character of a trustee merely because he has expended money on it whilst acting as trustee. On the contrary it would appear to be the duty of the Court, especially in the case of a public charitable trust to take the trust property out of the possession of persons not entitled to hold it, whilst making due provision for any claims they may have in respect of expenditure incurred in connection therewith.

Turning now to the facts of the present case, the defendants' case on the pleadings and at the trial was that they were entitled to remain in possession until recouped under an express agreement supplemental to Exhibit I. It is only after the rejection of this contention by the Subordinate Judge that the defendants fell back in appeal on this alleged equitable right. Apart from this we do not think the appellants are entitled to any modification of that part of the preliminary decree which directs the defendants to give up possession to the plaintiffs, but we are prepared to amend paragraph 2 of the preliminary decree by directing accounts to be taken in respect of the temple as between the plaintiffs and defendants Nos. 6, 8, 9 and 10 of the one part and defendants Nos. 2 to 5 and 11 to 13 of the other part, so as to enable the latter to establish any claim they may have against the trust properties on the taking of the accounts, leaving it to be determined by the final decree how such claim, if established, should be enforced. Otherwise the appeal fails and must, we think, be dismissed with costs. Fresh evidence may be taken if the modification of the preliminary decree should be found to render it necessary.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 76 OF 1914.

March 5, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

AUDIAPPA PILLAI—PETITIONER—APPELLANT

versus

NALLENDRAN PILLAI—RESPONDENT.

Guardians and Wards Act (VIII of 1890), ss. 17, 19—Father marrying second wife, whether sufficient ground to deprive him of his children's guardianship—Guardianship of husband and father and of other relations, distinction between.

The fact that the father has married a second wife is not a sufficient ground for holding that he is unfit to be the guardian of his children. [p. 5, col. 1.]

Bindo v. *Sham Lal*, 29 A. 210; A. W. N. (1907) 24; 4 A. L. J. 22; *Gulbai and Lilbai, In re*, 32 B. 50; 9 Bom. L. R. 923, distinguished.

A distinction exists between the guardianship of a father or a husband and that of other near relations. The former could be deprived of the right of guardianship only *when he is found to be unfit to be the guardian of children or wife* and the latter, when it does not conduce to the welfare of the children. [p. 5, col. 1.]

Appeal against the order of the District Court of Trichinopoly, in O. P. No. 296 of 1913.

Messrs. *T. R. Ramachandra Aiyar* and *T. R. Krishnaswami Iyer*, for the Appellant.

RAM CHARAN *v.* BISMILLAH CEGAM.

Mr. *S. Varadachariar*, for the Respondents.

JUDGMENT.—The District Judge held that no circumstances have been proved which could deprive the father of the right of guardianship of his minor daughters. We agree with him. Mr. Krishnaswami Aiyar has taken us through the whole of the evidence; accepting in their entirety the depositions of appellant's witnesses, we are unable to find that any circumstance has been spoken to which would render the father unfit to be the guardian of his minor daughters. There is some evidence that the deceased mother of the girls was not properly treated: that is not a ground for presuming that the children will not be properly looked after. The eldest girl was 12 years of age at the time of the inquiry and the grandfather is unable to depose to any single act which shows that either the father or the step-mother ill-treated the girl. The fact that the father has married a second wife is not a sufficient ground for holding that he is unfit to be the guardian of his children.

The learned Vakil for the appellant relies on *Bindo* v. *Sham Lal* (1), which seems to lay down that if the father marries again he ought to be deprived of his legal right of guardianship. The learned Judges refer only to section 17 and say that the welfare of the girls is the primary consideration. There is no doubt that that would be the consideration which would influence the Court ultimately: at the same time, it ought not to be forgotten that the Legislature advisedly draws a distinction between the legal rights of husband and parents on the one side and those of the other near relations on the other side. In the first class of cases, it must be established that any act or conduct of the husband or father renders him unfit for guardianship: the fact that the child may be happier and more comfortable with other relations is not sufficient to deprive the two relations referred to of their right and duty. The same sanctity does not attach to the rights claimed by the other relations. It is for these reasons that section 19 of the Guardians and Wards Act lays down that the Court must be satisfied that the husband or the father is unfit to be the guardian of his wife or child respectively before it can appoint another person as the guardian. For these reasons we are unable to follow the decision in *Bindo* v. *Sham Lal* (1). The decision in *Gulbai and Lilbai, In re* (2) deals with guardianship of other near relations. To such cases section 19 does not apply and the only consideration which should weigh with Courts is the welfare of the minor. We think the order of the District Judge is right: we must dismiss this appeal. Having regard to the fact that the grandfather is deeply interested in the minors, we think the provision for consulting the Court before giving the girls in marriage is a salutary one. We see no reason to think that the security is not sufficient. We make no order as to costs.

Appeal dismissed.

(1) 29 A. 210; A. W. N. (1907) 24; 4 A. L. J. 22.

(2) 32 B. 50; 9 Bom. L. R. 923.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 11 OF 1913-14 OF FARRUKHABAD DISTRICT.

March 20, 1914.

Present:—Sir Duncan Colvin Baillie, S. M.

RAM CHARAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat BISMILLAH BEGAM—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 50, 154, 3—Rent-free land—Resumption—Proceedings to have rent assessed—Rent not assessed—Suit for resumption, whether barred.

In 1869, a *zemindar* got a declaration that he had a right to have rent assessed on the rent-free land but got no rent assessed. In 1912 he brought a suit for resumption. It was contended that the only right of the *zemindar* was to have the rent assessed:

Held, that, under the present law as under the old law, the former proceedings were no bar to a proceeding for resumption. [p. 6, col. 1.]

Second appeal from an order of the Commissioner, Allahabad Division, dated the 4th September 1913, reversing that of the Assistant Collector of Farrukhabad District, in a case of resumption.

JUDGMENT.—The suit was for resumption of a service rent-free grant. The one point which calls for notice in connection with this appeal is the claim that because in 1869 it was declared by a Settlement Deputy Collector that the landlord had a right to have rent assessed on

this land, the landlord is now barred from suing for resumption and can only sue for assessment of rent. It is claimed that section 3 applies, that the appellant had acquired a right to hold this land on payment of rent and that the right so acquired is not affected by the passing of the Tenancy Act.

I am afraid that I cannot hold that there has been in this case any right acquired. The landlord in 1869 wished to declare that he could have rent for this holding and a declaration to that effect was made. The declaration was never given effect to and rent was never fixed, and I do not think that from those proceedings it can be inferred that the tenant had a right which barred the resumption if the *zemindar* desired to resume. Even under the present law which makes service grants liable to resumption, the alternative is offered to the *zemindar* of suing for assessment of rent, but this right to have rent assessed does not in any way imply that the right to resume is barred. I take it that the circumstances were similar then. In my opinion this appeal must be dismissed with costs on appellant.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 256 OF 1914.

February 24, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

VUPPALAPATI VENKATAPPA—DEFENDANT No. 2—APPELLANT

versus

THOVAGUNTA VIRARAGHAVAYYA AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 1 AND 3 TO 6—RESPONDENTS.

Execution against wrong representative—Sale—Property in hands of usufructuary mortgagee—Reversioner, suit by—Decree-holder purchaser, whether protected.

In a mortgage suit the mortgagee obtained a decree against the mortgagor and on the latter's death brought his widowed daughter-in law on the record while his widow was still alive. He then proceeded to execute the decree and purchased the property himself at the Court sale. At that time the property was in the hands of a usufructuary mortgagee and when the estate fell into possession, the reversioners sued to recover possession;

Held, that inasmuch as the property was in the hands of a usufructuary mortgagee at the time of sale, the purchaser acquired merely the equity of redemption and the sale could not be binding on the reversioners.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Guntur, in Appeal Suit No. 432 of 1911, preferred against that of the Court of the District Munsif of Ongole, in Original Suit No. 549 of 1909.

Mr. *P. Venkata Rama Rao*, for the Appellant.

Mr. *T. Narasimha Aiyangar*, for the Respondents.

JUDGMENT.—We think that the learned Judge was right in holding that the sale was not binding on the reversioners. Narasamma, who was brought on the record as the legal representative of Lakshami Devamma, could not in any view of the case have been her true legal representative. Her only possible interest in the property would have been as one entitled to claim maintenance from it and this interest could not have been affected by the sale. As a matter of fact she had not even that interest in it, as she had other property for securing to her her maintenance. The property at the time of the sale was in the hands of a usufructuary mortgagee, and the auction-purchaser acquired merely the equity of redemption, which amounted in effect to a right to possession 16 years after the sale. As soon as the time for redemption expired and the estate fell into possession, the reversioners instituted the present suit. In these circumstances the remarks of their Lordships of the Privy Council in *Khiarajmal* v. *Daim* (1) seem to be directly applicable: "In the opinion of their Lordships, it is not a mere question of form but one of substance. In coming to this conclusion their Lordships are quite sensible of the importance of upholding the title of persons who buy under a judicial sale, but in the present case the real purchaser was the judgment-creditor, who must be held to have had notice of all the facts".

The decree of the lower Appellate Court is confirmed and the second appeal is dismissed with costs.

Appeal dismissed.

(1) 32 C. 296 at p. 315; 1 C. L. J. 584; 2 A. L. J. 71; 9 C. W. N. 201; 7 Bom. L. R. 1; 32 I. A. 23 (P. C.).

ABDUL GHAFUR KHAN *v.* MUSHARRAF BI.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 128 OF 1910.
March 9, 1915.
Present:—Mr. Justice Johnstone and
Mr. Justice Shah Din.
ABDUL GHAFUR KHAN AND OTHERS—
DEFENDANTS—APPELLANTS
versus
Musammat MUSHARRAF BI AND ANOTHER—
PLAINTIFFS—RESPONDENTS.

Custom—Inheritance—Lodi Pathans *of Mustafabad, Ambala District—Presumption*—Onus.

In matters of inheritance *Lodi Pathans* of Ambala District follow agricultural custom and not their personal law, and the presumption is that among them first cousins succeed to ancestral estate in preference to daughters. [p. 8, col. 1.]

Where the daughters seek to rebut this presumption the *onus* lies on them to establish their prior right. [p. 8, col. 1.]

Musammat Ishar Devi v. *Bindraban*, 26 Ind. Cas. 686; 5 P. R. 1915; *Mowas* v. *Gulab Jan*, 24 Ind. Cas. 920; 121 P. W. R. 1914; 220 P. L. R. 1914; 97 P. R. 1914; *Nizam Din* v. *Shahab-ud-Din*, 108 P. R. 1900; P. L. R. 1900, p. 548, *Najabat Khan* v. *Abdul Rahman Khan*, 27 P. R. 1896; *Musammat Jivi* v. *Sardar Khan*, 39 P. R. 1895; *Nizam Din* v. *Musammat Fariga*, 68 P. R. 1889, referred to.

Wazir Ali Khan v. *Musammat Asmat Bibi*, 61 P. R. 1902; 72 P. L. R. 1902, *Kutab* v. *Ismail*, 157 P. R. 1890; *Tari Baz Khan* v. *Fateh Khan*, 13 Ind. Cas. 316; 114 P. W. R. 1912; 29 P. R. 1912; 98 P. L. R. 1912, distinguished.

Second appeal from the decree of the Divisional Judge, Ambala Division, dated the 8th of November 1909, reversing that of the District Judge of Ambala, dated the 31st of March 1909, dismissing the suit.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Appellant.

Rai Bahadur Pandit *Sheo Narain* and Mehta *Bahadur Chand*, for the Hon'ble Mr. *Shadi Lal*, K. B., for the Respondent.

JUDGMENT.—This is a custom case in which the contest is between a first cousin (paternal uncle's son) of the deceased whose estate is the subject of the claim, and a daughter and daughter's daughter. The parties are *Lodi Pathans* of Mustafabad, District Ambala. The first Court framed seven issues and wrote an exhaustive and, barring a few unimportant slips, a careful and judicious order, dismissing the suit of the ladies for possession against the cousin. That Court, after disposing summarily but quite correctly of certain unimportant issues, turned to the issues on which the case really depends, namely, the second and third. On these it held that, inasmuch as no fraud, but only plaintiffs' own carelessness, is a cause of the belated amendment of the plaint so as to include the omitted *ala milkiyat* right, therefore, section 18, Limitation Act, could not help plaintiffs and the claim to that right is barred; that the widow of the last male holder succeeded as a life-tenant—as to this see *Mansoman* v. *Abdul Kadir* (1); that the parties in matters of inheritance are governed by custom and not Muhammadan Law; and that the plaintiffs have proved no special custom under which they can exclude a first cousin. Other points decided need not be detailed here. It will be seen that the Court laid upon the ladies the burden of proving a special custom and ruled that they had failed in this.

They appealed and the learned Divisional Judge accepted their appeal. His judgment is not easy to follow, but he seems to lay the *onus* on defendant and he decrees the whole claim. No good purpose would be served by analysing that judgment in detail, for this faulty laying of the *onus*, after first saying it was futile to discuss the question of *onus*, coupled with the rather surprising remark that it was immaterial whether these *Pathans* were agriculturists or not, vitiates the whole judgment. We will deal with the case on the merits, and briefly.

The case has been hotly contested and there is ample evidence for a decision on the question of custom. It is unnecessary to discuss the matter of the time-bar as regards the amendment of plaint, for on the merits we find the suit must fail *in toto*.

The land and houses in suit are ancestral. The defendant has been in undisputed possession from the death of the last male holder's widow in 1896 until 6th June 1908, all but 12 years later. Mustafabad is a large village, containing four *pattis* and inhabited by such tribes (in addition to the 11 families of these *Lodi Pathans*) as *Rajputs*, *Jats*, *Kazis*, *Chimbas* and so forth. These Pathans live by agriculture and have been settled in the village for hundreds of years, it is said since A. H. 725; and though they hold in *khud kasht* only seven ploughs out of 21 in their *patti*, it is said they have always held the same land

(1) 65 P. R. 1881.

from the beginning. In these circumstances following all the authorities, we can readily believe that they follow agricultural custom in matters of inheritance. That they do not follow their personal law is clear from many indications—indeed, they do not really pretend that they do, see the depositions of their witnesses. As they follow custom, there is certainly a reasonable presumption that among them first cousins would succeed to ancestral estate in preference to daughters. As to *onus* we need only refer without discussion to the analogous cases, *Musammat Ishar* v. *Bindraban* (2), *Mowas* v. *Gulab Jan* (3) (and the many authorities there quoted), *Nizam Din* v. *Musammat Fariga* (4), *Najabat Khan* v. *Abdul Rahman Khan*(5), *Nizam Din* v. *Shahab-ud-Din* (6), *Musammat Jiwi* v. *Sardar Khan* (7). Cases of *gifts* to daughters and of contest between remote collaterals and daughters, *e. g.*, *Wazir Ali Khan* v. *Musammat Asmat Bibi*(8), *Kutab* v. *Ismail* (9), *Tari Baz Khan* v. *Fateh Khan* (10), etc., etc., are not in point.

Have they rebutted that presumption? Mr. Sheo Narain, speaking for them, frankly admits that they have not, unless the instances that have occurred at Shahabad of daughters among *Lodi Pathans* excluding agnates are imported into the case. Now Shahabad is a town of over 10,000 inhabitants and has been a Municipality. It is 12 miles from Mustafabad and the only connection seems to be that the Pathans of the two places inter-marry. The conditions of life in the two places are so different that we do not think any safe deduction as to Mustafabad custom can be drawn from Shahabad.

And if we turn to Mustafabad itself and the seven villages near it in which *Lodi Pathans* live, the evidence is, strongly in favour of the defendant's contention. In those villages very many instances of exclusion of daughters by near agnates are proved, while not a single contrary instance is to be found. Then the cases in Mustafabad have been fully threshed out before us and in the lower Courts' judgments. As the first Court has pointed out, only one instance in that place in any way supports plaintiffs—Allahdi's case—and the decision there was ambiguous, it not being by any means clear that the real *ratio decidendi* was connected with the question now before us. Even if the case is really one of exclusion of near agnates by the daughter, it is insufficient by itself to rebut the presumption mentioned above *plus* the evidence of actual practice in Mustafabad and the near villages. It is unnecessary for us to go into greater detail in view of the undoubted fact, admitted by plaintiffs' Counsel, that, apart from the Shahabad instances, plaintiffs cannot prove their case.

We allow this appeal and dismiss plaintiffs suit with cost throughout.

Appeal allowed.

(2) 26 Ind. Cas. 686; 5 P. R. 1915.
(3) 24 Ind. Cas. 920; 97 P. R. 1914; 220 P. L. R. 1914; 121 P. W. R. 1914.
(4) 68 P. R. 1889.
(5) 27 P. R. 1896.
(6) 108 P. R. 1900; P. L. R. 1900, p. 548.
(7) 39 P. R 1895.
(8) 61 P. R. 1902; 72 P. L. R. 1902.
(9) 157 P. R. 1890.
(10) 13 Ind. Cas. 316; 29 P. R. 1912; 114 P. W. R. 1912; 98 P. L. R. 1912.

MADRAS HIGH COURT.

CIVIL APPEAL No. 19 OF 1914.

March 8, 1915.

Present:—Sir John Edward Power Wallis, KT., Chief Justice, and Mr. Justice Tyabji.

Sri HOTHA VIRABHADRAYYA PANTULU—CLAIMANT—APPELLANT

versus

REVENUE DIVISIONAL OFFICER, POLAVARAM REFERRING OFFICER) AND ANOTHER—RESPONDENTS.

*Land acquisition—Land acquired by Government—Apportionment of compensation amount between landlord and tenant—*Muchilika *by tenant before Madras Estates Land Act giving up claim to compensation, effect of—Madras Estates Land Act (I of* 1908), *s.* 6 (1).

A *ryot* in occupation of "*ryoti* land" on the date the Estates Land Act came into force can also claim compensation in respect of the occupancy right conferred upon him by section 6 (1) of the Act when that land is acquired by Government under the Land Acquisition Act. A *muchilika* executed by a tenant prior to Madras Estates Land Act, relinquishing his claim for compensation, does not estop him from making the claim in view of the new right conferred upon him by the passing of the Estates Act. [p. 9, col. 2.]

Where there are distinct interests in the land, compensation awarded must be for both and not in respect of one alone. [p. 9, col. 2.]

PHULESARI *v.* SHUKUL RAJ SINGH.

Appeal against the order of the Court of the Government Agent, Godavery, in Revenue Case No. 188-*a*/Ag., dated the 28th June 1913.

FACTS.—Government acquired three items of land from the proprietor of the Gangole Estate for building a choultry. Two were pieces of dry land, and the third a piece of *jeroya'i* land under cultivation by a tenant. The *ryot* came into occupation of that item of land under three *muchilikas A*, *B* and *C*, executed before the Estates Land Act came into force, each of which contained the following clause:—

"If either you or the Government open roads, channels, etc., through the said lands, during the stipulated period, I shall have no concern in the compensation to be given by the Government either in respect of the said lands or fruit trees thereof. But it is agreed that the *cist* should be paid on the excess land, according to the aforesaid rates."

The landlord contended that under the above clause the tenant was not entitled to any share of the compensation paid by Government. The Land Acquisition Officer *i.e.*, the Deputy Tahsildar, referred the question to the Government Agent under section 18 of the Land Acquisition Act. He held that the Estates Land Act altered the *status* of the *ryot* and conferred upon him a permanent right of occupancy in the land; the *muchilikas* refer to a state of things before the Estates Land Act came into force, and the tenant is entitled to claim compensation in respect of the permanent right of occupancy conferred upon him by section 6 (1) of the Madras Estates Land Act. The present ap eal is against that decree.

Mr. *V. Ramesam*, for the Appellant:—Even under the Estates Land Act, the agreement is not invalid, because there is nothing in the Act prohibiting such an agreement.

Mr. *V. Ramadoss*, for the Respondent:—The condition in the agreement may be valid before the Estates Land Act came into force, and not after when the tenant secured occupancy right in the land.

JUDGMENT.—We think the terms of the *muchilikas*, Exhibit A, etc., which were entered into before the passing of the Madras Estates Land Act, were intended to amount to an admission by the tenant that he had no permanent interest in the holding and no claim to any compensation in the event of its being acquired by Government. We think, however, that the *muchilika* must be read with reference to the state of things when it was entered into, and that the terms in question cannot be read as an agreement by the tenant to transfer to the landlord his right to compensation in respect of any interest in the holding which might afterwards be conferred upon him by the Legislature. We think, therefore, that the Government Agent was right in holding that the 2nd respondent was entitled to a share. As regards the amount of compensation, the Government Agent does not say that he has taken the tenant's interest into account and refers only to the landlord's interest. The value of the landlord's share as paid by him being Rs. 3 per annum, it is conceded that the tenant's interest may be estimated at a like amount and 20 years' purchase at Rs. 120 an acre be awarded for the whole with the usual 15 per cent., of which the appellant will be entitled to one-half and the 2nd respondent to the other half. The appellant must pay the 2nd respondent's costs of the appeal and will recover proportionate costs against the 1st respondent who has not entered an appearance.

Appeal partly allowed; *Decree modified.*

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 21 OF 1912-13 OF AZAMGARH DISTRICT.

August 15, 1913.

Present:—Sir Duncan Colvin Baillie, S. M., and Mr. Tweedy, J. M.

Musammat PHULESARI—DEFENDANT—APPELLANT

versus

Babu SHUKUL RAJ SINGH—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 22—Succession—Uncle, whether can succeed to nephew's holding—Cultivation, sharing in.

An uncle who shared in cultivation of an occupancy holding with his nephew at the time of the latter's death is entitled to inherit the nephew's holding. [p. 10, col. 1.]

Second appeal from an order of the Commissioner of the Gorakhpur Division,

dated 12th March 1913, reversing that of the Assistant Collector of Azamgarh District in the case of ejectment.

JUDGMENT.

TWEEDY, J. M.—Paltu and Meet were joint occupancy tenants of a holding. They died of cholera practically at the same time, aged 14 and 16. Their uncle Padarath undoubtedly helped them in their cultivation and on their death claimed the occupancy holding by virtue of inheritance. Padarath has a separate occupancy holding and the Commissioner has found that he was not a sharer in the holding but a manager and that as he had his separate cultivation he had no title to succeed.

There is practically no dispute about the facts and the question is whether the Commissioner has drawn a correct inference from those facts. I think not. When the boys died, they were quite able to join in cultivation and it is to my mind proved that their mother Phulesari and they with their uncle's help ran the holding. Padarath no doubt had separated from his brothers, but the circumstances are such as to raise the presumption that he and his nephews had re-united. I would decree the appeal as far as Padarath is concerned with costs and restore the holding of the Assistant Collector.

BAILLIE, S. M.—I concur.

Appeal allowed: Decree modified.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2398 OF 1912.

February 23, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

KALIAPERUMAL KEERUDAYAN AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

CHIDAMBARAM THANJIRAN—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 142,144—Suit for possession—Plaintiff, what must prove—Adverse possession pleaded—Possession within 12 years, proof of—Defendants' inability to prove possession continuously for 12 years—Presumption—Possession under illegal order, effect of.

In a suit for possession the plaintiff must prove not only that he is entitled to the property but also (if and in so far as that is contested) that he has not been out of possession during the whole of the 12 years preceding his suit. The facts that the defendants are not able to establish affirmatively that they have been continuously in possession for the said period of 12 years under Article 144 of the Limitation Act does not necessarily entitle the plaintiff to succeed unless the requirements of Article 142 are also satisfied. [p. 11, col. 1.]

In calculating the said period of 12 years, possession under an illegal order should not be taken into account. [p. 11, col. 1.]

Motee Singh v. *Rajah Leelanand Singh*, 11 W. R. 49, followed.

Second appeal against the decree of the Court of the Subordinate Judge of Tanjore in Appeal Suit No. 907 of 1910, preferred against that of the Court of the District Munsif of Tanjore in Original Suit No. 216 of 1909.

Mr. *N. Rajagopala Chariar*, for the Appellant.

Messrs. *K. Ramanath Shenai* and *P. Ramanathan*, for the Respondents.

FACTS.—Plaintiff in this suit is Chidambara Thanjiran and the defendants Nos. 1 and 2 are sons of one Amirthalinga Keerudayan. The property in dispute originally belonged to one Muthusami Thanjiran, who sold it to the present plaintiff on 16th February 1888 under Exhibit F which was registered on 22nd March 1888.

Within a month of the registration of the said sale-deed, the plaintiff's vendor Muthusami mortgaged the same property with possession to defendants' father Amirthalinga Keerudayan on 19th April 1888 under Exhibit XI for a sum of Rs. 200.

Plaintiff's case is that after sale to him under Exhibit F and at the same time, he allowed his vendor Muthusami to be in possession of the land on an oral lease. Plaintiff further contends that as per this oral lease, his vendor was in possession and enjoyment of the land, giving him *muktha* every year. The tie is between the present plaintiff and Amirthalinga's sons claiming the same property from the same person by virtue of a sale-deed in favour of plaintiff and a mortgage in favour of the defendants' father.

Plaintiff contends that the mortgage in favour of Amirthalinga Keerudayan under Exhibit XI is only a sham and collusive

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transaction and that Amirthalinga Keerudayan never got possession of the property and was never in possession and enjoyment of the same.

This second appeal coming on for hearing on the 30th and 31st July 1914, the Court delivered the following

JUDGMENT.—The learned Subordinate Judge has, it seems to us, overlooked the bearing of Article 142 of the Limitation Act. The plaintiff must prove not only that he is entitled to the property, but also (if and in so far as that is contested) that he has not been out of possession during the whole of the twelve years preceding his suit. The fact that the defendants are not able to establish affirmatively that they have been continuously in possession for the said period of twelve years under Article 144 of the Limitation Act does not necessarily entitle the plaintiff to succeed unless the requirements of Article 142 are also satisfied. We must call for a finding, therefore, on the following issue: "Whether at any time within twelve years from the date of the suit the plaintiff or his predecessors-in-title were in possession of the property referred to in the plaint."

In answering this question the Subordinate Judge will not consider the possession which was given to the plaintiff on the 24th October 1907 under the decree in Second Appeal No. 164 of 1903 on the file of the High Court. That decree was passed when the father of the present appellants stood on the record as a party respondent, though he had then died and his legal representatives had not been brought on the record. The decree was consequently not binding on the appellants and the delivery of possession on the 24th of October 1907 was cancelled for all legal intents and purposes when the possession was ordered to be re-delivered to the appellant in May 1908. In this connection we follow the decision of Loch, J., in *Motee Singh* v. *Rajah Leelanund Singh* (1) though it was dissented from by Glover, J.

Fresh evidence may be given by either party.

The finding should be submitted within six weeks from this date and seven days will be allowed for filing objections.

(1) 11 W. R. 49.

FINDING.—* * * *

I find the issue for defendants and against plaintiff.

This second appeal coming on for final hearing after the return of the above finding from the lower Appellate Court upon the issue referred to it for trial, the Court delivered the following

JUDGMENT.—We accept the finding and allow the appeal, dismissing the suit with costs throughout.

Appeal allowed; Suit dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 13 OF 1912-13 OF FATEHPUR DISTRICT.

December 5, 1913.

Present:—Sir Duncan Colvin Baillie, S. M., and Mr. Tweedy, J. M.

GAURI SHANKAR—APPELLANT

versus

AMBIKA PRASAD—RESPONDENT.

Landlord and tenant—Tanks in villages, ownership in—Presumption—Entry in papers on basis of possession—Evidence of permission to make tanks—Burden of proof.

There is no persumption of law or custom that the ownership in the tanks situate in a village vests in the *zemindar*. They belong to the proprietor if he has made them or to the tenant if he has made them. Entry in the papers must be made on the basis of possession and a tenant should not be asked to give in every case evidence of the *zemindar's* permission to make it. [p. 12, col. 1.]

Appeal from an order of the Commissioner, Allahabad Division, dated 1st April 1913, reversing that of the Settlement Officer of Fatehpur District in the case of correction of papers.

JUDGMENT.

BAILLIE, S. M.—The dispute is as to the record to be made in regard to an old tank. It is clear that the entry to be made must be on the basis of the possession, and on this ground it was decided in favour of the appellant by the Settlement Officer. The Commissioner lays down that village tanks are by common custom the property of the land-holders to whom the village belongs and that if a tenant claims a tank as his own, he must be prepared to prove this, to show that he got permission to make it and on the understanding that it would be his own when made. In my opinion both

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these grounds are baseless. There is no custom as to the ownership of tanks; they belong to the proprietor if he has made them; they belong to a tenant if he has made them. There is no provision of law by which a tenant claiming a tank must give evidence of his permission to make it and of an understanding that it would be his own when made. The tank now in question is a very old one and it seems to me absolutely unreasonable to suggest that evidence of permission to make it in favour of the grand-father of the appellant should now be demanded. In my opinion the Settlement Officer was right in deciding on the basis of possession and his order should be restored. I would allow this appeal and restore the order of the lower Appellate Court. Costs on respondent.

TWEEDY, J. M.—I concur.

Appeal allowed.

MADRAS HIGH COURT.

APPEAL FROM ORIGINAL CIVIL SUIT NO. 31 OF 1914.

February 24, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Musammat KHADER UNNISSA BEGAM—PLAINTIFF—APPELLANT

versus

MUHAMMAD MUSTAN ALI BADSHA SAHIB—DEFENDANT—RESPONDENT.

Malicious prosecution—Want of reasonable and probable cause—Malice, proof of—Complaint false to the knowledge of defendant—Plaintiff guilty of some dishonest act—Defendant not justified in making false allegations.

In a suit for damages for malicious prosecution, not only want of reasonable and probable cause but also malice is proved if the complaint was false to the knowledge of the complainant. The fact that the plaintiff was guilty of some other dishonest act will not justify the defendant in making allegations against his conduct false to his knowledge.

Bhim Sen v. *Sita Ram*, 24 A. 363; A. W. N. (1902) 92; *Abrath* v. *North Eastern Railway Company*, (1886) 11 A. C. 247; 55 L. J. Q. B. 457; 55 L. T. 63; 50 J. P. 659, followed.

Appeal from the judgment of the Hon'ble Mr. Justice Sankaran Nair, in the exercise of the ordinary original civil jurisdiction of this Court in Civil Suit No. 95 of 1913.

Mr. *M. K. Ramaswami Aiyar*, for the Appellant.

Mr. *C. Venkatasubbaramiah*, for the Respondent.

JUDGMENT.—The finding of the learned Judge is that the defendant's complaint against the plaintiff was false and the facts found further show that the complaint was false to the knowledge of the complainant. When a complaint is false *to the knowledge of the complainant*, not only is want of reasonable and probable cause proved but malice also is proved. See *Bhim Sen* v. *Sita Ram*(1) and *Abrath* v. *North Eastern Railway Company* (2). We are unable to agree with the learned Judge that because the defendant had grounds for suspecting the plaintiff or her husband of having committed some wrongful act in connection with the defendant's daughter's jewels, the defendant could not be deemed to have been actuated by malice in himself bringing a case on allegations false to the defendant's knowledge.

On the evidence we hold that Rs. 1,000 (thousand rupees) is a fair sum to be awarded to the plaintiff as damages.

We set aside the Judge's decision and pass a decree in the plaintiff's favour for Rs. 1,000 (thousand rupees) and costs in both Courts.

Order set aside.

(1) 24 A. 363; A. W. N. (1902) 92.
(2) (1866) 11 A. C. 247; 55 L. J. Q. B. 457; 55 L. T. 63; 50 J. P. 659.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 931 OF 1912.

September 19, 1913.

Present:—Sir Charles Arnold White, KT., Chief Justice, and Mr. Justice Sankaran Nair.

CHITIBOBU ADENNA AND OTHERS—DEFENDANTS APPELLANTS

versus

GARIMALLA JAGGARRAYADU—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 4—Acceptance subject to a condition subsequent—Auction sale—Bidder benamidar—Fraud — Misrepresentation — Repudiation of contract—Specific performance—Benamidar *can sue—Exchange of* patta *and* muchilika *does not give title.*

CHITIBOBU ADENNA *v.* GARIMALLA JAGGARRAYADU.

Where an auction-sale conducted through an agent has been confirmed in the name of the highest bidder subject to the approval of the principal, there is a contract of sale on the grant of the approval. [p. 13, col. 2.]

Where there is an acceptance on behalf of the principal of an offer which has been made subject to a condition subsequent, there is a contract, if that condition subsequent is satisfied. [p. 13, col. 2.]

In the absence of any restriction in the conditions of sale that bids must be made in the bidder's own interest and not on behalf of anybody else, the mere fact that a person was acting on behalf of somebody else when he made a bid, would not make it fraudulent, nor would it amount to such misrepresentation or suppression of material facts as to entitle the other party to repudiate the contract. [p. 14, col. 2; p. 15, col. 1.]

In a suit for specific performance it cannot be successfully pleaded in defence that the man who has entered into the contract for specific performance is not the man who has the beneficial interest. [p. 15, col. 1.]

An exchange of *patta* and *muchilika* or an agreement to dispense with the exchange of *patta* and *muchilika* is a condition of the right to recover rent, but the mere exchange of *patta* and *muchilika* does not give title. [p. 15, col. 1.]

Second appeal from a decree of the Court of the Temporary Subordinate Judge of Vizagapatam, in Appeal Suit No. 129 of 1910, preferred against that of the Court of the District Munsif of Chodavaram, in Original Suit No. 810 of 1908.

Mr. *B. N. Sarma*, for the Appellants.

Mr. *S. Srinivasa Aiyangar*, for the Respondent.

JUDGMENT.

WHITE, C. J.—Two questions, it seems to me, arise for consideration in this appeal. *First*, was there a contract between the 1st defendant and the Maharajah acting through his agents, on the strength of which the 1st defendant had a good defence to the plaintiff's claim in the ejectment and which would entitle the 1st defendant to remain in possession of the lands in question? *Secondly*, assuming there was a contract, was the Maharajah, entitled by reason of the events which happened to withdraw his consent and to repudiate the contract and to deal with the lands as if no contract had been entered into?

The *first* question turns mainly on the documentary evidence. The 1st document is Exhibit I. This is a record of the sale, as I understand it, of the right of occupancy in the lands in question. The 1st defendant was the highest bidder and we find this statement in the document, that as the 1st defendant "bid the last bid for one hundred and fifty rupees, and as no other bid for more than that it (the sale) has been confirmed in the name of the highest bidder, Chitibobu Adenna, subject to the approval and orders of the special agent, Vizianagaram Samastanam." That is dated 8th July 1907. Then on August 16th we have a document which embodies the approval of the special agent. That document, which is Exhibit V, is in these terms: "The leasing out of the said *patta* lands for settlement cowle for *Fasli* 1317 to Adenna Chitibobu (the 1st defendant) according to the *amin's* recommendation has been approved. It must be duly given effect to". On August 29th we have an application by the plaintiff for a cowle of the lands in question. That is Exhibit L. On September 6th we have a document, Exhibit H, which amounts to a grant of the lands in question to the plaintiff, who is now seeking to eject the defendants. The terms of that order are very similar to the terms of the document which embodies the approval by the special agent of the confirmation of the sale by the *amin* in favour of the 1st defendant.

Mr. Srinivasa Aiyangar has contended that Exhibit I was nothing more than an offer by the 1st defendant to the *amin*. He says that, that being so, there was no contract between the parties because the communication of the acceptance by the agent of the Maharajah was not complete (we must take it as a fact that the acceptance was not communicated to the 1st defendant). He relies on section 4 of the Contract Act: "The communication of an acceptance is complete.....as against the acceptor when it comes to the knowledge of the proposer." If Exhibit I were nothing more than an offer made through the *amin* and all that the *amin* had said was "You have made an offer; I will communicate it to my superior officer and see if he is prepared to accept it," then, no doubt, Mr. Srinivasa Aiyangar's contention under section 4 of the Contract Act would be good. But it seems to me that Exhibit I is a great deal more than that. It seems to me that it amounts to an acceptance on behalf of the principal of an offer which has been made subject to a condition subsequent, and that, if that

condition subsequent is satisfied, then there is a contract. That the special agent in fact approved is not denied.

I will take it to be the case that the onus is on the 1st defendant to establish that the confirmation which the *amin* purported to give to the sale, was an act within the scope of his authority. If the onus is on the 1st defendant—I am not quite sure that it is—we have to consider what there is to satisfy that onus. We have been referred to a document, Exhibit D, which purports to define the scope of the agent's authority. We find in it a direction to the *amin* from the special agent that "the usual auction must be held and a full report should be sent....Everything should be done subject to the approval of the undersigned". I do not think the latter sentence carries the case much further, because nobody denies that what was done under Exhibit I was subject to the approval of the special agent. We have the words "the usual auction must be held." That seems to me to indicate that what took place when the 1st defendant was the highest bidder was in accordance with the usual practice. I think it may fairly be assumed that the terms which are embodied in the document, represent the usual practice which prevailed when a sale by auction took place by the *amin*. There can be no question that the *amin* purported to confirm the sale in favour of the 1st defendant subject to the approval and orders of the special agent, and if the onus is on the 1st defendant to show that the *amin* in so acting was acting within the scope of his authority, I think there is evidence to show that when the *amin* purported to confirm the sale subject to the condition subsequent, he was acting within the powers which were entrusted to him as agent.

As regards this part of the case, Mr. Srinivasa Aiyangar cited several authorities, but I do not propose to deal with them as the question here really turns upon the construction of instrument, and upon the facts of this particular case, I think there was a contract between the 1st defendant and the Maharajah's representatives.

The *second* question is, was the Maharajah entitled in the events which happened to repudiate the contract? It is contended that he was, as soon as he ascertained that the 1st defendant had not entered into the contract on his own behalf but on behalf of another man. The learned Judge would seem to a great extent to rest his judgment on this part of the case on the ground of fraud. He says in one part of the judgment: "If the 1st defendant did not inform the *amin* that he was bidding for the 4th defendant he committed a fraud." Further on he says: "The very fact that the 1st defendant concealed from its knowledge that he had bid for the 4th defendant would amount to a fraud practised by him on it. (the *samasthanam*)." It is admitted that the 1st defendant in bidding was not acting on his own account but was acting as a name-lender for or on behalf of another party, *i. e.*, the 4th defendant. I cannot take the view of the learned Subordinate Judge that the fact that the 1st defendant was a *benamidar* acting for some other man was in itself fraudulent and would entitle the Maharajah to withdraw his consent and to repudiate the contract. The relations between the 1st defendant and the 4th defendant are clear enough. They are to be found in Exhibit VII, which is a letter from the 1st defendant to the 4th defendant in respect of this transaction and the release deed (Exhibit VIII). These documents show that the 1st defendant intended that the 4th defendant should have the benefit of this transaction and that he should have possession of the lands. As I have said there is nothing fraudulent in the fact that the 1st defendant was a *benamidar*.

Then can it be said that there was such misrepresentation or suppression of material facts, as would entitle the Maharajah to withdraw his approval and repudiate the contract. It must be observed that this is not a personal contract, that it is not one of the class of cases in which one party to the contract may be said to rely on the personal qualities or personal character of the other. It is a contract to put a man in possession of land. It is conceded that, if a formal lease had been given to the 1st defendant, nothing could have prevented him from assigning the rights which he had acquired to anybody he pleased. That being so, I am certainly not prepared to hold from the mere fact that he was acting on behalf of somebody else when he made the bid and when the sale was confirmed in his favour with the condition to which I have referred,

that the 1st defendant was either misrepresenting things or suppressing material facts so as to entitle the Maharajah to say, 'in view of certain facts which have been brought to my notice since I gave my consent, I withdraw my consent and repudiate the contract." There was no restriction of any sort or kind in the conditions of sale which provided that bids must be made in the bidder's own interest and not on behalf of anybody else. I do not think that any case could be found in which a defence to a suit for specific performance had been successfully set up to the effect that the man who had entered into the contract for specific performance was not the man who had the beneficial interest.

It was further contended by Mr. Srinivasa Aiyangar that the Maharajah had the right to withdraw his consent because, as I understood his argument, the title of the 1st defendant was not complete since there had been no exchange of *patta* and *muchilika* as between him and the Maharajah. No doubt an exchange of *patta* and *muchilika* or an agreement to dispense with the exchange of *patta* and *muchilika* is a condition of the right to recover rent. But I do not think it has ever been suggested that the exchange of *patta* and *muchilika* gives title. No doubt the parties contemplated that something further should be done after the agent's consent was given, but this was not necessary for the completion of the 1st defendant's title. For these reasons I think that the District Munsif is right and that we should set aside the decree of the Subordinate Judge and dismiss the suit with costs throughout.

SANKARAN NAIR, J.—I agree.

ALLAHABAD HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL No. 1183 OF 1913.

April 9, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, Justice Sir P. C. Banerji, KT., and Mr. Justice Tudball.

Musammat LAHASO KUNWAR—PLAINTIFF —APPELLANT

versus

MAHABIR TEWARI AND OTHERS—DEFENDANTS—RESPONDENTS.

Co-sharers—Joint land—Long exclusive possession of one co-sharer—Building, erection of—Presumption—Other co-sharer, right of, to demolish.

Where one co-sharer is for many years in exclusive possession of a particular plot and makes constructions thereon, the presumption is that he is so in possession with the consent of the co-sharers. The other co-sharers cannot after lying by for many years come in and ask to have the constructions demolished. [p 16, col. 1.]

Second appeal from the decision of the Subordinate Judge of Ghazipur, dated the 30th July 1913.

Mr. *S. K. Dar*, for the Appellant.

Mr. *Lakshmi Narain* (for Mr. *M. L. Agarwala*), for the Respondents.

JUDGMENT.—This appeal arises out of a suit in which the plaintiff sought a declaration that the share of the plaintiff and the defendants Nos. 38 and 39 amounts to $\frac{3}{8}$ths in a plot No. 703, and that she might have a decree for joint possession of the plot and for removal of a thatch and for the restoration of a ditch said to have been filled in. Notwithstanding the pleadings it is quite clear that the (contesting) defendants' contention was not that the plot in question did not form part of the joint property of the co-sharers, but that they for a very long time had been in possession and had sunk a well and made certain constructions. In the lower Appellate Court the defendants raised no controversy as to the proprietary title of the parties to the plot in question. All that they contended was that having regard to the long time they had been in possession, the plaintiff was not entitled to put them out or to have the constructions demolished. It is perfectly clear that in the event of a partition the plot in question will have to be taken into consideration. The authority making the partition will have regard to the rules that as far as

possible parties in possession shall be left in possession and if that is found to be impossible and a certain plot (on which are buildings) in the possession of one party has to be put into the lot of another, rent will be assessed. Where one co-sharer is for many years in exclusive possession of a particular plot and makes constructions thereon, the presumption is that he is so in possession with the consent of the co-sharers. The other co-sharers cannot after lying by for many years come in and ask to have the constructions demolished. We think that the view taken by the Court below was correct and ought to be affirmed. There is no question of adverse possession in the case. We dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 96 OF 1913.

March 1, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

GURRALA SESHAYYA AND ANOTHER—DEFENDANTS NOS. 4 AND 5—APPELLANTS

versus

YEDIDA VENKATASUBBIAH—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182—Limitation, saving of—Application only necessary—Return of application for amendment and failure to re-present, immaterial.

Article 182 of Schedule I of the Limitation Act only requires that there should be an application. The fact that an application was returned to the decree-holder for amendment and was not re-presented, would not affect limitation.

Appeal from an order of the Court of the Subordinate Judge of Bezwada, in Appeal Suit No. 96 of 1913 (Appeal Suit No. 352 of 1912 on the file of the Court of the Subordinate Judge of Kistna at Ellore), preferred against that of the Court of the District Munsif of Ellore, in Execution Petition No. 873 of 1910, in Original Suit No. 31 of 1896.

Mr. *P. Narayanamurthi*, for the Appellants.

JUDGMENT. The Subordinate Judge holds that as the applications of the year 1907 and 1908 were returned for amendment

to the decree-holder and not represented by him, they would save limitation. He relies upon *Gopal Sah* v. *Janki Koer* (1) in support of this view. Article 182 of the Limitation Act only requires that there should be an application. The fact that it was not re-presented would not affect limitation. *Gopal Sah* v. *Janki Koer* (1) was dissented from in Civil Miscellaneous Appeal No. 322 of 1913 [*Vadivelu Pillai* v. *Maruda Pillai* (2)]. See also *Srinivasa Aiyangar* v. *Tirumalai Chetty* (3). We are not prepared to follow the Calcutta decision.

The lower Appellate Court is in error in saying that when the applications of 1907 and 1908 were made, the decree was in the Rajahmundry Court. The B diary shows that there must have been a re-transfer. Moreover the District Munsif, who may be presumed to know how his record stands, does not say that at the time the two applications were made, the Ellore Court had no jurisdiction. We must reverse the order of the Subordinate Judge and remand it for disposal according to law.

Costs will abide the result.

Order reversed.

(1) 23 C. 217.
(2) 26 Ind. Cas. 413.
(3) 23 Ind; Cas. 991; (1914) M. W. N. 372; 15 M. L. T. 337.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 2 OF 1912-13 OF ETAWAH DISTRICT.

August 5, 1913.

Present:—Sir Duncan Colvin Baillie, S. M., and Mr. Tweedy, J. M.

JATA SHANKAR—PLAINTIFF—APPELLANT

versus

RAM DAT—DEFENDANT—RESPONDENT.

U. P. Land Revenue Act (III of 1901), s. 172—Mango trees—Standing timber—Sale whether can be set aside by deposit—U. P. General Clauses Act (I of 1904), s. 4 (23)—Immoveable property—Standing timber.

The mango trees when sold with the intention that they should be cut down and taken away by the purchaser are standing timber. Under section 4, clause 23 of the United Provinces General Clauses Act immoveable property does not include standing timber and, therefore, a sale of them cannot be set aside by deposit of money under section 172 of the Land Revenue Act. [p. 17, col. 1.]

MAUNG MAUNG *v.* SAN NYEIN.

Second appeal from an order of the Commissioner, Allahabad Division, dated the 22nd October 1912, upholding that of the Collector of Etawah District in the case of a suit for sale of trees in default of payment of rent.

FACTS.—A grove of mango trees was sold on account of arrears of revenue and purchased by appellant.

The owner of the grove deposited in the Collector's office under section 172 of the Land Revenue Act the money necessary under that section to set aside the sale, and applied to set aside the sale. The purchaser objected on the ground that section 172 applied to immoveable properties but that the mango trees were moveable property. The Collector set aside the sale. On appeal, the Commissioner passed the following order on 22nd October 1912 :—

"The question is whether a grove of mango trees is moveable property for the purpose of section 146 (*c*) of Land Revenue Act. According to the definition in the Registration and Transfer of Property Acts, standing timber is moveable property. The reverse is the case, I may perhaps note, according to the Penal Code. The Revenue Act, section 193 (*k*), compels the inference that standing timber is not moveable property in Revenue Law. As far as my experience goes, groves are always treated by Revenue Officers as immoveable property. The Collector was not authorised to sell the grove and his order setting aside his order of sale must be upheld. I dismiss the appeal."

On a further appeal to the Board it passed the following

ORDER.

BAILLIE, S. M.—There is no doubt as to the law applicable in this case. The United Provinces General Clauses Act interprets the language of Provincial Acts, unless there is something repugnant in them. According to that Act, section 4, clause 23, immoveable property does not include standing timber.

There remains the question whether mango trees are standing timber. The question has to be decided in consideration of the circumstances in which the trees were sold. If as is claimed by the appellant they were sold with the intention that they should be cut down and taken away, they were undoubtedly standing timber. In these circumstances the Collector had no right to set aside the sale which, therefore, must hold good. I would allow this appeal with costs on respondents. Pleader's fee Rs. 10.

TWEEDY, J. M.—I agree.

Appeal allowed.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL NO. 38 OF 1913.

March 22, 1915.

Present:—Sir Charles Fox, KT., Chief Judge, and Mr. Justice Parlett.

MAUNG MAUNG—PLAINTIFF—APPELLANT

versus

MAUNG SAN NYEIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Execution sale—Auction-purchaser's right—Mistake or oversight in procedure, effect of.

When the auction-purchaser, in execution sale of a mortgage decree is claiming possession from persons who could claim only through one or more of the mortgagors and whose claim has been declared unfounded, a mistake or oversight in the proceedings cannot affect the real substance and subject of the litigation between the mortgagors and the mortgagee. [p. 19, col. 2.]

Balwant v. *Hirachand*, 27 B. 334; 5 Bom. L. R. 217, *Mahomed Kala Meah* v. *A. V. Harperink*; 1 Ind. Cas. 122; 13 C. W. N. 249; 6 A. L. J. 34; 5 M. L. T. 126; 9 C. L. J 165; 11 Bom. L. R. 227; 36 C. 322; 19 M. L. J. 115; 36 I. A. 32 (P. C.); 5 L. B. R. 25, referred to.

Mr. *N. N. Burjorjee*, for the Appellant.

Mr. *Higginbotham*, for the Respondents.

JUDGMENT.

FOX, C. J.—The first and second defendants-respondents are the sons of Maung Po Maung and Ma Me: the other defendant-respondent is a Receiver appointed in a suit by a mortgagee against the above persons and one Po Nwai on a mortgage of the property in dispute. On the 11th November 1904 Po Maung, Ma Me, Maung Po U and Ma Mi executed a document, Exhibit B, by which they agreed that if they failed to re-pay to S. R. M. A. Pallaneappa Chetty Rs. 30,000 and interest by a specified date in the following year, they would make over outright a piece of land situate on the Western Bank of Thongwa Creek bounded on the east by Hmaw-wun river, on the

west by Po Thi's paddy land, on the south by Maung On Saing's paddy land, and on the north by Po Thi's garden together with the rice mill standing thereon.

The money not having been paid, Pallaneappa Chetty on the 2nd July 1907 filed a Suit (No. 43 of 1907) against the executants of the document Exhibit B, in which his case was that he had lent the Rs. 30,000 to enable them to erect a rice mill on the land, and that the defendants by the document agreed to execute a legal mortgage of the land and the rice mill erected on it, but they had failed to do so. He asked for specific performance of the agreement to mortgage and for a mortgage decree. In the first paragraph of the plaint, the property in respect of which he made his claim to a mortgage was described as

"that piece of land situated within the jurisdiction of this Hon'ble Court and known for the year 1904 1905 as Holding No. 53, in Thongwa Kwin Yone Circle, Hanthawaddy District, with the rice mill, granaries and buildings thereon."

In paragraph 4 and in the second prayer of the plaint the rice mill, granaries and other buildings are referred to as commonly known as No. 2 Thongwa Rice Mill.

The number 53 was not the correct number of the holding on which the rice mill and buildings stood. The land included within the boundaries given in the agreement was not one holding. Part of it was garden land and this was Holding No. 53: the other part on which the mill and its buildings had been erected was Holding No. 43.

Pallaneappa Chetty must have intended to enforce the agreement to sell outright as stated in Exhibit B, or to mortgage, as by his plaint he admitted the agreement to have really been, over all the land included within the boundaries stated in the document, but he failed to verify the correct revenue holding number of the land before he filed his suit.

Po Maung, who was the Circle Thugyi of the part in which the land is, and Ma Me, his wife, filed a written statement which foreshadowed the chicanery in which they subsequently indulged. The 4th paragraph of this written statement indicates that they knew that the Chetty had made a mistake about the holding number of the land on which the mill stood. It implies that they had offered to mortgage the garden land (Holding No. 53) but the Chetty had refused to accept a mortgage of this, although it was all that he was in any event entitled to. The suit, however, was not fought out. All the parties signed a petition stating that it had been compromised on terms set out in the petition, and asking that a decree might be passed in accordance with those terms. By these the Chetty abandoned a considerable portion of his claim on condition of being paid the principal due to him by a certain date, but if it was not paid by such date the decree was to be a mortgage decree for the full amount due to him, and the premises described in paragraph 1 of the plaint were to be sold to sastisfy the decree.

On the 31st August 1908 an order absolute was made for the sale of "a peice of land known as Holding No. 53 of 1904-05 situate in Thongwa Kwin Yone Circle, Thongwa Township, Hanthawaddy District, measuring 3·57 acres with the rice mill, granaries and buildings thereon." The proclamation of sale and subsequently the sale certificate described what was to be sold and was sold in the same terms. The plaintiff in the present suit was the purchaser at the auction sale which took place on the 24th July 1909, and he paid Rs. 26,200 for what he bought.

In the meanwhile Po Maung and Ma Me had made various attempts to defeat and delay their creditor. In December 1908 they petitioned the Court asking for an enquiry as to whether the Chetty had not lost all rights to a lien over any of the property. In the petition (Miscellaneous Case No. 195 of 1908) they asserted that the compromise was come to because the Chetty was fully aware that only the piece of garden land, Holding No. 53, was the subject-matter of the suit.

In October 1908 their sons, the 1st and 2nd defendants in the present case, applied that the sale of the mill and buildings might be stayed on the ground that these belonged to them, and were not liable to be sold in satisfaction of the decree against their parents who had never been owners or in possession.

Again on the 19th July 1909 these young men filed a suit against the Chetty, their parents, and their aunt, Ma Me, and her husband, Po U, the present plaintiff, being subsequently joined as a party, in which they asked for a declaration that they were the owners of the piece of land on which the rice mill, granaries and other buildings stood, that is, of Holding No. 43 of 1904-05.

This suit was decided against them : the decision is conclusive that they have no right whatever to the land or to the buildings thereon.

It is unnecessary to set out in detail the dodgery by which it was sought to establish that these two young men had become the owners of the land and buildings. Unfortunately by means of some of this dodgery, Po Maung, Ma Me and their two sons were enabled to impose on the Bank of Bengal, and to induce its then manager to accept Holding No. 43 of 1904-05 and the rice mill, etc., on it as security for a large advance made by it.

The plaintiff auction-purchaser, not having been able to obtain possession of what he bought, brought the present suit to obtain it. One would have thought that the decision in the first and second defendants' previous suit would have been sufficient to deter them from contesting the suit, but they have contested it on practically the same grounds as their own suit was fought on.

The District Judge found in favour of the plaintiff on all contested facts. He decided, however, against him on legal grounds raised by himself. In his profuse and minute examination of the legal intricacies which occurred to him he appears to have lost his way in the maze he created for himself.

The result of the first and second defendants' Suit No. 73 of 1909 having been that they failed to prove that they were the owners of the rice mill, granaries and buildings on Holding No. 43 of 1904-05, the only matter left to be determined as between the plaintiff and them was whether the plaintiff had bought the rice mill and other buildings and the land on which they stood. What "he bargained and paid for" in the words of the Privy Conucil quoted in *Balwant* v. *Hirachand* (1), was certainly rice mill buildings and the land on which they stood. No one in his senses would have paid Rs. 26,200 for 3·57 acres of garden land in a village in the country far away from a large town. There can be no possible doubt as to which rice mill, etc., was sold. None of the defendants in Suit No. 43 of 1907 could now be heard to say that the compromise decree did not cover the whole of the property over which Pallaneappa claimed to have a mortgage-decree or a mortgage. On the principles adverted to by the Privy Council in *Mahomed Kala Meah* v. *A. V. Harperink* (2), the Court itself was bound to hold that the plaintiff had bought a rice mill and the land on which it stood. The fact that such land was not included in Holding No. 53 cannot oust the right of the plaintiff to obtain the rice mill and the land as well as Holding No. 53. The omission of mention of Holding No. 43 throughout Suit No. 43 of 1907 was a mistake or oversight, which cannot affect the real substance and subject of the litigation between the mortgagors and mortgagee: certainly not so when the auction-purchaser is claiming possession from the persons who could claim only through one or more of the mortgagors, and whose claim has been declared unfounded.

The third defendant is merely an officer of the Court appointed to take possession at the instance of a mortgagee whose mortgage, was created by one or more of the original defendants in Suit No. 43 of 1907. Questions may arise between this mortgagee the Bank of Bengal and the plaintiff as to whether it can enforce its mortgage over the land as against him, but it is not entitled to have a Receiver kept in possession in a suit to which the plaintiff is not a party. It may be noted that he was at one time made a party defendant in the Bank's Suit No. 51 of 1910, but his name was struck out of that suit by an order which appears in the diary under date the 28th September 1911.

I would allow the appeal, set aside the

(1) 27 B. 334; 5 Bom. L. R. 217.

(2) 1 Ind. Cas. 122; 5 L. B. R. 25; 13 C. W. N. 249; 6 A. L. J. 34; 5 M. L. T. 126; 9 C. L. J. 165; 11 Bom. L. R. 227; 36 C. 323; 19 M. L. J. 115; 36 I. A. 32 (P. C.).

decree of the District Court and make a decree ordering the defendants to deliver up to the plaintiff the rice mill, granaries and buildings on a piece of land now found to have been Holding No. 43 of 1904-05 in Thongwa Kwin Yne Circle, Thongwa Township, Hanthawaddy District, whatever its present holding number may be, and would order the 1st and 2nd defendants, Maung San Nyein and Maung Tun Win, to pay the plaintiff mesne profits in respect of such property from the 27th August 1909 up to the time when the third defendant obtained possession as Receiver of such property, and the third defendant to pay to the plaintiff mesne profits in respect of such property from the time he received possession of it until possession is delivered to the plaintiff, and would direct the District Court to enquire into and determine the amount of such mesne profits.

I would order the first and second defendants to pay the plaintiff's costs of the suit and of this appeal.

PARLETT, J.—I concur.

Appeal allowed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 24 OF 1914-15 OF FARRUKHABAD DISTRICT.

February 15, 1915.

Present:—Mr. Holms, S. M., and Mr. Campbell, J. M.

MUHAMMAD ABDUL HAFIZ KHAN—PLAINTIFF—APPELLANT

versus

RAM RATAN LAL—DEFENDANT—RESPONDENT.

Grove—Fruit orchard or timber grove—Tenant—Occupancy rights, acquisition of—Land—Agra Tenancy Act (II of 1901), *s.* 11.

Where a fruit orchard or timber grove has been planted, the grove-holder cannot be ejected as a tenant from year to year so long as the land maintains its character as a grove. Nor can he acquire occupancy rights so long as it remains a grove, because in either case, land is not land within the meaning of the Tenancy Act in which only occupancy rights can accrue. It becomes land after the disappearance of the grove. [p. 20 col. 2; p. 21 col. 1.]

Selected Decision No. 7 of 1911, Selected Decision No. 4 of 1911 and *Habibullah* v. *Kalyan Das*, 25 Ind. Cas. 169; 12 A. L. J. 1080 at p. 1081, considered and followed.

Selected Decision No. 1 of 1908, discussed and dissented from.

Second appeal from the order of the Commissioner of Allahabad Division, dated the 16th September 1914, reversing that of the Assistant Collector of Farrukhabad District in the case of ejectment.

JUDGMENT.

HOLMS, S. M.—(*February 9th*, 1915.)—There is a finding of fact by the Commissioner that the land was first shown as cultivated in 1315 *Fasli* and in his judgment he says the facts are not disputed. Respondent wished to urge that the land became cultivated in 1306 *Fasli*. The *patwari* mentions the cultivation in that year, but does not say how much of the land was cultivated and the *khasra* has not been produced. I must accept the finding of fact by the Commissioner.

The case of a fruit orchard like the present must be distinguished clearly from that of a timber grove. By Selected Decision No. 7 of 1912 it is laid down that an important principle which applies to timber groves is applicable also to a fruit orchard. The principle is that, where a landlord allows a grove to be planted, he admits the tenant on a special agreement which prevents him ejecting the tenant as one holding from year to year. This is not, however, precisely the point in the present case. Under section 11, a tenant who has held the same land continuously for twelve years has a right of occupancy in that land. The Board have held in Selected Decision No. 1 of 1908 that the term 'land,' as used in the Tenancy Act, includes an area occupied by grove land, whether a timber grove or a fruit orchard, that is to say, that a fruit orchard comes within the definition of land held for agricultural purposes. In Selected Decision 4 of 1911 both members dissented from this decision as regards timber groves and one member (Mr. Reynolds) seems to have dissented from it as regards fruit orchards in cases where the land was for the purpose of planting an orchard in it.

The High Court in *Habibullah* v. *Kalyan Das* (1) has held that land which was given for the purpose of growing both timber and fruit trees was not land held for agricultural purposes within the meaning of the Tenancy Act.

(1) 25 Ind. Cas. 169; 12 A. L. J. 1080 at p. 1081.

The High Court mentioned in their judgment Selected Decision No. 4 of 1911. It has been held definitely that a timber grove-holder cannot acquire rights of occupancy in the land on which the grove exists so long as it maintained the character of a grove, but there has been no similar finding in the case of a holder of a fruit orchard. When under the implied] special agreement, the land-holder, is prevented from ejecting the tenant so long as the grove exists, it would be harsh on the landlord that the tenant should be allowed to acquire occupancy rights. In this view, I should be inclined to treat a fruit orchard such as that in suit, for planting which the land was originally given and a timber grove similarly for purposes of acquisition of occupancy rights, seeing that the principle of a special agreement has been extended to the former by Selected Decision No. 7 of 1912.

It seems clear that the land no longer maintains the character of a fruit orchard.

I would set aside the order of the Commissioner and restore that of the Assistant Collector, respondent paying costs throughout.

CAMPBELL, J. M.—I agree.

Appeal allowed,

LOWER BURMA CHIEF COURT.

CIVIL REVISION PETITION No. 191 OF 1914.

April 29, 1915.

Present:—Sir Charles Fox., KT. Chief Judge.

MA NYEIN HLA—APPLICANT

versus

MAUNG GYI—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 63, 73—Execution proceedings—Decree-holders of different Courts attaching in execution same property, right of, to rateable distribution—Court of highest grade—Transfer of decree.

Under sections 63 and 73, Civil Procedure Code, all the holders of money-decrees who have attached the property of their judgment-debtor in execution in several Courts before the actual receipt of the assets by the Court of the highest grade, are entitled to share in the rateable distribution on application to such Court without getting their decrees transferred to it.

Sit Saing v. *Maung Po Kaing*, L. B. R. (1901) I p. 121, *Narasimhachariar* v. *Krishnamachariar*, 23 Ind. Cas. 909; 26 M. L. J. 406; 1 L. W. 403, referred to.

Mr. *Rahman*, for the Applicant.

Mr. *Sin Hla Aung*, for the Respondent.

JUDGMENT.—It appears to me that the Divisional Judge was correct in holding that section 63 of the Code was applicable to the case.

The property attached was money due by the Municipal Committee to the judgment-debtor. The decree-holder in the Sub-Divisional Court had it attached by prohibitory order on the 23rd May. The plaintiff in the District Court had previously had it attached before judgment, and on his obtaining a decree on the 20th June he asked for an order that the money be paid into Court. The money was not then in the custody of any Court, but was under attachment under the decree of two Courts. The money was paid into the District Court on the 25th June. The District Court under the circumstances was bound to give effect to both attachments. It could do so only by giving rateable distribution.

The case is distinguishable from *Sit Saing* v. *Maung Po Kaing* (1) in that no attachments by the inferior Courts had actually been made in that case, whereas in the present case attachment had actually been effected by the inferior Court before the superior Court received the money attached. In a case like the present the recent decision of the Madras High Court in *Narasimhachariar* v. *Krishnamachariar* (2) lucidly explains the duties of the superior Court.

It was urged at the hearing that no appeal lay to the Divisional Court. This is the case, but the ground was not taken in the application for revision, and as the Divisional Court's decision set right a decision of the District Court which was obviously unjust to the decree-holder in the Sub Divisional Court, I decline to exercise the revisional powers of the Court in the applicant's favour. If I did so, I should feel bound to revise the District Court's order and to pass the same order with respect to it as the Divisional Court did. The application is dismissed with costs.

Application dismissed.

(1) L. B. R. (1901) I, p. 121.

(2) 23 Ind. Cas. 909; 26 M. L. J. 406; 1 L. W. 403.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 8 OF 1911-12 OF SHAHJAHANPUR DISTRICT.

November 24, 1912.

Present:—Mr. Baillie, S. M., and Mr. Tweedy, J. M.

KEDAR NATH—APPELLANT

versus

HAR PRASAD—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 22—'Sharing in cultivation,' interpretation of—Member of joint family away from home, whether shares in cultivation.

Where a member of an agriculturist's family attempts to eke out the resources of the family by some extra work away from home which is not connected with agriculture, he does not cease to share in the cultivation within the meaning of the Tenancy Act.

Where cultivation is personal, the sharing must be personal; but where it is not personal, it need amount to no more than taking part in whatever arrangements are made by the tenant-in-chief.

Second appeal from an order of the Commissioner of the Rohilkhand Division, dated the 29th March 1912, reversing that of the Assistant Collector of Shahjahanpur District, in the case of determination of tenure.

JUDGMENT.

TWEEDY, J. M.—(*November 9th*, 1912).—The view taken by the Commissioner that where sub-tenants are cultivating no one can be said to share in the cultivation with the original tenant, cannot be upheld. Where the cultivation is personal the sharing must be personal, but where it is not personal it need amount to no more than that taking a part in whatever arrangements are made by the tenant-in-chief. I am not prepared to lay down that when a member of an agriculturist's family attempts to eke out the resources of the family by some extra work away from home which is not connected with agriculture, he ceases to "share in the cultivation" within the meaning of the Act. The appellant was born in the house and brought up by Laljit as his son and there is evidence that whenever at home on leave he helped in the arrangements made for the cultivation. He was beyond all controversy joint when he took up the appointment of schoolmaster and the mere fact of his leaving home and spending most of his time in his new employment would not necessarily separate him from his holding particularly when no personal cultivation is required. The judgment of the Deputy Collector is a sound judgment and commends itself to me.

I would restore it and quash the finding of the Commissioner with costs.

BAILLIE, S. M.—Laljit at the time of his death did actually cultivate part of the holding and I agree that appellant enjoying jointly with him the profits of the holding and contributing to the common may be held to have shared in this cultivation and to be, therefore, qualified to succeed to the whole holding. I concur.

Appeal allowed.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 141 OF 1912.

November 22, 1914.

Present:—Mr. Hayward, A. J. C.

HUSSEINI NANDOO—PLAINTIFF

versus

MESSRS. WEICHERS AND LEVY, LTD.—DEFENDANTS.

Civil Procedure Code (Act V of 1908), s. 83—Alien enemy, suit against—Property o such enemy, how far available in execution.

The plaintiff sued the defendants, a German Corporation, for an account. On the outbreak of hostilities between England and Germany in August 1914, the question arose whether the plaintiff could continue the suit during the war:

Held, that an alien being amenable to all local laws in consideration of the protection he enjoyed while residing in a foreign territory, there was no reason why he should not be sued or proceeded against in the Courts of India and that the decree against an alien enemy would be effective against his property subject to any rights of the Crown. [p. 22, col. 2; p. 23, col. 1.]

Mr. *Hirdaram Mewaram*, for the Plaintiff.

Mr. *Kalumal Pahloomal*, for the Defendant.

JUDGMENT.—An alien would appear to be amenable to all local laws in consideration of the protection he enjoys while residing in a foreign country according to the cases quoted in paragraph 672 of Volume I of Halsbury's Laws of England. This would appear to apply equally to an alien friend or an alien enemy. Reference should be made to the recent case of *Robinson Co.* v. *Continental Insurance Co.* decided in England and reported in the *Pioneer* of the 18 November 1914. There would appear,

therefore, to be no reason why an alien enemy should not be sued or proceeded against in the Courts of India, though he has been expressly precluded from suing by section 83, Civil Procedure Code, unless resident with the permission of the Governor-General in Council. Such permission would apparently have to be express and in absence of such permission, it would have to be considered how far an alien enemy's property would be available in execution without reference to the Executive Officers of the Crown in view of the authorities quoted in paragraph 685 of Volume I of Halsbury's Laws of England.

This suit, therefore, can proceed and it is unnecessary at this stage to determine whether or no an alien character has attached to the defendant Corporation by reason of the number of alien share-holders. The alien manager has, however, been interned in Ahmednagar and an adjournment till a day to be fixed in February will be given for the defence to be duly prepared on behalf of the Corporation by the present management under the British share-holders. The decree will be effective against the property of the Corporation subject to any rights of the Crown.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 22 OF 1911-12 OF JAUNPUR DISTRICT.

July 22, 1912.

Present:—Mr. Baillie, S. M.

PHEKU TEWARI—APPELLANT

versus

KALI DIN SINGH—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 28, scope of—Perpetual lease by widow having life-interest—Land-holder, right of.

A perpetual lease granted by a widow who has only a life-interest in the occupancy tenancy is not after her death binding upon the land-holder under section 28 of the Tenancy Act.

Section 28 of the Tenancy Act contemplates merely a lease for a fixed term and not a lease in perpetuity.

Second appeal from an order of the Commissioner of Benares Division, dated 18th January 1912, reversing that of the Assistant Collector of Jaunpur District in a case of ejectment.

JUDGMENT.—The question is as to the validity of a perpetual lease, granted by a woman as a widow who had a life-interest in an occupancy tenancy, after the death of lessor. The Commissioner has decided that the lease is not binding on the land-holder.

There appear to me to be two grounds for holding that section 28 does not apply :—(*i*) The lessor was not a full occupancy tenant having a right to transmit her rights to a successor. She had a life-interest only and lease executed by her would not have been binding on her sucessor if there had been any successor. It would be absurd to make a lease, which would not have been binding on the lessor's successors, to be binding on the landholder.

(*ii*) Section 28 appears distinctly to contemplate a lease of a term and not a lease in perpetuity. I do not consider that the lease now in question was binding on the landholder under section 28. It has been contended that as in addition to the signature of the life-tenant, two other persons alleged to be reversioners also signed it, the effect is the same as if it were given by a person having full occupancy rights. There is nothing to show that the persons who in addition to the widow signed the lease were entitled to the reversion of this occupancy right. I agree with the view taken by the Commissioner and dismiss the appeal with costs on appellants.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1170 OF 1913.

February 5, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

T. R. SUNDARAM AIYAR—PLAINTIFF—APPELLANT

versus

SUBBAMMAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Absolute alienation of joint family property in lieu of maintenance, whether legal.

GOPHURAN *v.* KALLU.

An absolute alienation of joint family property to a maintenance-holder in lieu of maintenance is not necessarily illegal.

Second appeal against the decree of the District Court of Tinnevelly, in Appeal Suit No. 265 of 1912, preferred against that of the District Munsif of Ambasamudram, in Original Suit No. 50 of 1911.

Mr. *C. V. Anantha Krishna Aiyar*, for the Appellant.

Mr. *A. Swaminatha Aiyar*, for the Respondent.

JUDGMENT.—No authority has been adduced to support the appellant's contention that any absolute alienation of joint family property to a maintainance-holder in lieu of maintainance is necessarily illegal: and in the present case we must accept the finding of the lower Appellate Court that the alienation by Exhibit I was not excessive or unreasonable in the circumstances in which it was made.

The second appeal is dismissed with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 35 OF 1902-03 OF MEERUT DISTRICT.

July 1, 1903.

Present:—Mr. Hardy, S. M., and Mr. Thomson, J. M.

Musammat GOPHURAN—PLAINTIFF—APPLLICANT

versus

KALLU AND OTHERS—DEFENDANTS—RESPONDENTS.

Ejectment suit—Cause of action, when arises—Suit withdrawn without permission to bring fresh suit—Fresh suit based on another cause of action, if barred—Civil Procedure Code (Act XIV of 1882), s. 373.

A fresh cause of action arises each year as regards ejectment and, therefore, a suit for ejectment withdrawn without permission to bring a fresh suit does not bar another suit of ejectment based on another cause of action.

Application for revision of an order passed by the Additional Commissioner of Meerut Division, dated 7th February 1903, confirming that of the Assistant Collector, first Class of Meerut District, in a case of ejectment.

JUDGMENT.

THOMSON, J. M.—The plaintiff brought a suit under section 58/63 (*a*), Act II of 1901, on 27th March 1902, for ejectment of the defendants, but on 15th May applied to have it dismissed, and it was struck off accordingly. On 16th May plaintiff applied for permission under section 373, Civil Procedure Code, to file a fresh suit. This application was granted.

On 9th July 1902 the plaintiff brought the present two suits in respect of the same land under the same sections. The lower Courts have held that they are not maintainable, the permission granted under section 373 being *ultra vires* and the Court which dismissed the first suit on 15th May being *functus officio* on the 16th May. A reference to section 63, Act II of 1901, shows that the first suit was brought under the special provisions of clause (2) of that section with a view to ejectment from 1st July of that year *i. e.*, from the beginning of 1310 *Fasli*.

The second suits were for ejectment from the 1st July 1903, *i. e.*, 1311 *Fasli* and were brought under the first clause of section 63.

The lower Courts were, in my opinion, right in their view of the law as regards the first suit which, inasmuch as no permission under section 373, Civil Procedure Code, had been granted before it was struck off, could not be instituted again. But a fresh cause of action arises each year as regards ejectment and I hold that so far as the second suits were concerned, no permission was necessary.

The Commissioner was, in my opinion, wrong in holding that the second suits did not lie and as he disposed of the appeal before him on this point only and failed to dispose of the other pleas before him, I would remand the appeal to him for disposal on the other points.

HARDY, S. M.—I concur. The Commissioner's order should be set aside and the case remanded.

Application allowed; Cause remanded.

LADHIBAI *v.* ISARMAL.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 12 OF 1912.

October 23, 1914.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

Musammat LADHIBAI—PLAINTIFF—APPELLANT

versus

ISARMAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Res judicata—*Hindu widow, suit by, for maintenance—Subsequent suit by her for residence in family house, whether barred—Evidence Act (I of 1872), s.* 115—*Estoppel—Subsequent contention negativing a prior one—Estoppel.*

The plaintiff, a Hindu widow, lived outside her husband's house in his life-time and received a maintenance allowance awarded to her under section 488, Criminal Procedure Code. Her husband died in 1897 and in 1898 she took up her residence in one of his houses which was not a family residence. She continued receiving her maintenance allowance from the defendants (heirs of her husband) which was subsequently stopped. In 1908 she filed a suit for maintenance and obtained a decree against the defendants. The defendants filed another suit in 1908 against her for ejectment and obtained a decree, which was confirmed on appeal, ejecting her from the house occupied by her on the ground that she had a right of residence in the family house, but not the house in that suit. Thereupon she brought the present suit to establish her right of residence in the family house which the defendants contended was barred by reason of her prior suit for maintenance wherein no relief for residence had been sought:

Held, that the suit was not barred by her prior suit for maintenance as that maintenance allowance was fixed at a time when she had a residence in one of the defendants' houses and that her subsequent ejectment therefrom gave her a cause of action to demand that the maintenance should be supplemented by provision for her residence in the family house; [p. 26, col. 1.]

that the defendants having ejected plaintiff from the house she was occupying on the ground that it was not the family residence, were now estopped from denying her right to a residence in the family house. [p. 26, col. 1.]

Varajlal Solot v. *Bhaiji Nagardas*, 6 Bom. L. R. 1103, followed.

Appeal against the judgment and decree of the Joint Judge, Sukkur-Larkana.

Mr. *Nihalchand Tikamdas*, for the Appellant.

Mr. *Fatehchand Asudomal*, for Respondents Nos. 1 and 3.

JUDGMENT.—The plaintiff who is a widow of Hemandas sues the defendants, who are a co-widow and other heirs, for a declaration of her right to reside in the family house of Hemandas and for a consequential injunction.

The facts that led up to the suit are admitted.

The plaintiff either left or was turned out of Hemandas' house in Hemandas' life-time and received a maintenance allowance awarded to her under section 488 of the Criminal Procedure Code. Hemandas died in the plague of 1897 and the plaintiff in 1898 took up her residence in a house of Hemandas which was not the family residence. The *nazir* was appointed guardian of the property of the minor heirs of Hemandas and he did not interfere with her occupation and continued the maintenance allowance that had been ordered under section 488. On the heirs succeeding to the management of the estate they discontinued the maintenance allowance and suits ensued.

Plaintiff filed Suit No. 206 of 1908 for maintenance and obtained a decree on the 31st May 1909. The defendants then filed Suit No. 244 of 1908 to eject her from the house she was occupying, on the grounds that she was unchaste and that the house was not the family residence. That suit was decided on the 1st January 1909 prior to the decree in the maintenance suit. But at the time of that decree the ejectment suit was under appeal and in appeal it was decided on the ground that she had a right of residence in the family house, but not in the house in suit.

The plaintiff then brought the present suit to establish her right of residence in the family house.

The suit was decreed by the first Court, but the decree was reversed in appeal by the lower Appellate Court.

The lower Appellate Court proceeds on two grounds, (1) that the plaintiff is not entitled to both maintenance and residence and (2) that she lost her right of residence by living separate from her husband. We do not think the decision can be supported on either of these grounds. The proposition that a widow who receives a separate maintenance cannot claim residence in the family house is perfectly reasonable on the assumption that her separate maintenance has been assessed with a view to separate residence, further the amount of maintenance so fixed would cover her expenses for rent.

The widow has a right to adequate maintenance and there is no obligation on her to reside in the family house. Where she elects to live apart, the maintenance would include a provision for her rent or residence and this is only subject to the direction of the Court which might, where the family property is small, refuse to a widow living apart a greater allowance than her maintenance would have cost had she remained in the family house. *Kasturbai* v. *Shivajiram Devkurna* (1). The second ground is directly opposed to the law as laid down by the Madras High Court in *Surampalli Bangaramma* v. *Surampalli Brambaze* (2), a decision in which we fully concur.

Now it is admitted that at the time the maintenance decree was made the plaintiff was in occupation of one of Hemandas' houses and the lower Appellate Court finds that a provision for her residence was not considered when fixing the amount of maintenance. It is said that the decree in the maintenance suit bars the present claim. But as laid down in the case of *Bangaru Ammal* v. *Vijayamachi Reddier* (3), a maintenance decree is not final in respect of the amount of maintenance fixed, a suit will always lie for its reduction or increase. Plaintiff's maintenance allowance was fixed at a time when she had a residence in one of the defendants' houses. She has been ejected from that residence and that gives her a cause of action to demand that the maintenance should be supplemented by provision for her residence in the family house. This cause of action arose on her ejectment subsequent to 1909 and the suit is, therefore, in time. We should also add that the defendants having ejected plaintiff from the house she was occupying on the ground that it was not the family residence, are now estopped from denying her right to a residence in the family house. As said in *Varajlal Solot* v. *Bhaiji Nagardas* (4), "it is a sound principle of law that as between the same litigants a defendant cannot defeat the claim of the plaintiff by a plea negativing a contention successfully advanced by him in a former suit if he thereby approbates and reprobates."

(1) 3 B. 372.
(2) 31 M. 338; 18 M. L. J. 254; 3 M. L. T. 266.
(3) 22 M. 175.
(4) 6 Bom. L. R. 1103.

It is not contended that the estate is too small to bear the charge of maintenance and residence.

Before making a final decree, however, we wish to give the parties an opportunity of making provision for the right of residence in some other way. We adjourn the appeal for this purpose till to-day fortnight.

The parties have agreed that plaintiff should receive Rs. 5 a month increased maintenance in lieu of residence in the family house. We reverse the decree of the lower Court and pass a decree for the plaintiff for Rs. 5 a month increased maintenance with arrears from date of suit. Costs in all Courts on the defendants.

Decree reversed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 56 OF 1914.

February 24, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

KATTAMPUDI SUBBIAH CHETTY—DEFENDANT—PETITIONER—APPELLANT

versus

Khan Bahadur WALJI LALJI SAIT—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. V, r. 20—Service of summons upon defendant—Affixing of summons to outer door of house, when sufficient—Inquiry as to suit by third party, whether notice to party inferred.

Notice of suit cannot be fixed to a party to a suit by officious inquiries made by parties unconnected with it about its result. Service of the summons by affixture to the outer door of the house of the defendant is good only when the plaintiff, on being told that the defendant has gone to a different place, makes an attempt to serve him in that place by taking out fresh summons against him to that place also. [p. 27, col. 1.]

Appeal against the order of the Court of the Temporary Subordinate Judge of Nellore, dated the 1st November 1913, in Miscellaneous Petition No. 106 of 1913, in Original Suit No. 36 of 1913, (Original Suit No. 30 of 1913, on the file of the District Court of Nellore).

Mr. *S. Subramania Aiyar*, for the Appellant.

Mr. *K Narain Rao*, for the Respondent.

S. M. A. CHETTY *v.* M. L. R. M. A. CHETTY.

JUDGMENT.—We think that the mere fact that some person, who had no authority to represent a party to a certain suit, makes inquiries as to what had been done with that suit, is not a legal ground for declaring that that party was duly served with notice of the suit.

We also think that the return on the first summons in the case being that the defendant had gone to Gudur, the Subordinate Judge should have directed the plaintiff to take out fresh summons to Gudur, and in the absence of any attempt to effect service at Gudur, the service by affixture at Santhapeta should not have been treated as sufficient service.

We set aside the *ex parte* decree and direct the District Judge to take the case on his file and dispose of it according to law.

Costs will be costs in the cause.

Appeal allowed; Suit remanded.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 83 OF 1913.

February 22, 1915.

Present:—Sir Charles Fox, KT., Chief Justice, and Mr. Justice Hartnoll.

*S. M. A. CHETTY FIRM—PLAINTIFF—APPELLANT

versus

M. L. R. M. A. CHETTY FIRM AND OTHERS—DEFENDANTS—RESPONDENTS.

Acknowledgment of debt—Partnership firm—Receiver, acknowledgment by, how far affords starting date for fresh period of limitation—Limitation Act (IX of 1908), s. 19.

The acknowledgment of a debt of a partnership firm by its Receiver, appointed for collecting its outstandings and doing all things necessary for the realisation and preservation of its assets, does not afford a fresh start for limitation, as it does not come within the power to collect outstandings or to realize assets; it may have been otherwise if the powers of managing the partnership business had been conferred on the Receiver. [p. 28, col. 2.]

Payment of interest and giving of acknowledgment of a debt are two different things. [p. 28, col. 2.]

Lewin v. *Wilson*, (1866) 11 App. Cas. 639; 55 L. J. P. C. 75; 65 L. T. 410; *Ebrahim Haji Yakub* v. *Chunilal Lalchand Kabree*, 10 Ind. Cas. 888; 35 B. 303; 13 Bom. L. R. 264; *Chinnery* v. *Evans*, (1864) 11 H. L. C. 115; 4 N. R. 520; 10 Jur. (N. S.) 855; 11 L. T. 68; 13 W. R. 20; 11 E. R. 1274; 145 R. R. 79, referred to.

Mr. *Coltman*, for the Appellant.

Mr. *B. Lentaigne*, for the Respondent.

JUDGMENT.

FOX, C. J.—The question for determination on this appeal is whether an acknowledgment given by a Receiver of a partnership property appointed in a suit to dissolve and wind-up the partnership afforded a creditor of the partnership a starting date for a fresh period of limitation under section 19 of the Indian Limitation Act, 1908.

The suit in which the Receiver was appointed was brought by the 2nd respondent in this appeal by his next friend, the 1st respondent. It is Civil Regular Suit No. 38 of 1910 of this Court. The order of appointment runs as follows:—

"It is ordered that M. A. R. A. R. Ramanathan Chetty be and he is hereby appointed Receiver on a monthly remuneration of Rs. 300 (three hundred) only to take charge of the property of the Chetty firms of M. L. R. M. A. and A. L. A. S. R. M. pending the decision of the suit for dissolution of partnership with power to collect outstandings and do all things necessary for the realization and preservation of the assets of the said firms."

The debt sued on in the present suit was contracted by the M. L. R. M. A. firm on the 30th January 1908, and the suit was instituted on the 15th May 1912. *Prima facie* it was barred by limitation. The plaintiff firm, however, relied on an entry in a book the translation of which is given as affording them a fresh period of limitation: "17th day of *Kartigai* month *Satharana* year (corresponding with the 2nd December 1910) credit to S. M. A. firm and debit to M. L. R. M. A. firm by transfer from previous account at the two months' term, loan rate of interest, Rs. 5,917-7-9 for which sum of Rupees five thousand nine hundred and seventeen, annas seven, pies nine (I sign)

M. L. R. M. A.'s Receiver,

M. A. R. A. R. Ramanathan Chetty."

The plaintiff's agent and attorney said in evidence that in December 1910 he pressed the M. L. R. M. A. firm for payment. This pressure was apparently put on Soliappa Chetty, one of the defendants, who had been managing partner of the firm in Rangoon. The plaintiff's agent asked him to give an

acknowledgment of the debt, but Soliappa refused to do so because a Receiver had been appointed, and the Receiver would give one as he had given in others cases.

Both went to the Receiver, who said he had no money in hand but he would renew the loan. He then give the acknowledgment in Soliappa's presence, the latter agreeing to this course being adopted. For the plaintiff, it is contended that in signing the acknowledgment the Receiver did so as a duly authorized agent of all the partners of the M. L. R. M. A. firm in virtue of his position as Receiver of its assets, or at any rate as authorized by its managing partner Soliappa, and that in view of how it came to be given the patners of the M. L. R. M. A. firm are, or Soliappa is, estopped from repudiating the acknowledgment.

I agree with the learned Judge that no question of estoppel arises in the case. The plaintiff's agent was not dealing direct with partners of the firm. It lay upon him to ascertain the extent of the authority of the person he dealt with to bind the partners in the firm. Soliappa was no longer the managing partner, and had refused to himself give any acknowledgment. This should have conveyed to the plaintiff's agent that Soliappa did not profess to have any authority at the time to bind his fellow-partners. Upon the question whether the Receiver was as such an agent of the partners duly authorized to sign an acknowledgment of a debt due by them, *Chinnery* v. *Evans* (1) has been relied on. It was a case in which a Receiver of mortgaged property had been appointed under an Irish Act, and the question was whether payments of interest he had made kept alive the mortgage over several properties although in fact he had been in possession of only one of them. It was held that in making the payments he acted as agent of the mortgagor, and the mortgage-debt over all the estates was not barred by limitation. From the report of the arguments at page 129 of the report it would appear that the wording of the Statute under which the Receiver was appointed treated a Receiver under it as the agent of all the parties concerned. The decision underwent some examination and criticism in *Lewin* v. *Wilson* (2) in the Privy Council. It was pointed out that payment of interest and giving an acknowledgment of a debt are two different things. The case we have to deal with is a case of a Receiver of partnership assets in a suit for dissolving and winding-up the partnership, who was appointed under Order XL of the Code of Civil Procedure. Under that Order powers of managing the partnership business might have been conferred on the Receiver, but this was not done. His powers were limited to collecting outstandings and doing all things necessary for the realization and preservation of the assets. The giving of an acknowledgment of a sum being due by the partnership clearly did not come within the power to collect outstandings or that to realize assets. It is argued, however, that it came within the power to do all things necessary to preserve the assets. *Ebrahim Haji Yakub* v. *Chunilal Lalchand Kabree* (3) is relied on in support of this contention. That was a case in which an acknowledgment of liability of his principal had been given by the manager of a business after the owner's death. It was held that under the circumstances of the case the letter containing the acknowledgment was a reasonable one for the manager to write to a creditor and that his writing was authorised under sections 208 and 209 of the Indian Contract Act as being an act which an agent could reasonably do for the protection and preservation of his principal's property after his death.

It is unnecessary to express either assent to or dissent from the decision. The case we have to deal with is not that of a managing agent but one of a Receiver upon whom no power of managing and carrying on the business had been conferred by the Court which appointed him. Under the power of doing all things necessary to preserve the assets, the Court could not have contemplated that the Receiver should either pay away any of the moneys he collected or give acknowledgments of amounts being due, or do any other acts of carrying on the business as a going concern without its further orders.

(1) (1864) 11 H. L. C. 115; 4 N. R. 520; 10 Jur. (N. S.) 855; 11 L. T. 68; 13 W. R. 20; 11 E. R. 1274; 145 R. R. 79.

(2) (1866) 11 App. Cas. 639; 55 L. J. P. C. 75; 55 L. T. 410.

(3) 10 Ind. Cas. 888; 35 B. 303; 13 Bom. L. R. 264.

In re TANGUTURU SRIRAMULU.

No case has been cited to us of a Receiver of a partnership business being held to be the agent of all or any of the partners, and the order of appointment of the Receiver who gave the acknowledgment did not, in my opinion, authorize him to give the acknowledgment. Consequently the acknowledgment did not afford a fresh start for limitation and the suit was barred.

I would dismiss the appeal with costs against the defendant who has appeared on the appeal.

HARTNOLL, J.—I concur.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 521 OF 1915.

February 16, 1915.

Present:—Sir John Edward Power Wallis, KT., Chief Justice, and Mr. Justice Trotter.

In re TANGUTURU SRIRAMULU—PLAINTIFF—PETITIONER.

Transfer of a civil case Judge's expression of opinion about plaintiff's paper, when not ground for transfer—Conduct of plaintiff.

An expression of opinion by a Judge as to the character of the plaintiff or of his paper, is no ground for transfer when that expression of opinion was elicited by the conduct of the plaintiff himself.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to direct the transfer of Original Suit No. 48 of 1913 from the file of the District Court of Godaveri to that of any other District Court.

FACTS.—Mr. Sriramulu, Editor of the *Carlylean*, and a first Grade Pleader practising in the District Court of Godaveri, instituted a suit against Rao Bahadur K. Veeresalingam Panthulu for damages for libel alleged to have been published by the defendant in a pamphlet which was circulated to the public. In the course of the trial before the District Judge, Mr. Cotton, the plaintiff applied for an adjournment of the case stating that certain papers relevent to the case had been filed in a criminal case then pending, and that they could not be yet procured. The Judge refused the adjournment asked for, and asked the plaintiff to enter into the witness-box to prove the allegations in his plaint. The plaintiff in reply stated that he had other evidence to adduce, which he would do first before himself going into the witness-box. The Judge insisted on his going into the box and asked the *duffadar* of the Court to put him into the witness-box, and in the course of the examination of the plaintiff, the Judge was alleged to have stated, referring to an article in his paper, the *Carlylean*, that the Judge used to sleep on the Bench, that Mr. Elwin, the Collector and District, Magistrate, Mr. Stewart the Sub-Divisional Magistrate, and himself had formed a bad opinion of him and his paper. The plaintiff, thereupon, requested the Judge to adjourn the case, on the ground that, in view of the remarks that had fallen from the Bench, he wanted to apply to the High Court for a transfer of the case, as he apprehended that he was not going to have a fair and impartial hearing. The adjournment asked for was granted and the plaintiff applied to the High Court.

Messrs. *P. Chenchiah* and *J. L. Rosario*, for the Appellant.

JUDGMENT.—There is, we think, nothing in the allegation in paragraphs 7 and 8 of the affidavit. The plaintiff in the course of the case appears to have been vaunting the merits of his paper and the District Judge in answer observed that he did not make much of it or him. Mr. Cotton in the observations he has forwarded us very frankly admits that the observation, which was to some extent elicited by the observations of the plaintiff himself, who as a litigant in person no doubt assumed considerable latitude, was injudicious and it was no doubt thoughtlessly made, but we do not think it and the other allegations afford any serious ground for supposing that the plaintiff will not have a fair trial or for inducing him to think so.

The application is dismissed.

Application dismissed.

JETHALAL KALIANJI *v.* GANGARAM NAOOMAL.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT NO. 43 OF 1914.

November 16, 1914.

Present:—Mr. Hayward, A. J. C.

JETHALAL KALIANJI—PLAINTIFF

versus

GANGARAM NAOOMAL AND OTHERS—DEFENDANTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 10—Insolvency of defendants in a money suit—Official Receiver, whether necessary or proper party to such suit —Provincial Insolvency Act (III of 1907), s. 16, cl. (2) (b)—Suit instituted before pendency of insolvency proceedings—Decree, how far binding on Official Receiver.

The plaintiff sued for recovery of money and after the institution of the suit, the defendants applied to be adjudicated insolvents and were so adjudicated under the Provincial Insolvency Act (III of 1907). The defendants contended that the Official Receiver ought to be made a party to the suit and in any event, the decree ought not to be made binding on the Official Receiver:

Held, (1) that the insolvency of defendants in a mere money suit did not effect the devolution of any interest upon the Official Receiver within the meaning of Order XXII, rule 10, of the Civil Procedure Code; [p 30, col. 1.]

Miller v. *Budh Singh*, 18 C. 43, followed.

(2) that as no interference in pending proceedings was contemplated by section 16 of the Provincial Insolvency Act (III of 1907), it was not necessary nor even proper to join in a suit of that nature the Official Receiver, but at the same time the decree could not be executed against the estate of the insolvents, nor be binding on the Official Receiver. [p. 31, col. 1.]

Wray, In re, (1887) 36 Ch. D. 138 at p. 143; 56 L. J. Ch. 1106; 57 L. T. 605; 36 W. R. 67, *Berry, In re, Duffield* v. *Williams*, (1895) 1 Ch. D. 939 at p. 946; 65 L. J. Ch. 245; 74 L. T. 306; 44 W. R. 346; 3 Manson 11, referred to.

Mr. *Assanmal Bulchand*, for the Plaintiff.

Mr. *Isardas Oodharam*, for Defendant No. 2.

JUDGMENT.—The plaintiff sues the defendants for damages in respect of a breach of contract of sale of land. The defendants have admitted the contract but dispute the damages. The plaintiff agreed to purchase the land for Rs. 18,150 on the 4th of October 1913. Rupees 1,000 were paid as earnest money and the balance was to be paid on completion of the sale within two months. The plaintiff called upon the defendants to complete the sale by messages through the broker and also by notices. But the defendants failed to complete it. The plaintiff received an offer for the property of Rs. 22,000 on the 13th of December 1913, but was unable to accept the offer owing to the failure of the defendants to complete the transfer of the land. The offer would appear to have been a *bona fide* offer made by a Bori Alibhoy through the broker Deo Chand. The plaintiff would, therefore, appear to be entitled to recover from the defendant the earnest money, Rs. 1,000, and also Rs. 3,850, being the difference between the contract price Rs. 18,150 and the offer of Rs. 22,000, which must be taken as market value of the land about the time of the defendants' breach of their agreement to sell. There must, therefore, be a decree for Rs. 4,850 against the defendants with costs.

The defendants, however, have been adjudicated insolvents since the filing of the suit. The defendant No. 1 has not appeared, but Mr. Isardas has asked on behalf of defendant No. 2 who has not appeared that the Official Receiver ought to be made a party and that in any event the decree ought not to be made binding on the Official Receiver. The only rule of procedure under which it would be possible to make him a party would appear to be rule 10 of Order XXII. But it was held, and apparently rightly held, in the case of *Miller* v. *Budh Singh* (1) that the insolvency of defendants in a mere money suit did not effect the devolution of any interest upon the Official Assignee within the meaning of section 372 of the Civil Procedure Code, which is now substantially rule 10 of Order XXII. The only other rule necessary to consider is that prescribed in section 16 of the Provincial Insolvency Act of 1907. The words of that provision again do not appear strictly to cover the case. The words are: "No creditor....shall, during the pendency of the insolvency proceedings, have any remedy against the property or person of the insolvent in respect of the debt or commence any suit or other legal proceeding." Those words were taken from section 9 of the English Bankruptcy Act, 1883, and were held to have no reference to proceedings actually pending by North, J., in the case of *Wray, In re* (2). That decision was approved by Stirling, J., in the case of

(1) 18 C. 43

(2) (1887) 36 Ch. D. 138 at p. 143; 56 L.J. Ch. 1106; 57 L. T. 605; 36 W. R. 67.

Berry, In re, Duffield v. *Williams* (3). No doubt there is a provision providing for staying of pending actions in section 10 of the English Bankruptcy Act, 1883. That, however, has not been incorporated in section 16 of the Provincial Insolvency Act, 1907, that section must be interpreted as it stands and it would, accordingly, appear that no interference in pending proceedings was contemplated by section 16 of the Provincial Insolvency Act, 1907. It follows that it would not be necessary, nor even proper, to join in a suit of this nature the Official Receiver. At the same time the decree cannot be executed against the estate of the insolvents nor be binding on the Official Receiver, and it would be open to him, if so advised, to decline to accept the decree as proof of a claim against the estate of the insolvents and to insist on such other proof as might appear necessary, should the decree be offered as proof of a debt provable under section 28 of the Provincial Insolvency Act of 1907.

Suit decreed.

(3) (1895) 1 Ch. D. 939 at p. 946; 65 L. J. Ch. 245; 74 L. T. 306; 44 W. R. 346; 3 Manson 11.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 506 TO 510 OF 1912.

January 25, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

IN NOS. 506 AND 508 OF 1912

SONA ALAGA KUDUMBAN—DEFENDANT—APPELLANT

IN No. 507 OF 1912

KARUPPAI KONE—DEFENDANT—APPELLANT

IN No. 509 OF 1912

CHITRA AND ANOTHER—DEFENDANTS—APPELLANTS

IN No. 510 OF 1912

MANGAIKKARASU PILLAI—DEFENDANT—APPELLANT

versus

N. S. SIVARAMA AIYAR—PLANTIFF—RESPONDENT (IN ALL).

Madras Estates Land Act (I of 1908), ss. 3 (5), 77 194—Suit for rent—Tenant disputing title of plaintiff as land-holder—Court, duty of, in such cases—Court, when to decide the question by itself.

Where a *ryot* disputes the title of the plaintiff to collect rent, no decree can be passed for the rent until that question has been decided in favour of the plaintiff. [p. 32, col. 2.]

Where, in a suit under section 77 of the Madras Estates Land Act for recovery of rent, the tenant disputes the title of the plaintiff as a land-holder and sets up the title of a third person, there are three courses open to a Court, *viz.*, the Court may, by itself, determine who the land-holder is who should collect rent, or it may direct the plaintiff to apply to the Collector to declare him to be the land-holder or may apply section 194 of the Madras Estates Land Act and if it finds there has been no *bona fide* payment of rent to a third person, it may give the tenant the option of paying the same into Court. Where the parties themselves are before the Court, the proper course is for the Court before which the suit is filed to make the inquiry itself. [p. 32, col. 2.]

Second appeals against the decrees of the District Court of Ramnad, in Appeal Suits Nos. 373, 370, 372, 371 and 369 of 1911 respectively, preferred against those of the Special Collector of Ramnad, in Summary Suits Nos. 2149, 2146, 2148, 2147 and 2145 of 1910 respectively.

Mr. *V. Viswanatha Sastri*, for the Appellants.

Messrs. *T. R. Ramachandra Aiyar*, *T. R. Krishanaswamny Aiyar* and *E. S. Chidambaram Pillai*, for the Respondents.

These second appeals coming on for hearing on the 16th January 1914 and having stood over for consideration till 10th Feruary 1914, the Court (the Hon'ble Sir Charles Arnold White, KT., Chief Justice, and the Hon'ble Mr. Justice Tyabji) delivered the following

JUDGMENT.

IN SECOND APPEAL No. 506 OF 1912.

This appeal arises out of a suit under section 77 of the Madras Estates Land Act, which was instituted before the Special Deputy Collector of Ramnad for rent for *Faslis* 1318 and 1319. The plaintiff claims to be the sub-lessee of the village of Peerkangurichi and alleges that the defendant is a *ryot* occupying lands in the said village. The defence is not quite easy to understand from the written statement and the learned Pleader who appeared for the defendants had some difficulty in interpreting it.

The issues raise the question whether the lands are *inam* lands and whether the Court

has jurisdiction to entertain the suit. The real question between the parties seems to be whether the right to receive the *melvaram* is now vested in the plaintiff or whether it has been acquired by a third party through whom the defendants claim to hold the lands, and the argument before us proceeded on the basis that what had to be decided was whether the plaintiff is the land-holder within the meaning of section 3 (5) of the Madras Estates Land Act and whether the Revenue Courts have any jurisdiction to try a suit in which it is disputed that the plaintiff is the land-holder.

The suit being under section 77 of the Madras Estates Land Act, it can lie before the Revenue Courts only if the plaintiff establishes that he is the land-holder within the definition of that term in section 3 (5). The second sentence of that sub-section is in the following terms: "Where there is a dispute between two or more persons as to which of them is the land-holder for all or any of the purposes of this Act or between two or more joint land-holders as to which of them is entitled to proceed and be dealt with as such land-holder, the person who shall be deemed to be the land-holder for such purposes shall be the person whom the Collector, subject to any decree or order of a competent Civil Court, may recognise or nominate as such land-holder in accordance with rules to be framed by the Local Government in this behalf." It was argued in the first instance that the dispute referred to in this sentence must be between two or more persons who are parties to the suit. But there is nothing to warrant such a construction of the clause. On the other hand, it is admitted that in the present case there is no person that the Collector has recognised or nominated as such land-holder in accordance with rules framed by the Local Government in this behalf. The Act is silent on the question as to what is to be done in such a case, though it provides for the converse case, namely, where the Collector has already recognised or nominated a land-holder. There is no express provision to the effect that no suit shall proceed under the Act unless the person whose title to be a land-holder is questioned, has been recognised or nominated as land-holder by the Collector in accordance with sub-section 5 of section 3 of the Act. It would, therefore, seem that the suit could not have been rejected by the Deputy Collector on that ground.

The next question is in what manner the Act requires it to be determined whether or not the plaintiff is a 'land-holder' in a case where no person has been recognised or nominated as such under section 3 (5). Reference was made to section 194 of the Act. But that section cannot in terms apply to the present suit, as here the *ryots* do not admit that rent is due from them. In such circumstances it is difficult to apply section 194 and to require the *ryots* to pay into Court the amount claimed by the plaintiff.

It is, by no means, easy to determine what is the procedure laid down by the Act under such circumstances. But it is clear that where the *ryot* disputes the title of the plaintiff to collect rent, no decree can be passed for the rent until that question has been decided in favour of the plaintiff. How is that question to be decided in cases that are not covered either by section 194 or by section 3, sub-section 5?

Where in a suit for rent the plaintiff has not been recognised or nominated as land-holder under section 3 (5), and his title to be deemed the land-holder is disputed by the defendants, then it would seem that the Court has various alternatives open, and that it may choose that one which may seem to be the most suitable to the particular circumstances. *First*, it may itself determine the question in the course of the suit as to whether or not the plaintiff is the land-holder. *Secondly*, it may require the plaintiff to apply to the Collector under section 3 (5) for being recognised or nominated as the land-holder. *Thirdly*, it may apply, as nearly as possible, the provisions of section 194 and for that purpose determine, in the first instance, whether as a matter of fact rent had been paid by the *ryots* to the third person alleged by them to be the land-holder, and if it is found that the rent has not been paid, may give them the option of paying the rent into Court so that they may not have to risk the liability to pay it over a second time nor be unnecessarily brought in as parties to a dispute between two rival claimants to be deemed land-holders. In any event the Court would have to exercise its discretion as to which of these alternatives should be

chosen in any particular case; and in doing so it would take a course which would on the one hand discourage frivolous denials of title on the part of the tenants who wish to avoid paying any rent, and on the other, prevent real disputes as to the title to land being brought up for decision in a suit for rent under section 77. In the present case we think the most suitable course would be that the question should be decided in the suit itself, in accordance with the first alternative to which we have referred.

There is no doubt a finding of the lower Appellate Court that the plaintiff is the land-holder, but we cannot accept that finding. The learned District Judge seems to have omitted to notice that the plaintiff might have lost his right to the *melvaram* in the lands in question by limitation and that some third person might have acquired it by adverse possession. The suit will, therefore, be remanded to the lower Appellate Court for recording findings on the following issues:—

(1) Whether the plaintiff is the land-holder of the lands referred to in the plaint;

(2) whether the plaintiff is entitled to any, and if so what, rent from the defendants.

The parties will be at liberty to adduce fresh evidence if they desire to do so. The findings will be submitted within six weeks and seven days will be allowed for filing objections.

The Second Appeals Nos. 507 to 510 of 1912 will follow this judgment.

In compliance with the above Order of this Court, the District Judge of Ramnad submitted the following

FINDINGS: * * * *

1. *Finding on issue* 1. In the result I find this issue against plaintiff.

2. *Finding on issue* 2. Plaintiff is not, therefore, entitled to any rent for suit lands. If, however, he is held to be the land-holder, he will be entitled to rent as sued for; the rent claimed in each suit being on the basis of the Baki Jabitas, Exhibits L, series and defendants having no evidence *contra*.

These second appeals coming on for final hearing after the return of the findings of the lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the findings, set aside the decrees of the lower Appellate Court and restore those of the Special Deputy Collector. Appellants will get their costs from the respondents in this and the lower Appellate Court.

Appeal allowed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE REFERENCE No. 21 OF 1914 OF ALIGARH DISTRICT.

May 6, 1914.

Present:—Sir Duncan Colvin Baillie, S. M., and Mr. Tweedy, J. M.

RAFIULLAH—APPLICANT

versus

AHMAD SALEH—RESPONDENT.

U. P. Land Revenue Act (III of 1901), s. 185—Revision, power of—Suit for profits—Claim admitted—Plaintiff absent—Suit dismissed—Order, legality of.

Where in a suit for profits the plaintiff was absent on the date of hearing and the defendant who was present, admitted part of the claim but the Court dismissed the suit *in toto*:

Held, that the order was glaringly illegal and that the Board had jurisdiction under section 185 of the Land Revenue Act to set aside the order.

Reference made by the Commissioner of the Agra Division.

JUDGMENT.

TWEEDY, J. M.—The applicant, who was plaintiff in the profit suit, was absent on 5th August and the Court dismissed the suit in default, regardless of the fact that defendant admitted part of the claim and acknowledged that profits were due on actual collections. That order was so glaringly illegal as to give the Board jurisdiction under section 185. The same is true of the order of the 4th September refusing to review the order of the 5th August.

I would quash both orders and direct a re-trial by the Assistant Collector according to law. Any cost before the Commissioner or the Board will be costs in the case.

BAILLIE, S. M.—I concur.

Reference allowed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 259 OF 1914.

March 10, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

PICHI AIYAR AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

SUBBARAYAR *alias* SUBRAMANIA AIYAR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 1', Expl. IV—Set-off, claim of, not put forward—Subsequent suit for that amount, whether barred—Res judicata.

A defendant who can claim set-off is not bound to put forward his claim in answer to the suit against him, and his failure cannot take away his right to sue for the amount subsequently.

Appeal under clause 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Ayling, dated the 12th March 1914, in Civil Revision Petition No. 188 of 1913, preferred against the decree of the Court of the Subordinate Judge of Trichinopoly in Small Cause Suit No. 1407 of 1912.

Messrs. *S. Varadachariar* and *S. Parthasarathy Aiyar*, for the Appellants.

Mr. *T. R. Venkatarama Sastri*, for the Respondent.

JUDGMENT.—The decision of the learned Judge is right. Mr. Varadachariar draws attention to the written statement in the suit of the Manager against the subscriber and argues that the claim for profits was pleaded in that suit and must be deemed to have been decided against the subscriber; the defence in that case was one of discharge and no question of set-off arose for decision.

The learned Vakil broadly contends that in all cases where independent obligations arise out of the same contract, the defendant is bound to plead his claim by way of reduction of the amount sued for. We do not think that such a contention is well founded. The authorities cited by him, *Vinayak* v. *Dattatraya* (1) and *Rukminibai* v. *Venkatesh Bab Prabhu* (2), do not support him in that contention. In those cases, the learned Judges held that the plaintiff omitted to sue for a right which was an adjunct to the main right claimed and that it was not open to him to agitate the matter again.

A defendant who has a claim for set-off is not bound to put it forward in answer to the

(1) 26 B. 661; 4 Bom. L. R. 492.
(2) 31 B. 527; 9 Bom. L. R. 958.

suit against him and his failure cannot take away his right to sue for the amount subsequently.

There can be no *res judicata* under such circumtances. We dismiss the appeal with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE UNITED PROVINCES.

REVENUE PETITION No. 2 OF 1911-12 OF FARRUKHABAD DISTRICT.

March 23, 1912.

Present:—Mr. Baillie, S. M., and Mr. Broun, J. M.

BHARAT INDU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MISRI AND OTHERS—DEFENDANTS—RESPONDENTS.

Grove—Custom—Tenant, right of, to cultivate—Payment of rent—Landlord, right of, to get rent assessed.

A tenant is not entitled to bring a grove land under cultivation and to hold it free from payment of rent. The land-holder is entitled to have rent assessed on such land. [p. 35, col. 1.]

Second appeal from an order of the Commissioner of the Agra Division, dated the 23rd September 1911, reversing that of the Assistant Collector of Farrukhabad, in the case of assessment of rent.

JUDGMENT.

BAILLIE, S. M.—(*February 23rd*, 1912.)—The land in question is old grove land and 8 old trees still stand on it. It appears that 20 or 25 new trees have been planted. The land is, however, now under cultivation of the same character as is usual in the best cultivated land. It is growing potatoes, *kachiana*, wheat and barley. The Court of first instance held that inasmuch as the land was held free of rent and was cultivated land, the land-holder was entitled to have rent assessed on it The Commissioner held that the land was still grove, that the tenant was entitled to maintain the grove and retain possession of it and, therefore, cancelled the assessment of rent on it. Now it may be true, though this is not proved, that in accordance with custom

the tenant was empowered to re-plant this land and to retain possession of it, but he was not in any way entitled to bring it under cultivation and after having so brought it, to hold it free from payment of rent. The present suit is not for ejectment, it is for assessment of rent and, in my opinion, the area being cultivated land within the meaning of the definition in the Rent Act, the proprietor is entitled to have rent fixed on it. I would allow the appeal and restore the order of the Court of first instance. Costs on respondent.

BROUN, J. M.—I concur.

Appeal allowed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 11 OF 1911-12 OF ALLAHABAD DISTRICT.

November 20, 1912.

Present:—Mr. Baillie, S. M., and Mr. Tweedy, J. M.

SAHAI AND ANOTHER—DEFENDANT—APPELLANT

versus

ALI BAKSH—PLAINTIFF—RESPONDENT.

Ejectment suit for—Parties—All co-sharers must join unless agent appointed—Lambardar *as such, power of, to eject.*

All the co-sharer landlords must join in a suit for ejectment unless they appoint an agent for the same.

A *lambardar* as such has no power of ejectment.

Selected Decision No. 2 of 1910, discussed and allowed.

Second appeal from an order of the Commissioner of the Allahabad Division, dated the 14th May 1912, reversing that of the Assistant Collector, first Class, of Allahabad District, in the case of ejectment.

JUDGMENT.

BAILLE, S. M.—(*November 14th*, 1912.)—Respondent, the *lambardar*, ued for the ejectment of a tenant. It appears that respondent collects only half of the rent from the appellant and that the remaining half is collected by the mortgagees in possession. The Court of first instance decided that in these circumstances the *lambardar* was not entitled to sue for ejectment without the concurrence of the mortgagees, who were in possession and collected the share of the rent. The Commissioner distinguishes this case from Selected Decision No. 2 of 1910, in which Mr. Porter pointed out that a co-sharer is not, owing to the mere fact of being *lambardar*, empowered to eject when he does not collect the rent. In the opinion of the Commissioner the cases were differentiated by the fact that in the case in which the Selected Decision No. 2 of 1910 was given the entire rent was collected by persons other than the *lambardar* and that in the present case the *lambaadar* collects part of the rent. There is, I agree, this distinction between the two cases, but the principles laid down by Mr. Porter in Selected Decision No. 2 of 1910 and case No. 17 mentioned in the above Selected Decision apply generally. The power of ejectment is given to the land-holder. The land-holder is the person entitled to receive rent. In the present case the *lambardar* is only one of the land-holders, the mortgagees in possession are also land-holders and under section 194 all the land-holders must bring a suit for ejectment unless they have appointed an agent for the purpose. For respondent, reference is made to the *wajib-ul-arz* of the village which contains an entry that the *lambardar* had power of collection, and to a Selected Decision of 1903 in which the powers generally enjoyed by the *lambardar* are mentioned. The *wajib-ul-arz* no longer applies and the Selected Decision does not, in any way, hold that the *lambardar* has, as such, the powers of collection of rent or ejectment. It simply states that he ordinarily has it. In the present case he has not, he is not the land-holder. I would allow the appeal with costs on respondent.

TWEEDY, J. M.—I concur.

Appeal allowed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 12 OF 1912-13 OF ALLAHABAD DISTRICT.

April 18, 1913.

Present:—Mr. Baillie, S. M.

PYARE LAL—PLAINTIFF—APPELLANT

versus

RAM BHAROSE AND ANOTHER—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 11—Occupancy right, acquisition of—Sub-letting, meaning of—Allowing brother to cultivate, if sub-letting—Period, if counted in continuous possession.

Sub-letting implies the leasing of land at a fixed rent to a sub-tenant.

Therefore, if a tenant allows his brother to cultivate a part of the land or associates him with himself in cultivation, there is no sub-letting and this period cannot be deducted under section 11 of Act II of 1901 from the period of acquisition of occupancy rights.

Second appeal from an order of the Commissioner, Allahabad Division, dated the 23rd September 1912, reversing that of the Assistant Collector, first Class of Allahabad District, in the case of ejectment.

JUDGMENT.—The respondent has cultivated since 1304 *Fasli*, a period of 16 years. The question is whether he has acquired occupancy rights. The appellant, a *zemindar*, claims in the first place to exclude 1304, the year in which the *patta* was executed. It is well-recognised revenue law that an ordinary cultivating *patta* not securing a right to continue to cultivate beyond the year for which it was granted, is not a lease for a fixed period, that it is simply an instrument which fixes the rent to be paid from year to year. The year for which the *patta* was granted, therefore, counts.

The main question, however, is whether a period during which a part of the land was recorded as cultivated by the brother of the respondent as sub-tenant, should be excluded or not. The Commissioner has held that the fact that appellant allowed his brother to cultivate a part of the land did not amount to a sub-letting and in this opinion I concur. It appears that the brothers have either together or separately been cultivating this land and in certain years apparently they cultivated separate fields. I do not consider that this amounts to sub-letting. The provisions as to sub-letting must be strictly construed and sub-letting, I understand, implies the leasing of land at a fixed rent to a sub-tenant. In this case the position appears to be simply that the respondent associated his brother with himself in the cultivation of this holding. There was no formal or definite sub-letting. Agreeing with the Commissioner I dismiss the appeal with costs on appellant.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 446 OF 1913.

March 17, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

S. RAMASWAMI PATTER—DEFENDANT—APPELLANT

versus

TIRUCHA MANNADIAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s 19—Promise to pay amount due—Acknowledgment of liability—Appellate Court, powers of, to decide points of limitation.

An Appellate Court can decide questions of limitation, if no further facts than those before it, are necessary for that purpose. [p. 37, col. 1.]

Kunhi Marakkar Haji v. *Kutti Umma*, 20 M. 496; *Subbayya* v. *Rami Reddi*, 22 M. 344, followed.

A promise to remit money due under a particular document is "an acknowledgment" within the meaning of section 19 of the Limitation Act, sufficient to save limitation. [p. 37, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge of Palghat, in Appeal Suit No. 194 of 1911, preferred against that of the Court of the District Munsif of Palghat, in Original Suit No. 404 of 1909.

Mr. *N. A. Vaidyanatha Aiyar*, for Mr. *C. V. Ananthakrishna Aiyar*, for the Appellant.

Mr. *T. K. Govinda Aiyar*, for the Respondents.

JUDGMENT.—In the lower Appellate Court no objection was taken to the finding that the suit was in time. Having regard to *Kunhi Marakkar Haji* v. *Kutti Umma* (1) and *Subbayya* v. *Rami Reddi* (2), the question

(1) 20 M. 496.
(2) 22 M. 344.

of limitation argued in this Court, as it appeared to us, is that the point can be decided without remanding the case to the lower Appellate Court. We feel no hesitation in holding that the promise to remit the money in Exhibit B11 refers to the claim made under Exhibit G and to the further claim on account of renewal fees. We are not satisfied that Article 64 of the Limitation Act will cover this case. There has been no account in writing signed by the defendant. But we think that Exhibit B is an acknowledgment of liability and as such it saves the bar of limitation. In this view, there is no other question to be decided.

We dismiss the second appeal with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 19 OF 1911-12 OF ALLAHABAD DISTRICT.

November 16, 1913.

Present:—Mr. Baillie, S. M.

GANESH—DEFENDANT—APPELLANT

versus

Musammat SAHIB-UN-NISSA BIBI—PLAINTIFF—RESPONDENT.

Alluvial accretion—Non-occupancy holding, accretion to—Occupancy rights in accretion, acquisition of—Limitation.

Occupancy rights in an alluvial accretion to a non-occupancy holding arise only by twelve years' continuous cultivation of that accretion.

Second appeal from an order of the Commissioner of the Allahabad Division, dated the 15th May 1912, reversing that of the Assistant Collector of Allahabad District, in the case of ejectment.

JUDGMENT.—Appellant in this case complains that the Commissioner placed him at a disadvantage by admitting fresh evidence and arriving at a finding on facts which had not come to the notice of the Court of first instance. He admits that the land held by Binda before 1310 was only 1 *bigha* 18 *biswas* and the whole holding of the appellant is now 7 *bighas* 11 *biswas*. He claims, *first*, that the land held by Binda is part of the present holding and *second*, that the remainder is an alluvial accretion on that holding. The first claim appears to be correct. The second does not benefit him, as, if this were an alluvial accretion in 1310, it was not an accretion on an occupancy holding, it was an accretion on a non-occupancy holding and occupancy rights can accrue in it only under the ordinary provision of the law by 12 years' continuous cultivation.

The Commissioner's judgment shows that the evidence of the *patwari*, on which the continuity of the possession of Binda and that of the appellant was based, was not worthy of credit. I am unable to differ from the Commissioner's opinion in this matter. I do not consider that it has been shown that the entry in Binda's name and that in appellant's has reference to a holding continuously held by the family. The sudden entry of the entire area of 7 *bighas* 11 *biswas* in 1310 indicates a different conclusion. I find no reason for interfering with the Commissioner's decision and dismiss the appeal with costs on appellant.

Appeal dismissed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 46 OF 1913.

February 2, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Raja MULRAZZU LAKSHMI VENKIAH AMMA ROW BAHADUR—PLAINTIFF—APPELLANT

versus

THE OFFICIAL ASSIGNEE OF MADRAS—DEFENDANT—RESPONDENT.

Presidency Towns Insolvency Act (III of 1909)—Entrustment of sovereigns and gold to jeweller—Conversion—Insolvency of jeweller—Relationship between parties constituted by transaction, nature of—Person entrusting, whether entitled to preferential payment or to rank pari passu *with general body of creditors—Trust property, following of—Tracing and* quasi-*charge, doctrines of, if applicable.*

Where a jeweller, who was entrusted by the claimant with sovereigns and gold to be made into a jewel for him converted the same into cash and subsequently became bankrupt and after the Official Assignee took charge of his estate, the owner of the sovereigns and gold put forward a claim that he was entitled to a preferential treatment and to get out of the estate the full value of the sovereigns and gold entrusted by him to the bankrupt:

Held, that the transaction between the claimant and the jeweller amounted to a bailment

and the jeweller became, in consequence, a trustee for the claimant in respect of the sovereigns and gold entrusted to him; [p. 39, col. 2].

Held, further, that inasmuch as there was no evidence that the sovereigns and gold formed a portion of the estate taken possession of by the Official Assignee and as there was nothing to identify the same, the claimant was not entitled to the benefit of the doctrines of tracing and *quasi*-charge and, therefore, to any preferential payment, but was only entitled to rank *pari passu* with other creditors of the insolvent. [p. 41, col. 1.]

In re Hallett's Estate, 13 Ch D. 696; 49 L. J. Ch. 415; 42 L.T. 421; 28 W.R. 732 and *Sinclair* v. *Brougham*, (1914) A. C. 398; 83 L. J. Ch. 465; 111 L. T. 1; 58 S. J. 302; 30 T. L. R. 315, followed.

Harris v. *Truman*, 51 L. J. Q. B. 338; 46 L. T. 844; 30 W. R. 533; 9 Q. B. D. 264; *Ex parte Kelley and Co.*, 11 Ch. D. 306; 48 L. J. Bk. 65; 40 L. T. 404; 27 W. R. 830, *In re Oatway, Hertslet* v. *Oatway*, (1903) 72 L. J. Ch. 575; 88 L.T. 622; 2 Ch. 356; *Frith* v. *Cartland*, 2 H. & M. 417; 34 L. J. Ch. 301; 11 Jur. (N. S.) 238; 12 L. T. 175; 13 W. R. 493; 71 E. R. 525; 144 R. R. 202 and *Official Assignee* v. *Rajam Iyer*, 6 Ind. Cas. 383; 7 M. L. T. 401; 33 M. 299; (1910) M. W. N. 451, referred to.

Appeal from the judgment of the Hon'ble Mr. Justice Bakewell, dated the 22nd April 1914, in Insolvency Jurisdiction of the High Court.

FACTS.—This is an appeal under the Presidency Towns Insolvency Act, III of 1909, against an order of the Commissioner in Insolvency dismissing the notice of motion taken out by the appellant claiming to rank as a preferential creditor.

The appellant gave the insolvent forty-five sovereigns and some gold for being made into a gold *oddiyanam* (waist ornament). The insolvent did not make the ornament, but used the sovereigns and gold "for his own purposes for other work." The appellant claimed that there was an entrustment of the sovereigns and gold to the insolvent, that the latter was, therefore, a trustee or a bailee for him, that he was in consequence a preferential creditor, entitled to follow the estate and to have his claim for the value of the sovereigns and gold satisfied in full out of the estate in the hands of the Official Assignee.

Bakewell, J., who heard the application, sitting as a Commissioner in Insolvency, held that the insolvent did become a bailee for the claimant but that as it was impossible to trace what became of the sovereigns and gold, the latter was only entitled to rank *pari passu* with other creditors. The claimant then preferred this appeal.

Mr. *M. D. Devadoss* (instructed by Mr. *M. K. Ramaswami Iyer*), for the Appellant:—Where a trustee converts trust property and adds it to his private property and then becomes insolvent, the trustee in bankruptcy or the Official Assignee can only take the property of the insolvent subject to the right of the person who entrusted the property to be treated as a preferential creditor. The *cestui que trust* is entitled to follow the entrusted property into whatever form it may assume. So long as trust property can be traced, the beneficiary is entitled to treat the converted property as trust property. See *In re Hallett's Estate* (1). The beneficiary is entitled to a charge on the new property purchased, even though with mixed funds. The tracing need not be by actual evidence. It can be done by showing that the trust funds have gone to swell the estate. *Sinclair* v. *Brougham* (2) and *In re Oatway; Hertslet* v. *Oatway* (3). This principle is applicable even in the case of chattels. *Harris* v. *Truman* (4).

[SADASIVA IYER, J.—Suppose cash and jewels in the hands of the insolvent were there even before your entrustment. Can you still claim the charge?]

The case in *Official Assignee of Madras* v. *Rajam Iyer* (5) is of that kind. There was no cash or jewellery; still the High Court held that the beneficiary must be paid first. The facts in this case show that it is a case of a specific bailment. It is not a case of creditor and debtor at all.

Mr. *Sidney Smith*, for the Respondent:—This is not a case of entrustment at all. Nor is it a case of bailment. See Pollock and Mulla's Contract Act, page 484. In a bailment the thing entrusted will have to be specifically returned. There is nothing to show what became of the sovereigns or gold. They have not been traced to the hands of the Official Assignee. To 'follow' property, identification is necessary. The burden is on the person claiming preferential treatment. See *Sinclair* v. *Brougham* (2). No evidence has been let in by the claimant in this case. See also *In re Hallett's Estate* (1).

(1) 13 Ch. D. 696; 49 L. J. Ch. 415; 42 L. T. 421; 28 W. R. 732.

(2) (1914) A. C. 398 at p. 418; 84 L. J. Ch. 465; 111 L. T. 1; 58 S. J. 302; 30 T. L. R. 315.

(3) (1903) 2 Ch. 356; 72 L. J. Ch. 575, 88 L. T. 622.

(4) 9 Q. B. D. 264; 51 L. J. Q. B. 338; 46 L. T. 844; 30 W. R. 533

(5) 6 Ind. Cas. 383; 7 M. L. T. 401; (1910) M. W. N. 451; 33 M. 299.

MULRAZZU LAKSHMI v. OFFICIAL ASSIGNEE.

Mr. *M. D. Devadoss*, in reply:—The only question raised before the Commissioner was as to the liability of the insolvent's estate. No question was raised as to the estate not having been benefited at all, nor as regards the identity.

JUDGMENT.

SADASIVA AIYAR, J.—This is an appeal by a creditor whose notice of motion was dismissed by Mr. Justice Bakewell in the exercise of insolvency jurisdiction. The creditor (appellant) contended that he was entitled not merely to get a rateable distribution along with the other creditors, but that he was entitled to get the full amount due to him by the insolvent in preference to the other creditors of the insolvent (from and out of the insolvent's estate) inasmuch as he gave 45 sovereigns and 26½ *pagodas* weight of gold for the specific purpose of making a gold *oddiyanam* and 4 *mettus* by working the specific gold in the said sovereigns and the said gold bar, and as the relation between the insolvent and himself was one of bailment and not that of creditor and debtor in an ordinary loan transaction.

The learned Judge found (*a*) that the insolvent did become bailee of the specific gold given to him as metal and that there was not the relation of ordinary creditor and debtor created (by the giving of the sovereigns and the gold to the insolvent) between the petitioner and the insolvent; (*b*) that it was impossible "to have this specific gold," now that "it does not even appear that at the date of the insolveney, the insolvent was possessed of any sovereigns or bar gold with which the applicant's property might have been mixed," and that the sovereigns and the gold have "disappeared and cannot be followed." On these findings the learned Judge held that the petitioner, even taking him to be a *cestui que trust* and taking the insolvent as a trustee, had no greater right over the general property of the trustee than the other creditors have. In arriving at this conclusion, the learned Judge states that he followed the principle laid down in *In re Hallett's Estate* (1).

The contentions before us in appeal are, (1) that the appellant was entitled to preferential payment on the finding that the insolvent was a trustee and (2) that the Official Assignee has not denied the presence of gold and ornaments at the time of the failure of the insolvent's firm among the assets of the firm (See 6th ground).

I might at once say that I accept the findings of fact arrived at by the learned Judge, though each side attacked that portion of the finding which was against it. Mr. Smith, for the Official Assignee, contended that the oral evidence established that the sovereigns and the gold given by the petitioner were not themselves intended to be wrought into the jewels, but that the price of those sovereigns and gold was to be treated as if the price was given in current cash on the insolvent's promise to give certain jewels of the same value to the petitioner. I think that the terms of the contract between the parties, as reduced to writing in Exhibits A and A2, clearly support the learned Judge's finding. On the other side, the appellant contended that the gold in the sovereigns and in the bar given by him could be traced to some jewels which were taken possession of by the Receiver and afterwards by the Official Assignee. There was no such proof adduced before the learned Judge and it is impossible to find that in the assets taken possession of by the Receiver or by the Official Assignee either the gold or the value of the gold due to the insolvent could be at all traced.

Accepting then the facts as found, what is the law on the point? I have considered to the best of my ability the arguments advanced on both sides in this case and also the decisions quoted. Those cases include *In re Hallett's Estate* (1), *Harris* v. *Truman* (4), *Ex parte Kelley & Co.* (6), the very recent case of *Sinclair* v. *Brougham* (2) in the House of Lords, where the whole question has been elaborately considered and the case *In re Oatway*; *Hertslet* v. *Oatway* (3). I have also considered the six well-known Arbuthnot & Co. cases reported as *Official Assignee of Madras* v. *Smith* (7), *Official Assignee of Madras* v. *Ramachandra Iyer* (8), *Official Assignee of Madras* v. *Lupprian* (9), *Official Assignee of Madras* v. *Krishnaswami Naidu* (10), *Official*

(6) 11 Ch. D. 306; 48 L. J. Bk. 65; 40 L. T. 404; 27 W. R. 830.

(7) 1 Ind. Cas. 712; 32 M. 68; 5 M. L. T. 164.

(8) 5 Ind. Cas. 974; 33 M. 134; 7 M. L. T. 214; (1910) M. W. N. 47.

(9) 5 Ind. Cas. 312; 33 M. 145; 7 M. L. T. 151; 20 M. L. J. 428.

(10) 5 Ind. Cas. 331; 33 M. 154; 7 M. L. T. 266; (1910) M. W. N. 130.

Assignee of Madras v. *Rajam Iyer* (5) and the last case on appeal in *Official Assignee of Madras* v. *Rajam Iyer* (5).

Taking the pronouncement of the Lord Chancellor in the recent House of Lords case as enunciating the binding law on this point, I think it establishes (1) that where the moneys of *A* get into the hands of *B* (who afterwards becomes an insolvent or if *B* is a Society or Company whose affairs are in liquidation) and where the relation of creditor and debtor by *contract or quasi-contract* cannot be established between *A* and *B*, *A* can recover his moneys preferentially on the principle of "tracing" in two cases, (*a*) where *A*'s money can be earmarked in the hands of *B* (as where the money of *A* was contained in a bag and the bag with the contained money in specie could be identified); (*b*) where any particular asset was purchased by *B* with that money, if that particular asset is capable of being earmarked as purchased with that money. (2) That case further establishes that where the money of *A* was mixed by *B* with his own money in *B*'s Bank and appropriated by *B* and there is or can legally be no contract or *quasi*-contract by *B* establishing the ordinary relationship of creditor and debtor, there is what is called loosely a "charge" in *A*'s favour on the balance of all the moneys found in the Bank to the credit of *B* (at the time of *B*'s insolvency or liquidation) to the extent of the money which is due to *A*, and that charge entitles *A* to be preferentially paid out of those moneys, preferentially to ordinary creditors.

The whole law upon this point seems to have been developed from the observations of Vice-Chancellor Wood in *Frith* v. *Cartland* (11), and had its origin in the principle that a *cestui que trust*, if he can trace the trust property to a fund standing in the name of the trustee or to an asset in the hands of the trustee, should be preferentially paid out of that fund or out of that asset. In the 1914 case in the House of Lords, the doctrine of "tracing" was extended in favour of the persons who did not stand in the relation of *cestui que trustent* (even in the limited sense of bailors or principals), provided that they cannot be treated as creditors under even a *quasi*-contract or implied contract.

The majority of the Judges in *In re Hallett's Estate* (1) held that the rule in *Clayton's* case (12) as to the appropriation of cheques drawn upon a Bank to the moneys deposited there in order of dates was not applicable where the dispute is between the Official Assignee of a trustee *B* and the *cestui que* trust *A*, whether a balance in the Trustee's Bank is or contains the trust money belonging to *A*. Thesiger, L.J., dissented from the view of the majority which held that the rule was not applicable and that the balance should be traced to the trust money, though cheques had been for the full amount of the money, in priority to cheques affecting subsequent deposits to the trustee of his own moneys. The House of Lords' case has left this second question undecided.

The necessity of tracing what I might roughly call the misappropriated funds into the assets in the hands of *B* (of so tracing it, at least in an indirect manner and by reasonable presumptions), has not been questioned in this latest case. The Lord Chancellor seems even to lay down in one portion of his judgment that it lies upon *A* to establish by evidence that the assets in the hands of *B* do or must contain funds belonging to him. [*Sinclair* v. *Brougham* (2). See also the argument in the same case at page 406, proposition 3, in which the learned Counsel says "the burden of proving the identity is on the person who alleges it]". The burden of proof may be discharged by a sort of eliminating process, that is, *A* might establish that the remaining securities, investments and assets in the possession or name of *B must* be the result of the use of *A*'s funds. In that same case, their Lordships held on the facts that the funds in the hands of *B* (a statutorily constituted society), which received the moneys from the depositors on *ultra vires* transactions, must have contained the said moneys of the depositors and the increase of those moneys and hence their Lordships had no difficulty in applying the doctrine of tracing in that case, especially as the claims of ordinary outside creditors had been fully discharged.

(11) 2 H. & M. 417; 34 L. J. Ch. 301; 11 Jur. (N. S.) 238; 12 L. T. 175; 13 W. R. 493; 71 E. R. 515; 144 R. R. 206.

(12) 1 Mer. 572; 15 R. R. 161; 35 E. R. 781.

In the case of *Harris* v. *Truman* (4) and *In re Oatway, Hertslet* v. *Oatway* (3) also, the necessity of *A*'s establishing that his property, whether it was money or chattels or the proceeds of his chattels, was or must form a part of the whole of the assets or funds in the hands or name of *B*, was not denied. In the former case, though the assets (in the shape of barley and malt) were not purchased with *A*'s moneys which had been misappropriated by *B* (*A*'s agent employed expressly to purchase barley and malt for *A*), *B* did make those purchases for *A* in order to fulfil his obligation as agent to *A* to so purchase barley and malt for *A* and in those circumstances, *A* was held entitled to ratify the appropriation by his agent (though that appropriation was made to conceal his breach of trust) and to treat his (*A*'s) moneys as traced to the barley and malt purchased with the other moneys of *B*. If, in this case, I could have found my way to decide that the assets taken possesssion of by the Receiver or by the Official Assignee did include or must have included the gold or the value of the gold contained in the sovereigns and the bar given by the petitioner to the insolvent, or that though the petitioner's particular gold was misappropriated by the insolvent, he made *oddiyanams* or *mettus* with other gold [as in the case in *Harris* v. *Truman* (4)] *in order to fulfil his obligations to the petitioner*, I would be inclined to apply the doctrine of "tracing" and the doctrine of *quasi*-charge even to the full limits indicated by Lord Dunedin in his judgment in the recent House of Lord's case; but I do not see my way to differ from the finding of Mr. Justice Bakewell (which I take to be) that the petitioner has failed to show that the gold or the price of that gold was invested in or formed part of any of the assets taken possession of by the Receiver or by the Official Assignee, and I must, therefore, confirm the order of the learned Judge which held, that the petitioner must be treated as a man who had lost the gold entrusted by him to the insolvent, just as if the insolvent had converted it into cash and squandered it in unknown ways before his insolvency. On the finding, then, that none of the assets found with the insolvent is proved directly or even by remote fact, from which a reasonable inference could be drawn, to have contained any portion of the petitioner's gold or to have been acquired with the use of the proceeds of that gold, I must and do confirm the order of the learned Judge. But as it is a hard case for the appellant and as the legal question involved is an intricate one, which even the most learned English Judges have found it so difficult even to formulate for decision in all its subtle ramifications, I shall, while directing the appellant to bear his own costs in this appeal, not direct him to pay the respondent's costs, which will, of course, come out of the insolvent's estate.

NAPIER, J.—This is an appeal from an order of Mr. Justice Bakewell in Insolvency Petition No. 188 of 1912, rejecting an application for the return by the Official Assignee of certain sovereigns and bar gold given by the applicant to the insolvent for the purpose of making ornaments, or for payment of their value. The learned Judge finds on the evidence, and we agree with him in that conclusion, that the sovereigns and the bar gold were given as alleged for a specific purpose, that the insolvent, instead of obeying the directions, credited the applicant with the sovereigns as cash and used the gold for other work. There is no evidence to show what became of the sovereigns, nor is there any evidence that the jewel into which the bar gold had gone was in the possession of the insolvent at the time that a Receiver was appointed to take charge of his property, which was done sometime prior to the insolvency. The amount of the gold was $26\frac{1}{2}$ *pagodas*, which is nearly 3 oz. On these facts the learned Judge has held that the applicant's property has disappeared and cannot be followed, and applying the law as laid down in *In re Hallett's Estate* (1), dismissed the application.

It was contended before us that the appellant could recover as a preferential creditor on the principle that if the estate has been benefited by the transaction, the value of the specific moveable can be recovered. It is sufficient to say that there is no authority for this broad proposition.

It was next argued that the insolvent being a bailee of the specific gold, the applicant was entitled to follow it into any property possessed by the insolvent. Reliance is placed on *Official Assignee of Madars* v. *Rajam Iyer* (5). That, however, is no

authority for the proposition, that being a case where money stamped with the position of trust money was mixed with the insolvent's own money. During the course of the argument, I invited the attention of the learned Counsel for the appellant to the recent decision of the House of Lords in *Sinclair* v. *Brougham* (2), the well-known Birkbeck Bank case and he endeavoured to find support for the proposition in various passages in the judgment of the learned Lords. What he sought in effect to do was to apply the principle under which trust moneys, which were mixed, can be followed to specific moveables held by the insolvent. This case is no authority for that position. Their Lordships certainly re-affirm the proposition laid down in *In re Hallett's Estate* (1), that "where trust money has been mixed by an insolvent with his own moneys, the law will presume that any money drawn from that mixed account by the insolvent was his own money and that the balance remaining unexpended was the trust money." But with regard to specific moveables held by the insolvent as bailee, their Lordships state the law as already established, *vide Sinclair* v. *Brougham* (2): "If money in a bag is stolen and can be identified in the form in which it was stolen, it can be recovered in *in specie*. Even if it has been expended by the person who has wrongfully taken it, in purchasing some particular asset, that asset, if capable of being earmarked as purchased with the money, can be claimed by the true owner of the money." If it was impossible to establish that these sovereigns and bar gold had been converted into any particular jewel, the appellant might claim that jewel. But admittedly this cannot be shown. There is nothing in *In re Oatway*; *Hertslet* v. *Oatway* (3), inconsistent with this doctrine, which is clearly established in *In re Hallett's Estate* (1). The basis of the right to follow is stated to be that the claim is one *in rem* "the claim to follow and recover property with which in equity at all events they have never really parted." It is obvious that if the claim is *in rem*, the *res* must be ascertained. I am, therefore, clearly of opinion that the judgment of the learned Judge was right and must be affirmed. I agree with the order as to costs made by my learned colleague.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 2 OF 1912.

October 23, 1914.

Present:—Mr. Fawcett, A. J. C., Mr. Crouch, A. J. C., and Mr. Pratt, J. C.

HOTCHAND GULABRAI—APPELLANT

versus

MANGHANMAL GULABRAI AND OTHERS —RESPONDENTS.

Hindu Law—Mitakshara—*Partition—Joint family property—Lunatic co-parcener—Lunacy not congenital but subsequent—Right of such co-parcener to share on partition.*

Where the plaintiff, a lunatic, sued through a next friend for partition of the family estate of which he would, if sane, be certainly entitled to a share, and it was found that the lunacy was not congenital but subsequent:

Held, per *Crouch, A. J. C.*, that there was nothing in the *Mitakshara* from which could be deduced a clear rule of law that a man who on birth entered into a joint family holding joint property, lost that interest on becoming lunatic. [p. 45, col. 1.]

Tirbeni Sahai v. *Muhammad Umar*, A. W. N. (1905) 265; 3 A. L. J 4; 28 A. 247, followed.

Ram Sahye Bhukkut v. *Lalla Laljee Sahye*, 9 C. L. R. 457; 8 C. 149; 6 Ind. Jur. 306 and *Ram Soondur Roy* v. *Ram Sahye Bhugut*, 8 C. 919; 7 Ind. Jur. 85, dissented from.

(Per *Fawcett, acting J. C.*, dissenting):—That the *Mitakshara* intended the rules relating to 'exclusion from inheritance' to apply to both cases of inherited, as well as joint family property; that the principle on which the disqualification is based, *viz.*, the inability to perform sacrifices, applied equally to cases other than congenital; and that the plaintiff being insane at the time of the proposed partition was excluded from any participation in the joint estate. [p. 46, col. 1; p. 47, col. 2.]

Abilakh Bhagat v. *Bhekhi Mahto*, 22 C. 864 and *Murarji* v. *Parvatibai*, 1 B. 177, dissented from.

Ram Sahye Bhukkut v. *Lalla Lalji*, 8 C. 149; 9 C. L. R. 457; 6 Ind. Jur. 306 and *Ram Soondur Roy* v. *Ram Sahye Bhugut*, 8 C. 919; 7 Ind. Jur. 85, followed.

Tirbeni Sahai v. *Muhammad Umar*, 28 A. 247; A. W. N. (1905) 265; 3 A. L. J. 4, distinguished.

Held (Per *Pratt, J. C.*), that under the *Mitakshara*, which is the paramount Hindu Law authority in Sind, the disqualifications relating to 'exclusion from inheritance' apply not only to cases of obstructed but also to cases of unobstructed heritage, but in the case of the latter in joint family property they must apply at the time of birth, for that is the time when the rights would accrue if there were no disabilities: that to hold otherwise would necessitate the divestment of rights already vested, which is contrary to the general rule of Hindu Law; and that, therefore, subsequent lunacy could not divest the plaintiff of his right to the joint family property. [p. 48, col. 2; p. 49, col. 1.]

Ram Sahye v. *Lalla Laljee Sahye*, 8 C. 149; 9 C. L. R. 457; 6 Ind. Jur. 306, dissented from.

Abilakh Bhagat v. *Bhekhi Mahto*, 22 C. 864, followed.

HOTCHAND GULABRAI *v.* MANGHANMAL GULABRAI.

Appeal from a decision of the first class Subordinate Judge, Sukkur.

Mr. *Rupchand Bilaram*, for the Appellant.

Mr. *Fatehchand Asudamal*, for the Respondents.

JUDGMENT.

CROUCH, A. J. C.—(*September* 1*st*, 19`4.)—Plaintiff, a lunatic so found, sues by his wife as next friend for partition of the family estate of which he could, if sane, be certainly entitled to a share. Plaintiff became lunatic six years before suit, his father died four years before suit. The lower Court has dismissed the suit, holding on the authority of *Ram Sahye Bhakkat* v. *Lalla Laljee Sahye* (1), *Ram Soondur Roy* v. *Ram Sahye Bhugut* (2), that plaintiff is disqualified from inheriting, or from claiming partition and that his suit was not maintainable on account of his being of unsound mind.

Plaintiff appeals. Mr. Rupchand, in argument, has contended that, to disqualify a lunatic from claiming partition of joint family property, he must be lunatic from birth when his right in the family property vests. He relies on *Tirbeni Sahai* v. *Muhammad Umar* (3). Before examining the authorities, let us first consider the case in the light of well-known accepted principles of Hindu Law. Mayne says (6th Edition, page 323): "The whole body of (such) an undivided Hindu family, consisting of males and females, constitutes a sort of corporation, some of the members of which are co-parceners, that is, persons who on partition would be entitled to demand a share, while others are only entitled to maintenance.....Each person is simply entitled to reside and be maintained in the family house, and to enjoy that amount of affluence and consideration which arises from his belonging to a family possessed of greater or less wealth. As he dies out, his claims cease, and as others are born their claims arise. But the claims of each spring from the mere fact of their entrance into the family, not from their taking the place of any particular individual. Deaths may enlarge the beneficial interest of the survivors, by diminishing the number who have a claim upon the common fund, just as births may diminish their interests by increasing the number of claimants. But, although the fact that *A* is the child of *B* introduces him into the family, it does not give him any definite share of the property, for *B* himself has none. Nor upon the death of *B* does he succeed to anything, for *B* has left nothing behind to succeed to.....Until they elect to do so, the property continues to devolve upon the members of the family for the time being by survivorship and not by succession." "There is no such thing as succession properly so called in a Hindu family. It is very important to note that the right which the son takes at his birth in the ancestral property is wholly independent of his father. He does not claim through his father". (Mulla, section 183). A right to partition is one of the ordinary incidents of co-parcenary.

Now it is obvious from the nature of the estate enjoyed by a member of an undivided Hindu family, that plaintiff became vested with his interest in the family property at the time of his birth, and that the mere death of plaintiff's father could not have operated to divest him of this interest. Nor could he have been divested of his interest by the mere process of endeavouring to enforce it by filing a suit. The only possible theory open to defendants appears to be that by becoming lunatic he was divested. Before a Court will hold a person entitled to expropriate some other person from his estate and appropriate it to himself, it will require absolutely convincing proof that the law not only justifies such being done, but that the appropriate rule of law is so clear that it must be done.

In *Ram Sahye Bhukkut* v. *Lalla Laljee Sahye* (1), it was held that a co-parcener who has become insane, subsequent to his birth, could not claim partition. This decision was based on *Mitakshara*, part II, Chapter II, section 10, verses 1, 3 and 6. In *Ram Soondur Roy* v. *Ram Sahye Bhugut* (2), the learned Judges relied on verse 6 of the same section of the *Mitakshara*. Mr. Fatehchand, who appears for the respondent, adds to these authorities Smriti Chandrika, Chapter V, section 9, and Viramitrodaya, Chapter VIII, sections 3 and 4.

It will be convenient to have before us these several verses relied on.

(1) 8 C. 149; 9 C. L. R. 457; 6 Ind. Jur. 306.
(2) 8 C. 919; 7 Ind. Jur. 85.
(3) 28 A. 247; A. W. N. (1905) 265; 3 A. L. J. 4.

Mitakshara, Chapter II, section X:—

1. The author states an exception to what has been said by him respecting the succession of the son, the widow and other heirs as well as the re-united parcener.

2. An impotent person or outcaste and his sons, one lame, a madman, an idiot, and others must be maintained excluding them, however, from participation.

3. Manu likewise ordains, "Impotent persons and outcastes are excluded from a share of the heritage and so are persons born blind and deaf as well as madmen, idiots, the dumb and those who have lost a sense."

6. They are debarred of their shares, if their disqualification arose before the division of the property. But one already separated from his co-heirs, is not deprived of his allotment.

Smriti Chandrika, Chapter V, section 9: It must be understood that such as appear at the time of division to have been afflicted with impotence, etc., are excluded from their shares and that the exclusion is not confined to those only that are naturally (that is, by birth) impotent or the like.

Viramitrodaya, Chapter VIII, section 4: The exclusion, again, of these takes place if their disqualification occur previously to partition (or succession), but not also if subsequently to partition (or succession), for there is no authority for the resumption of allotted shares.

The venerable Vijnaneswara says that if subsequently (to partition) or succession their defects are cured by medication or the like, they become entitled to obtain their shares.

Now the first nine sections of Chapter II of the *Mitakshara* seem to deal, beyond doubt, with succession. Section X is headed "On exclusion from inheritance," and this also suggests "succession;" but some confusion is created by the very vague definitions given in Chapter I, section 1. We there find "heritage" (*daya*) defined as "wealth which becomes the property of another solely by reason of his relation to the owner." "Inheritance" is said to be used in the sense of "unobstructed heritage" and "partition" is said to mean "heritage subject to obstruction."

In verses 17 to 22 after a discussion as to whether property arises from partition or whether partition presupposes property, the writer arrives at the conclusion that property does not arise by birth but by death of the owner (where only one heir) or by partition (where more than one heir). But it is expressly stated in section 27 that property in the paternal or grandfather's estate is only by birth.

In Chapter 1, section 8, of the Smriti Chandrika "heritage" is defined as wealth which becomes the property of one or more persons by reason of relation to the owner, and which admits of partition. And in section 9 it is stated: "The law of inheritance (*daya dharma*) means the rule of partition."

It appears, therefore, that the learned commentators, having no recognized term of jurisprudence such as tenancy-in-common to express the estate enjoyed by heir, invented the term "partition"; and "before the division" and "at the time of division" appear to mean before and at the time when the estate devolved in severalty. "Heritage" also has its special meaning, wealth which a son inherits from a deceased parent solely because he is the son; but does not apparently include property which the son enjoys after his father's decease, because he had from his birth enjoyed a joint interest in it. By "son" is indicated any relation (verse 5). Inheritance, being "unobstructed heritage," is wealth which a man inherits from his father or paternal grandfather.

A most able attempt to reduce some of these passages to terms of modern jurisprudence has been made by Chandavarkar, J., in *Bai Parson* v. *Bai Somli* (4).

If we examine verses 1, 3 and 6 from the *Mitakshara* in the light of the definitions, we find that verse 1 refers to an exception "respecting the succession of the son, the widow and other heirs." This seems to point to succession and not survivorship, at any rate reference to survivorship is far from clear.

Verse 3 tells us of those who are excluded from the heritage. We know that "heritage"

(4) 15 Ind. Cas 774; 36 B. 424 at p. 429; 14 Bom. L. R. 400.

covers both obstructed and unobstructed property. This verse, again, may be referring to succession and not to survivorship.

Verse 6 is certainly open to the construction that it refers to tenancy-in-common, as also the verse from Smriti Chandrika, while the use, twice over, of the word partition (succession) in the verse from the Viramitrodaya seems conclusive as to its application.

While, then, it appears to me that the balance of probability is in favour of all the passages relied on being intended to refer exclusively to succession, it must, I think, be at least conceded that they offer only doubtful authority for the view accepted by the lower Court.

I can find nothing in any of the passages cited from which can be deduced a clear rule of law that a man who on birth enters into a joint family holding joint property, loses that interest on becoming lunatic. And no Court should, in my opinion, hold that property, which was admittedly the plaintiff's upto a certain date, became forfeit on that date, unless there is absolutely clear, indisputable authority for doing what is, *prima facie*, contrary to some of the most sacred principles of law and equity. It is, at any rate, clear that once the property which he takes by succession has vested, is not divested by lunacy, and it was so held in *Deo Kishen* v. *Budh Prakash* (5).

In *Tribeni Sahai* v. *Muhammad Umar* (3), the Court held that, if a person was not insane at birth, subsequent insanity did not deprive him of his right to share in the joint family property. The value of this decision is somewhat discounted by the fact that it is based entirely on *Deo Kishen* v. *Budh Prakash* (5), which in turn is based on passages from commentators which seem to have application only to separate property.

I would, however, follow the decision in *Tribeni Sahai's* case (3), for it is consistent with the general principles of common law and equity and of Hindu Law, and I am of opinion that no sufficient authority has been shown us for holding that a member of a joint family is divested of his rights of a co-parcener as regards partition on becoming a lunatic; this is all that it is necessary to rule for the present case. No such authority being forthcoming, the ordinary rule of law, equity and good conscience should, in my opinion, obtain.

I would reverse the decree of the lower Court and remand the case for trial.

FAWCETT, A. J. C.—I have given very careful consideration to the views expressed in my learned colleague's judgment, but regret that I do not concur in his conclusion.

The main point for determination is whether the verses 1,5 and 6 of section X of Chapter II of the *Mitakshara* apply also to the case of a co-parcener in a joint Hindu family who has an interest in the joint family property by birth, or only to the case of ordinary succession by inheritance as opposed to one by survivorship.

As those verses stand, they seem to me clearly to cover the case of a son, who is a member of joint family, as well as that of an heir, who succeeds by inheritance proper. Otherwise I fail to see what is the effect of the opening words in verse 1: "The author states an exception to what has been said by him respecting the succession of the son." This obviously refers to the sections in Chapter I dealing with this subject, more particularly sections II, III, V, VI, VIII, X, XI, and XII (I give the Nos. as appearing in Colebrooke's Translation). These mainly deal with the case of a son's share on partition and *prima facie*, therefore, the exception is meant to be one applicable in such a case.

As pointed out in Mayne's Hindu Law, 7th Edition, section 270, at page 333, "The Hindu lawyers always treat partition and inheritance as part of the same subject. The reason of this is that the normal state of the property, with which they have to deal, is to be joint property, and that they can only explain the amount of interest, which each member has in the property, by pointing out what share he would be entitled to in the event of a partition."

It is no doubt true that the term "*vibhaga*" which is generally translated by Colebrooke as "partition" covers the case both of partition and inheritance, and that the word "distribution" would be a better translation, as covering

(5) 5 A. 509; A. W. N. (1883) 105.

both cases (*cf.* note at page 171 of Gharpure's Collection of Hindu Law Texts, Volume III, No. 4). But there is, in my opinion, no sufficient ground for saying that it is generally used with reference to 'inheritance' rather than to 'partition' : in fact the contrary would be the natural presumption, for the reason given in the passage just quoted from Mayne's Hindu Law. And having regard to the treatment of 'partition' in the *Mitakshara* as a case of inheritance and the direct reference to the 'succession of a son' in verse 1, I can see no justification for the view that the author intends to limit the exception contained in this section X to cases of inheritance by succession as opposed to survivorship.

My view that section X covers both cases is, I think, strengthened by the reference in verse 1 to the "re-united parcener." This is the case dealt with in the preceding section IX and under verse 1 of that section such 're-united parcener' succeeds by survivorship to his deceased co-parcener, who leaves no issue actually born or then in the womb (*cf.* Mayne's Hindu Law, 7th Edition, section 586, at page 796).

If the disqualification mentioned in section X apply to his case, why should it not equally apply to the case of a son who is joint with his deceased father?

Again the provision in verse 6 that 'One already separated from his co-heirs is not deprived of his allotment," would seem to be quite unnecessary, if the exclusion dealt only with the cases of inherited property and did not extend to cases of partition in joint families.

It may also be noticed that section X does not appear in a Chapter dealing solely with cases of inheritance as opposed to partition. On the contrary, as already pointed out, the preceding Chapter deals with a case of the latter kind, and Chapter XII also relates to the subject of partition.

In my opinion it is far more likely that the *Mitakshara* intended the rules in section X relating to 'exclusion from inheritance' to apply to both cases than to only the latter case, and most unlikely that it intended them not to operate in the normal case of inheritance (in its wider sense) in a joint family. The rules are based on the principle that one who is unable to perform the necessary sacrifice is incapable of inheriting (see Mayne Loc. Cit., section 591, page 802), and this principle applies as much to a son in a joint family as to any other heir.

The argument that his disqualification would be opposed to the principle that he acquires an interest in the joint property by birth is not, I think, of any real weight in construing the *Mitakshara*. The latter work is supposed to have been written about the latter part of the 11th century (Mayne, section 26, page 28) and it cannot properly be construed in the light of subsequent developments in the law of partition. As is pointed out in Mayne's Hindu Law, section 244, page 313, it was only by very slow steps that the right to a partition reached its present form. According to the *Mitakshara*, a son could not partition from his father without his wish, unless the father was old, disturbed in intellect or diseased (Chapter 1, section 2, Volume VII, Mayne, page 314) and the normal partition was after the father's decease (Chapter 1, section 3). There is, therefore, nothing unnatural in its being treated as a case of succession, and the subsequent change of view referred to in Mayne's Hindu Law, section 252, at page 319, should not in my opinion be allowed to influence the construction of the *Mitakshara*.

Again, even according to the present law, a son has no definite ascertained share, until there is a partition; and the quantum of the share he may obtain on partition may vary from time to time according to the number of members of the co-parcenary. If it may become exceedingly small, why should it be against the principles of Hindu Law to vanish altogether? On the contrary, the principle on which disqualifications rest requires that it would vanish, as the disqualified person cannot perform the necessary sacrifices.

Then again, as is pointed out in *Krishna* v. *Sami*(6), the rule prohibiting the divesting an estate once vested in a full owner cannot be laid down without exception in respect of property governed by the law of the *Mitakshara*. And the verse 4, Chapter VIII,

(6) 9 M. 64 at p. 78.

of Viramitrodaya, referred to in *Deo Kishen* v. *Budh Prakash* (5), clearly is intended to deal only with the case where a co-parcener has been allotted a share on partition or succession and subsequently becomes disqualified, and not to refer in any way to the case of mere undivided interest in joint property. That being so, it affords no real authority for the ruling in *Tribeni Sahai* v. *Muhammad Umar* (3).

I would also rely very strongly on the fact that both Mayne and West and Buhler treat the disqualification as applicable to cases of partition, as well as inheritance. See West and Buhler, 3rd Edition, Book II, paragraphs 4 and 6, at page 679, and Mayne, 7th Edition, section 484, page 654, and section 594 at page 807. If I err, at any rate, I err in good company.

It may be noted in this connection that the case of *Abilakh Bhagat* v. *Bhekhi Mahto* (7), in which Prinsep, J., expressed doubts as to the correctness of the law laid down in the cases of *Ram Sahye* v. *Lilla Laljee Sahye* (1) and *Ram Soondur Roy* v. *Ram Sahye* (2), is cited in note (*c*), page 812 of Mayne's 7th Edition, but he evidently did not share Prinsep, J.'s doubts, else he would surely have commented on the rulings in *Ram Sahye* v. *Lalla Laljee Sahye* (1) and *Ram Soondur* v. *Ram Sahye Bhagat* (2) instead of relying on them as he does in section 484 at page 664 note (*c*). He does not hesitate to express his opinion when he defers: (*cf.* his doubt in paragraph 594 at page 806) as to correctness of the view taken in *Murarji Gokuldas* v *Parvatibai* (8) that madness must be congenital to disqualify.

There are also numerous cases cited in West and Buller, 3rd Edition, Volume I, where the Shastris consulted apply these rules as to disqualification to members of a joint family, see Chapter VI, section 1, Q. 1, pages 575, 576 ; Q. 2, page 577 ; Q. 4, page 578 ; Q. 5, pages 578, 579; Q. 6, page 579 ; Q. 7, page 580 : section 36, Q. 3, page 587, (*cf.* if one of his sons is insane.....he cannot be allowed a share of his father's property, but a maintenance only). The view I take appears, therefore, to be consistent with this practice, as evidenced by such cases.

In this particular case the plaintiff was admittedly insane when his father died, and must, I think, be therefore excluded from any partition in the joint estate in accordance with the *Mitakshara*, Chapter 1, section XI, verses 1 and 5. The succession as contemplated in Chapter I, section III, opened up then, and he is still a lunatic when the partition is proposed to be made (verse 6).

The view which is taken in certain *obiter dicta* in *Murarji Gokuldas* v. *Parvatibai* (8), the madness to be a disqualification should be congenital is dissented from in *Ram Sahye* v. *Lalla Laljee Sahye* (1), and also, as already mentioned, in Mayne's Hindu Law. The word 'born' does not appear before the word 'madman' in the *Mitakshara* and the principle on which disqualification is based, *viz.*, the inability to perform sacrifices, applies equally to cases other than congenital. I do not think, therefore, there is any sufficient ground for adopting the view taken in the Bombay case. For these reasons I agree with the conclusion of the Subordinate Judge that plaintiff's suit fails, and would dismiss the appeal with costs.

The case will be referred to a third Judge in accordance with the proviso to section 9 B of Bombay Act XII of 1866.

PRATT, J. C.—(*October 23rd*, 1914.)—This suit is for partition of joint family property.

The plaintiff had become insane six years before the suit, which was instituted by his wife as his next friend.

The questions for decision are

(1) Whether plaintiff's interest was divested by his supervening lunacy.

(2) Whether he has the right to sue for partition.

The *Mitakshara* is the paramount Hindu Law authority in this Province and the subject of disqualification is dealt with in Chapter II, section X. That section is headed "an exclusion from inheritance" and the first verse is as follows :—

The author states an exception to what has been said by him respecting the succession of the son, the widow and other heirs, as well as the re-united parcener.

"An impotent person, an outcaste, and his issue, one lame, a madman, an idiot, a blindman, and a person afflicted with an incurable disease, as well as others (similarly

(7) 22 C. 864.
(8) 1 B. 177.

disqualified) must be maintained; excluding them, however, from participation."

The 5th verse declares that those who are disqualified are entitled to maintenance ; and the 6th verse states a proviso to the rule in verse 1 in the following terms :—

They are debarred of their shares, if their disqualification arose before the division of the property. But one already separated from his co-heirs is not deprived of his allotment.

Mr. Rupchand's argument is that the term "succession" in the first verse refers to succession by inheritance properly so called and not to succession by survivorship ; to support this argument he explains the mention of the son and the re-united co-parcener as having reference to self-acquired property only.

I think this is the true construction of the verse. The re-united co-parcener in the case discussed in Chapter II, section IX, and the succession described in that section is confined to the separate property of the deceased. It lays down in verse 7 the curious rule that a re-united brother of the half blood takes equally with a divided brother of the full blood. This must refer to self-acquired property; for the re-united half brother would take all the joint property by -survivorship. Again, the succession of the son and of the widow is described in Chapter I, section III, and Chapter I, section VII, as a share in a partition, which clearly implies that the heritage was not co-parcenary property for such property passes without a division. The other 'heirs' are also discussed in the preceding part of the work in the order of succession according to heirship.

On the other hand, there is no doubt that the word " inheritance " in the heading to the section has a much wider significance. In Chapter I, section 1, verse 3, it is said heritage passes in two ways (*a*) unobstructed by right of birth and (*b*) obstructed on the death of the last holder. The second is the case of heirship and it is termed partition, for the estate passes as tenancy-in-common to co-heirs whose succession involves the idea of a division of interest. But the unobstructed heritage is primarily denominated inheritance, see Chapter I, section 1, verse 13, and the property vests at birth—Chapter 1, section 1, verse 27.

The conclusion seems to be that the disqualifications apply not only in cases of obstructed, but to cases of unobstructed, heritage and this inference seems to be supported by the very comprehensive language used is verse 5. Now the proviso made in verse 6 can only refer to the case of obstructed heritage, for that is implied in the words "division of the property." There is no division in the case of unobstructed heritage. This proviso, therefore, enacts that in the case of inheritance by heirship the disability must exist at the time the inheritance opens out. This has been assumed to be so by the Privy Council in *Bodhnarain Singh* v. *Omrao Singh* (9), and there are express decisions to that effect in *Wooma Pershad Roy* v. *Grish Chunder* (10) and *Deo Kishen* v. *Budh Prakash* (5).

In some cases the disabilities are expressed to be from birth, but that makes no difference to the application of the rule. For instance if a blind man claimed to succeed as heir the question would be, was he at the time the inheritance opened out congenitally blind?

It now remains to consider when the disability operates in the case of unobstructed heritage. It is important to bear in mind that there is no such thing as succession by survivorship in Hindu Law. Mr. Mayne explains this in section 270 of his work. "But although the fact that *A* is the child of *B* introduces him into the family, it does not give him any definite share of the property, for *B* himself has none. Nor upon the death of *B* does he succeed to anything, for *B* has left nothing behind to succeed to. *B* in fact succeeds to the heritage at the time of his birth." Therefore, if the disabilities apply, as I think they do, to the case of joint family property, they must apply at the time of birth—for that is the time when the rights would accrue if there were no disability. To hold otherwise would necessitate the divestment of rights already vested, and that is contrary to the general rule of Hindu Law. *Moniram Kolita* v. *Keri Kolitani*(11). There is a text in the Smriti Chandrika which conflicts with this construction. In Chapter V, verse 2, it is said that "it is thereby to be supposed that the impotent

(9) 13 M. I. A. 519; 6 B. L. R. 509; 15 W. R. (P. C.) 1; 2 Sar. P. C. J. 607; 20 E. R. 645.

(10) 10 C. 639.

(11) 5 C. 776 at p. 788; 6 C. L. R. 322; 7 I. A. 115; 4 Sar. P. C. J. 103; 3 Suth. P. C. J. 765; 4 Ind. Jur. 363; 3 Shome L. R. 198.

and others would be entitled to inheritance if a partition were made during the lifetime of the father." Smriti Chandrika is no authority here, but this commentary may be explained by the fact that the rights of the son to a partition are much more limited in that work than in the *Mitakshara*. See for example Chapter I, verse 26.

In some of the minor commentaries there are passages which imply that the vested right of a co-parcener may be divested for sin, subject to expiation. But these were merely doctrines profitable to the Brahmins, and not part of the present Hindu Law.

In the case of *Ram Sahye Bhakkat* v. *Lalla Laljee Sahye* (1) the lunacy had supervened since the birth of the plaintiff. The Calcutta High Court held that a right to the property was vested in him, but that he could not assert that right by a suit for partition. This seems to me to be a misconstruction of the Hindu Law. The *Mitakshara* denies the right to claim partition because a lunatic has no right to a share. But where there is a right to a share, the right to partition must follow as a logical consequence of the co-ownership. I fully concur in Mr. Justice Prinsep's adverse comment on this case in *Abilakh Bhagat* v. *Bhekhi Mahto* (7).

I, therefore, decide that plaintiff was not divested of his right to the joint family property by his subsequent lunacy and that he has a right to sue for partition. I reverse the decree of the lower Court and remand the suit for trial on the merits. Costs to be costs in the cause.

Decree reversed; Suit remanded.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 412 OF 1913.

January 4, 1915.

Present:—Mr. Justice Sadasiva Aiyar.

MUTHUKARUPPA KONE AND ANOTHER—PLAINTIFFS—PETITIONERS

versus

VEERABHADRA KONE AND ANOTHER—DEFENDANTS—RESPONDENTS.

Arbitration—Award, suit on—Failure to file award in Court within 6 months, whether bars suit—Award, whether in nature of foreign judgment—Punchayatdars, *if entitled to administer to witness any reasonable form of oath agreed upon by parties—Civil Procedure Code (Act V of 1908), Sch. II, para. 20—Limitation Act (IX of 1908), Sch. I, Art. 178.*

A suit lies on an award, even though the same has not been filed in Court under paragraph 20, Schedule II, Civil Procedure Code, 1908, within six months, as required by Article 178, Schedule I, Limitation Act, 1908. [p. 50, col. 1.]

Rani Bhagoti v. *Rani Chandan*, 11 C. 386; 12 I. A. 67; 4 Sar. P. C. J. 624; 9 Ind. Jur. 320 and *Ghulam Khan* v. *Muhammad Hassan*, 29 C. 167; 12 M. L. J. 77; 29 I. A. 51 (P. C.); 6 C. W. N. 226; 4 Bom. L. R. 161; 25 P. R. 1902, followed.

An award is not in the nature of a foreign judgment and a Court is, therefore, entitled to go into the merits of the same. [p. 50, col. 1.]

There is nothing illegal in the parties to an arbitration agreeing before *punchayatdars* to have evidence taken after the administration of any reasonable form of oath to the witnesses. [p. 50, col. 1.]

Bhagirath v. *Ram Ghulam*, 4 A. 283; A. W. N. (1882) 34, followed.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Paramakudi, in Small Cause Suit No. 33 of 1913.

FACTS.—The suit was upon an award. The defences to the suit were that it was barred, as the award had not been filed in Court within six months and that the award itself was vitiated by the misconduct of the arbitrators and also by the procedure followed by the *punchayatdars* in administering a novel form of oath to the witnesses. The District Munsif did not frame any issue as regards the misconduct set up, but found the other two points against the plaintiff and dismissed the suit. The plaintiffs thereupon preferred this Civil Revision Petition.

Messrs. *K. Bhashyam Iyengar* and *K. Rajah Iyer*, for the Petitioners:—The District Munsif erred in law in not raising the most material issue in the case. A suit lies on an award though the same has not been filed in Court: *Rani Bhagoti* v. *Rani Chandan* (1) and *Ghulam Khan* v. *Muhammad Hassan* (2). The District Munsif erred in going into the merits of the award, as it was not in the nature of a foreign judgment. It is competent to the *punchayatdars* to administer to the witnesses any form of oath which may be agreed upon by the parties, *Bhagirath* v. *Ram Ghulam* (3)

(1) 11 C. 386; 12 I. A. 67; 4 Sar. P. C. J. 624; 9 Ind. Jur. 320.

(2) 29 C. 167; 12 M. L. J. 77; 29 I. A. 51 (P. C.); 6 C. W. N. 226; 4 Bom. L. R. 161; 25 P. R. 1902.

(3) 4 A. 283; A. W. N. (1882) 34.

Mr. *K. V. Krishnaswami Iyer*, for the Respondents:—The District Munsif did consider the question of misconduct. *Vide* his finding that the statement in the award that the defendants did not appear on 22nd December 1911 at Nayinar Koil, was not true. It must, therefore, be taken that he does not find any misconduct in the arbitrators. The award not having been filed in Court within six months the suit is barred. The District Munsif is clearly right in his view that an award is in the nature of a foreign judgment. Arbitrators have no power to administer any form of oath they please

JUDGMENT.—I am satisfied on a perusal of the 6th paragraph of the plaint and the recital in the plaint about the date of the cause of action that this suit is based on the award (Exhibit E).

The learned District Munsif did not raise the most material issue in such a case, namely, whether the award was invalid owing to the misconduct of the arbitrators. He raised three other questions and fell into two serious errors in deciding those questions. He held that the suit was barred by limitation because no application was made within six months of the award to have it filed in Court. A suit lies on an award even though it has not been filed in Court [See *Rani Bhagoti* v. *Rani Chandan* (1) and *Ghulam Khan* v. *Muhammad Hassan* (2)].

The learned Munsif further held that the award was in the nature of a judgment of a foreign Court and he was, therefore, entitled to go into the merits of the award. He was clearly in error in that point also.

Following *Bhagirath* v. *Ram Ghulam* (3), I hold that there is nothing illegal in parties agreeing before *punchayatdars* to have evidence taken after the administration of any reasonable form of oath to witnesses.

There is, no doubt, a finding by the Munsif that a statement in the award of the arbitrators, that the defendants did not appear at Nayinar Koil on 22nd December 1911 to take the oath as agreed upon by the defendants, did not represent the true state of facts. But I am unable to accept the finding as a satisfactory one and the District Munsif does not find that the arbitrators, in making that statement and acting upon the footing that the facts were as found in that statement, were guilty of misconduct.

In the result, I set aside the judgment and decree of the District Munsif and remand the suit to him for disposal *de novo*, after raising and deciding the question whether the arbitrators' award was invalid owing to their misconduct and also with reference to the above observations.

Costs will abide the result.

Petition allowed.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 114 OF 1914.

March 9, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

SAHDEO GIR—APPLICANT—PETITIONER

versus

DEO DUTT MISIR AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 152—Error—Accidental slip—Jurisdiction—Refusal of Court to correct mistake—Revision.

In a suit for sale on the basis of a mortgage one of the defendants pleaded that he was a prior mortgagee. An issue was struck to that effect and was decided in favour of the defendant. In the operative part of the judgment, however, no mention was made as to the priority of the defendant's claim, and accordingly there was no mention of it in the decree. After the time for appeal had expired, an application was made for amendment of the decree under section 152 of the Code of Civil Procedure. The Court refused to go into its merits, holding that section 152 did not apply:

Held, that this was a clear case of an error arising from an accidental slip or omission and as the Court below had refused to correct the error, the High Court could interfere in revision. [p. 51, col. 1.]

Civil revision against an order of the Subordinate Judge of Gorakhpur.

Mr. *Sital Prasad Ghose* (with him Mr. *J. N. Chaudhri*), for the Applicant.

The Hon'ble Mr. *Abdul Raoof*, for the Opposite Party.

JUDGMENT.—This is an application in revision brought under peculiar circumstances. The petitioner was a prior mortgagee. He had brought a suit against the mortgagor and the subsequent mortgagees upon his mortgage and had obtained a decree. Later on the subsequent mortgagees brought a suit impleading the mortgagor and the

present petitioner, and asked for a decree for sale. The petitioner pleaded his prior mortgage. An issue was expressly struck on the point and was found in the petitioner's favour. The operative portion of the judgment directed that a decree for sale should be prepared in accordance with the provisions of Order XXXIV, rule 4, of the Code of Civil Procedure, allowing six months for payment. In the absence of any express direction in the judgment that this decree was to be for sale of the property in suit subject to the petitioner's prior mortgage, no order to that effect was embodied in the decree. The decree passed was, therefore, one for sale of the property as it stood, without reference to the petitioner's prior mortgage. That decree was not appealed against, and to this extent the petitioner may have been guilty of laches. When, however, it came to the petitioner's knowledge that the opposite party was seeking to execute that decree as it stood, he went to the Court which passed the same and sought to obtain its amendment. The application with which we are concerned was one presented under section 152 of the Code of Civil Procedure. The Court below refused to go into the matter on the merits. It held that the case was not one to which the provisions of section 152 aforesaid applied. We are unable to concur in the reasoning of the learned Judge of the Court below. In our opinion, this was a clear case of an error arising from an accidental slip or ommission. The Court should have been prepared to correct that error, either of its own motion or on the application of any of the parties. There has been a refusal to exercise what in this case was a necessary jurisdiction, and this refusal is based on a misunderstanding of the powers conferred on the Court below by the section aforesaid. We accept this application, and direct that the judgment be amended by the insertion of the express words directing the sale of the property in suit subject to the prior mortgage of this petitioner, and that consequential amendments be made in the preliminary decree for sale, as also in the decree absolute. As we think that the petitioner might have been more watchful over his own interests and should have taken action earlier than he did, we direct that he do bear the costs of the opposite side in the present proceedings both here and in the Court below.

Application granted.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 42 OF 1912.

November 20, 1914.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

H. H. SIR *Agha* SULTAN MUHAMMAD—PLAINTIFF—APPELLANT

versus

SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

Waste land—Title—Evidence—Possession—Quantum of evidence necessary—Bombay Land Revenue Code (Bom. Act V of 1879), s. 37—Open village sites, title of Government—Presumption.

Section 37 of the Land Revenue Code does not confer title on Government and there is no presumption of title in favour of Government even as to open village sites. [p. 52, col. 1.]

Hanmantrao v. *The Secretary of State*, 25 B. 287; 2 Bom. L. R. 1111, followed.

Where there is already title in one party, the law is slow to infer that the physical acts of user were done with the intention of defeating that title or of laying claim to land already vested in another, but the same acts of user which do not suffice as evidence of actual possession might be adequate proof of possession when the title to the land is in doubt. [p. 52, cols. 1 & 2.]

In such cases the quantum of evidence depends upon the character of the land and although in the case of waste lands, the Court would seize upon the slightest evidence of occupation, the occupation or the acts of user must be such as to indicate the intention to hold for oneself, for without such intention there is no possession. [p. 52, col. 2.]

Mahomed Ali Khan v. *Khaja Abdul Gunny*, 9 C. 744 at p. 751; 12 C. L. R. 257; *Musammat Natukhee Koeri* v. *Chintamun Singh Chowdhry*, 20 W. R. 247, followed.

Appeal against the decision of the District Judge, Hyderabad Sind.

Mr. *Mathradas Ramchand*, for the Appellant.

Mr. *E. Raymond* (Government Pleader), for the Respondent.

JUDGMENT.—The plaintiff sues to recover possession of a plot of land and a platform, alleging dispossession by the Collector in 1907.

The lower Court found that there was no direct evidence of title; that plaintiff had

proved possession of the platform and that the acts of user of the open site did not amount to evidence of possession. That Court, therefore, dismissed the suit as regards the open site, but restored plaintiff's possession of the platform.

The plaintiff appeals as to the open site and the defendant has filed cross-objections claiming the platform.

I think that the District Judge has come to a correct conclusion, although he was wrong in applying to the evidence the principle enunciated in the case of *Framji* v. *Goculdas* (1). There is no question here of adverse possession, for it is well settled that section 37 of the Land Revenue Code does not confer title on Government and that even as to open village sites there is no presumption of title in favour of Government —see the judgment of Jenkins, C. J., in *Hanmantrao* v. *The Secretary of State* (2).

There being no direct evidence of title or presumption of title on either side, the case has to be decided on the presumption of ownership arising from possession.

Now possession is the physical act of user coupled with the intention to hold as owner—where there is already title in one party, the law is slow to infer that the physical acts of user were done with the intention of defeating that title or of laying claim to land already vested in another. Mere casual acts of intrusion will not, therefore, be considered evidence of possession or as inconsistent with the title of the rightful owner. So in *Framji* v. *Goculdas* (1), it was said that "such user excites no particular attention", such temporary accommodation would not necessarily mean or be understood to mean a claim to the ownership of land and that "such acts of user are never construed as founding a claim to the land by adverse possession". But in that same judgment Sargent, C. J., was careful to limit these observations to *adverse possession*. He said that "it was important to bear in mind that the original title to the land was clear, for the acts of user, which were relied upon, might have been important evidence as to title if that was a matter upon which there was any doubt." It is clear, therefore, that the same acts of user which do not suffice as evidence of adverse possession might be adequate proof of possession when the title to the land was in doubt. For when that is the case, the law is not inclined to presume that the act of user was without the intention of holding the land.

In such cases the quantum of evidence must depend upon the character of the land, for, as said in *Mahomed Ali Khan* v. *Khaja Abdul Gunny* (3), land is often either partly or temporarily capable of actual enjoyment in any of the customary modes, as by residence or tillage or receipts of a settled rent. It may be incapable of any beneficial use, as in the case of land covered with sand by an inundation; it may produce some profit, but trifling in amount and only of occasional occurrence, as is often the case with jungle land. In such cases it would be unreasonable to look for the same evidence of possession as in the case of a house or a cultivated field.

And again in *Musammat Natukhee Koeri* v. *Chintamun Singh Chowdhry* (4), Phear, J., said that in the case of waste land the Court would seize upon the slightest evidence of occupation. But on the other hand, the occupation or the acts of user must be such as to indicate the "*animus sibi nahendi*" the intention to hold for oneself, for without such intention there is no possession.

Applying these principles to the present case it is clear that as to the land covered by the platform plaintiff has proved possession. It is a permanent structure erected by the plaintiff and kept in repair by him—and he must have done so with the intention of holding the land it occupies for himself. But as to the open site there is no such unambiguous evidence. It is not enclosed by the plaintiff and it is freely used by the villagers going to and from the village well. There is no presumption that plaintiff's possession of the platform implies possession of the open site as well. Possession of a part is sometimes evidence of possession of the whole, but that is only when there is a common character of locality between

(1) 16 B. 338.
(2) 25 B. 287; 2 Bom. L. R. 1111.
(3) 9 C. 744 at P. 751; 12 C. L. R. 257.
(4) 20 W. R. 247.

the two places. See the judgment of *Jones* v. *Williams* (5). The platform is distinct from the open site, for it lies within the frontage of plaintiff's buildings on either side. The question of the open site must, therefore, be decided on the evidence referring to it. There are three terms of evidence. The first is that Mahomedans used to celebrate the *Moharram* on it. This is public user and not indicative in any way of plaintiff's private ownership. Next it is proved that plaintiff has been in the habit of levying a fee from fishermen who sell fish on this site. But plaintiff's agent had admitted that the fee was merely a clearance charge, *i. e.*, not rent but compensation for the nuisance caused. This is an important admission, for it shows that at the time it was made there was no idea of asserting title to the land. Lastly, it is shown that the produce of three trees on the land has been taken by the plaintiff. The trees are not valuable trees. Nor is it shown that the plaintiff exclusively took the produce or that he had taken any precaution to protect the trees. The trees are a *nim* tree and two *babul* trees and the gum from them has yielded five rupees in 34 years. This is so insignificant that it seems probable that the gum could have been had by anybody for the trouble of picking, for the whole village has access to the land and to the trees. If this gum had been collected by virtue of a right of ownership, the plaintiff's agent would not have failed to assert the ownership when justifying to the *mukhtiarkars* the levy of the fee for selling fish. We, therefore, agree with the District Judge that the acts of user on the open site are not evidence of possession. The District Judge should not, however, have allowed mesne profits for the platform when he found that the fees levied were not in the nature of rent.

We vary the decree of the District Judge by disallowing mesne profits. The decree is otherwise confirmed. Parties to bear their own costs.

Decree modified.

(5) 8 M. & W. 349; 9 D. P. C. 702; 10 L. J. Ex. 253; 5 Jur. 895.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 135 OF 1914.

March 8, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

MAHARAJ NARAIN SHEOPURI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SHASHI SHEKHARESHWAR ROY—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 9—Specific Relief Act (I of 1872), s. 42—Suit for declaration to post of Honorary Secretaryship to an association, maintainability of.

Where the plaintiff sues for a declaration that he is the Honorary Secretary to an association and that a resolution passed at a meeting of the association dismissing him from the secretaryship is null and void: *Held*, that he is bound to satisfy the Court that the suit is one concerning the right to an office within the meaning of section 9 of the Civil Procedure Code, and also that what he is enforcing in the suit is his right to a certain 'legal character' within the meaning of section 42 of the Specific Relief Act. [p. 54, col. 1.]

Chanu Dat Vyas v. *Babu Nandan*, 6 Ind. Cas. 223; 9 A. L. J. 529; 32 A. 527, referred to.

Where the plaintiff's services to an association are voluntary and gratuitous and where there is no question of any contract between him and its Board of Trustees, the Civil Court has no jurisdiction to entertain the suit. [p. 54, col. 1.]

First appeal from an order of the District Judge of Benares.

Mr. *S. C. Chowdhri* (for Dr. *S. C. Banerji*), for the Appellants.

Mr. *A. E. Ryves*, (with him Messrs. *Harendra Krishna Mukerji* and *A. C. Mitra*), for the Respondent.

JUDGMENT.—In this case the plaintiff Raja Sashi Sekareshwar Roy, Rai Bahadur, describes himself as the Chief Secretary of the Board of Trustees, otherwise known as the Pratinidhi Sabha, of an Association known as the Sri Bharat Dharma Mahamandal, registered under Act XXI of 1860. He complains in effect that the two defendants, who are members of the same Association, are seeking to remove him from the post of Chief Secretary and have endeavoured to do so by measures contrary to the rules of the Association itself. He asks for a declaration that a circular convening a meeting to be held on May 12th, 1912, was "invalid and inoperative under the rules or constitution of the said Sri Bharat Dharma Mahamandal," and that the meeting held in consequence of this notice

and the resolutions passed at the said meeting are "null and void."

The first Court held that the dispute was not one cognizable by the Civil Courts and that the plaintiff had no *locus standi* under section 42 of the Specific Relief Act to ask for a declaration; it dismissed the suit accordingly. The learned District Judge in appeal has reversed this finding and remanded the suit for trial on the merits. The appeal before us is by the defendants against this order of remand.

I think the first Court was substantially right and that the learned District Judge has taken too narrow a view of the question in issue. In order to succeed, the plaintiff has to satisfy the Court both that the suit is one concerning the right to an office, within the meaning of section 9 of the Code of Civil Procedure, and also that what he is enforcing in this suit is his right to a certain "legal character" within the meaning of section 42 of the Specific Relief Act (No. 1 of 1877). Of the reported cases to which we were referred in argument, the one most nearly in point is that of *Channu Dat Vyas* v. *Babu Nandan* (1). It may be that the fact that a plaintiff is claiming some position to which no remuneration attaches is not always decisive; but in the present case I think it is so. If the plaintiff were the paid Secretary of the Board of Trustees he would have certain rights founded upon contract, and he could claim the enforcement of the rules of the Society or Association as they existed at the time of his appointment, in so far as those rules formed part of the essential conditions subject to which he accepted his employment. As a matter of fact the plaintiff's services are voluntary and gratuitous; there is no question of any contract between him and the Board of Trustees. The latter have a perfect right to entrust the duties of Honorary Secretary to their body to such person or persons, willing to undertake the same, as they may from time to time approve. It would be idle for the Civil Courts to enter upon an investigation of the rules of this particular Association governing the appointment of Honorary Secretaries, when those rules themselves could be altered at any moment by the Board of Trustees, and there is no enforceable contract in existence which could bind the Trustees to abide by the rules in existence at the time of the plaintiff's appointment in their subsequent dealings with him. That this is no merely conjectural argument is sufficiently shown by the fact that, at the hearing of this appeal, we have been handed two different sets of rules, the appellant putting in a book dated "January 1911" and the respondents one of 1913. The point really lies in a nutshell. The plaintiff either does or does not possess the confidence and support of a majority of the Board of Trustees. In the former case no such machinations as are alleged in the plaint could prevent the said Board from continuing to use his services as their Honorary Secretary, in the latter case no decree which any Civil Court could pass on a suit like the present could prevent the Board of Trustees from dispensing with the plaintiff's services and employing some one else.

I would set aside the order of the lower Appellate Court and restore the decree of the Court of first instance dismissing this suit.

CHAMIER, J.—I agree.

BY THE COURT.—The order and decree of the lower Appellate Court are set aside and the decree of the Court of first instance dismissing the suit is restored. The defendants will get their costs in all Courts.

Appeal allowed.

(1) 6 Ind. Cas 223; 9 A. L. J. 529; 32 A. 527.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL NO. 113 OF 1913.

March 10, 1915.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Tyabji.

PANDA PATYYA—PLAINTIFF—APPELLANT

versus

PANDA VENKAMMA AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow—Adoption with consent of reversioner, if invalid for want of authority—Authority, when can be presumed—Illatom *adoption—Quantum of proof—Charge created by widow—Necessity—Burden of proof—Nature of evidence.*

An adoption made by a Hindu widow with the consent of the nearest reversioner is not bad for want of authority. [p. 56, col. 1.]

PANDA PATYYA *v.* PANDA VENKAMMA.

In the absence of anything to show that a reversioner was actuated by any representation of a widow that her husband had given her authority to adopt, a Court is entitled to presume that the reversioner, in giving his son to be adopted by the widow, was fully conscious of what he was doing and was mindful of all those considerations which he, as a reversioner, ought to take into account in such circumstances. [p. 56, col. 1.]

The claim that a person has been taken as *illatom* son-in-law must be proved by very reliable evidence. [p. 56, col. 2.]

The onus of proving that a charge created by a Hindu widow is binding on the reversioners lies very heavily upon the persons who claim the benefit of the transaction. [p. 57, col. 2.]

Where the only evidence let in as to the existence of necessity was that a series of documents executed by a widow and an alleged *illatom* son-in-law (which *illatom*, however, was found against) were attested by the reversioners and that the widow had been maintaining in her house a large number of persons related to her but not belonging to her husband's family:

Held, that the evidence was insufficient to prove the existence of necessity and that the onus was not discharged. [p. 57, cols. 1 & 2.]

Hari Kishen Bhagat v. *Kashi Pershad Singh*, 28 Ind. Cas. 674; 19 C. W. N. 370; 13 A. L. J. 223; 21 C. L. J. 225; 28 M. L. J. 565; 17 Bom. L. R. 426; 2 L. W. 219 at p. 222; 17 M. L. T. 115, followed.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Guntur, in Original Suit No. 57 of 1910.

FACTS.—One Venkatadri died leaving behind him a widow Ademma and an adopted son Venkataramayya. Subsequently Venkataramayya died. Ademma then adopted one Rangayya, the brother of Venkataramayya, with the consent of his natural father Lakshminarasu, the then nearest reversioner to the estate. Rangayya also died, leaving a widow Venkamma. The latter and one Pichayya (who set up an *illatom* affiliation by his father-in-law Venkatadri during his life-time) together borrowed for meeting the expenses of maintaining a number of relations of the widow Venkamma and executed documents therefor which were attested by the plaintiff and his co-reversioner (his deceased brother). Ademma died in 1892 and in 1894 Venkamma released all her rights in favour of Pichayya. Some of the properties belonging to the estate having been brought to sale in respect of the debts above mentioned and having been purchased by the 3rd defendant, the plaintiff in 1908 instituted the present suit for a declaration that the sale was not binding on his reversionary right. The Temporary Subordinate Judge of Guntur dismissed the suit, holding that though the adoption was made with the consent it was still invalid for want of the authority of the nearest reversioner, that Pichayya had not been affiliated as *illatom* son-in-law, and that the suit was barred as it was not brought within 12 years of the death of Ademma. The plaintiff then appealed to the High Court.

Mr. *T. Prakasam*, for the Appellant:—The Sub-Judge erred in dismissing the suit. There is no authority for the position that when there is consent of the reversioner, authority also is necessary. In this case the boy adopted being the son of the nearest reversioner and there being nothing to show that he was induced to consent to the adoption by any representation by the widow as to the existence of any authority from her husband, the Courts ought to presume that the reversioner, after fully considering whether an adoption was necessary, consented to give his son in adoption. The plaintiff is entitled to the declaration prayed for. Attestation of the documents did not disentitle him to relief. *Vide* the observations of their Lordships of the Judicial Committee of the Privy Council in *Hari Kishen Bhagat* v. *Kashi Pershad Singh* (1). The onus of proving necessity, which lay very heavily upon the purchaser, had not been discharged.

Mr. *P. Nagabhushanam*, for the Respondents:—There is nothing to show that Lakshminarasu, when giving the son in adoption, had present in his mind the various considerations which ought to influence a reversioner when authorising an adoption by a widow. Merely giving his son in adoption would not, by itself, be sufficient to prove that the consent was a considered consent or that the adoption was authorised. In fact no adoption took place. What seems to have happened was that after Venkataramayya's death, Ademma pased off Rangayya, who had married her grand-daughter, as an adopted son. Pichayya had been adopted as *illatom* son-in-law. In any event the suit, having been brought more than 12 years after the death of Ademma, is barred. The debts having been incurred for necessity, the sale is

(1) 28 Ind. Cas. 674; 19 C. W. N. 570; 13 A. L. J. 223; 21 C. L. J. 225; 28 M. L. J. 565; 17 Bom. L. R. 426; 2 L. W. 219 at p. 222; 17 M. L. T. 115.

binding upon the reversioner and the plaintiff is not entitled to the declaration sued for.

JUDGMENT.—This is a suit brought by the plaintiff to declare that the sale of the properties, items Nos. 1 to 23 in the Schedule to the plaint, to the 3rd defendant, in execution of the decree in Original Suit No. 329 of 1893 of the Court of the District Munsif of Ongole against one Venkamma, the widow of one Rangayya, is not binding on the plaintiff's reversionary right to these properties. The suit is on the footing that Rangayya was adopted by Ademma, the widow of one Venkatadri, after the death of Venkatadri and of Venkataramayya, Rangayya's brother, whom Venkatadri had himself adopted during his life-time. Venkataramayya died after Venkatadri; and according to the evidence for the plaintiff Lakshminarasu, Rangayya's father, being then the next reversioner and there being no other reversioner in the same degree, gave his son Rangayya in adoption to the widow. The Subordinate Judge has found among other things that this adoption was bad for want of authority, although it was made with the consent of the nearest reversioner. We are unable to agree with this. We think that the circumstances indicate, and we are entitled to presume, that in giving his son to the widow the next reversioner was fully conscious of what he was doing and was mindful of all those considerations which a reversioner ought to take into account in such circumstances. It must be borne in mind in this case that there is no question that he was in any way actuated by any representation by the widow that her husband had given her authority to adopt. It was not suggested that her husband had given her any authority, but he had shown his desire that his lineage should be continued by himself adopting a son in his life-time. No authority has been cited to induce us to hold that a consent given in such circumstances is insufficient.

The Subordinate Judge, however, has also held that it is not proved that the adoption took place. On a careful consideration of the evidence we are unable to agree with this conclusion. The adoption is said to have taken place in March 1876, and within the next three years we have three registered documents, Exhibits B, C and H, Exhibits H and C being mortgages and Exhibit B, a sale-deed, in which Rangayya is spoken of as the adopted son of Venkatadri. Some far-fetched suggestion was made that after the death of Venkataramayya, the widow of Venkatadri, because this boy married her grand-daughter, was anxious to pass him off as an adopted boy when he was not one. But this is an explanation which we are unable to accept. The fact that, while he was merely a boy incapable of defending his own interests, we find he was recognized as adopted son, is strong evidence to show that he was such. He died very soon about, June 1881.

Before referring to what followed, it is necessary to deal with the position of the 2nd defendant's husband Pichayya, who, it has also been argued for the defendants, had been taken as an *illatom* son-in-law by Venkatadri at the same time that he adopted Venkataramayya. The Subordinate Judge has disbelieved the three witnesses who purported to speak to this taking in *illatom* by Venkatadri in his life-time, and we are unable to say that he was wrong in this conclusion It is very easy for men who have married into a family to set up a claim to a share of the family property on the footing that they have been taken as *illatom* son-in law; but such contentions require to be proved by very reliable evidence, as they are claims which is very easy to set up and which apparently there is a great temptation to set up. Now, after the death of Venkatadri, there are three documents, Exhibits XXII, XX (*b*) and XX (*c*), on which the defendants rely, as negativing the adoption of Rangayya and also as supporting the *illatom* claim of Pichayya. After Venkatadri's death Pichayya in 1876 and 1877 got three unregistered bonds, Exhibits XXII, XX (*b*) and XX (*c*), executed in his favour for a balance of indebtedness due to Venkatadri. How he got them is not shown. It may be that he induced some of these debtors to give them to him with a view of his making them evidence in support of his claim to be an *illatom* son-in-law.

To go back now to what happened after the death of Rangayya when the 1st defendant, his widow, became entitled to the estate if he were really the adopted son of Venkatadri, we find a series of documents, Exhibits XIX, XIX (*a*), XIX (*b*) and XX, one of them a mortgage and the others simple

bonds, and then we have another series of documents, Exhibits V, III, IV, XXII, XVIII and I, between January 1887 and December 1892, documents executed by Venkamma, the widow of Rangayya, and Pichayya, without saying in what character they executed those documents. It seems to us that those documents afford some recognition of the widow's right, though at the same time they show that Pichayya was seeking to set up his *illatom* right, but if the adoption had not been notorious, it is not likely that he would have brought in Venkamma at all. Then we come to Exhibit A of the 3rd December 1894. That is a document executed by Venkamma in favour of Pichayya, in which she distinctly states that she was the widow of Rangayya, who had been adopted by Venkatadri. It looks as if at this time the widow had come entirely under the influence of Pichayya and she purports to recognise the *illatom* sonship and to renounce all her rights in the property in his favour. The various documents executed by Venkamma and Pichayya resulted in two decrees which were obtained against them both in two suits of 1893, and it was when those decrees were sought to be executed, that the plaintiff, the alleged next reversioner, filed his suit in 1905. That suit was held to be premature on the ground that there was no cause of action. Subsequently some of the properties belonging to the estate were attached and sold in execution of these decrees and that gave the plaintiff his cause of action, to sue for a declaration that those sales are not binding on the properties beyond the life-time of the widow. If there had been no adoption of Rangayya, then the estate would have devolved on Ademma, the widow of Venkatadri, who died in 1892, and as the suit was not brought till 1908, it would have been barred. It is not contended, however, that if the adoption was valid a suit like this would be barred in the life-time of the 1st defendant, the widow of the last male owner.

Then the next question is whether the plaintiff is entitled to the declaration asked for. It has been authoritatively laid down quite recently by the Privy Council that "to be valid as against the reversioners, or to affect their reversionary rights, a charge created by a Hindu widow, or an alienation effected by her, can be supported only by proof *aliunde* that such debt was contracted, or alienation was made, for valid and legal necessity and the onus of establishing such necessity rests heavily on the person who claims the benefit of transactions with a Hindu widow or other females taking similar estates". *Hari Kishen Bhagat* v. *Kashi Pershad Singh* (1). Applying that law to the circumstances of this case we are unable to agree with the Subordinate Judge that that onus had been discharged. All we have really is a series of documents executed by this woman Venkamma and Pichayya and two further facts are relied on to show that there was necessity: one that she maintained in her house a large number of persons related to her but not belonging to her husband's family, for whose support she was obliged to run into debt: and the other is that most of these documents by which money was raised were attested either by the plaintiff or his deceased brother, who at that time was co-reversioner. In this very case, *Hari Kishen Bhagat* v. *Kashi Pershad Singh* (1), which I have just cited, their Lordships of the Privy Council have emphatically pointed out that great care must be used in drawing inference of consent to alienations of a widow from the fact that the reversioners attested the documents executed by her, because that is perfectly consistent with an expectation that those documents should only bind the widow's estate. Beyond this no attempt has been made to show that these debts were incurred for any necessary purpose and we must hold that the defendants have failed to establish the burden which is upon them, and we must reverse the decree of the lower Court and decree the suit with costs throughout.

Appeal allowed.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 38 OF 1912.

November 23, 1914.

Present:—Mr. Pratt, J. C. and Mr. Crouch, A. J. C.

HARUN KHAN RAHIM KHAN—APPELLANT.

versus

TEJUMAL PARIOMAL AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 54—Execution referred to Collector—Application to Civil Court to expedite execution, whether execution application—Power of Court to control Collector's proceedings.

An application to a Civil Court to expedite and authorize the Collector to revive and continue old execution proceedings referred to him for execution by that Court and still pending before him, is not an application for execution and the bar of limitation does not apply to it.

Qamar-ud-din Ahmed v. *Jawahir Lal*, 27 A. 334; 1 C. L. J. 381; 15 M. L. J. 258; 9 C. W. N. 601; 2 A. L. J. 397; 7 Bom. L. R. 433; 32 I. A. 102, followed.

A Civil Court is competent to entertain such an application as it has a right of control over the Collector's proceedings in execution.

Purushottam Bhaskar v. *Balkrishna Pandurang*, 28 B. 238; 5 Bom. L. R. 949, followed.

Appeal against an order of the District Judge, Sukkur.

Mr. *Gulabrai Nihalchand*, for the Appellant.

Mr. *Mulchand Maganlal*, for the Respondents.

JUDGMENT.—A decree for partition was made between the appellant and the respondents on the 26th March 1895.

On the respondent's application for execution of the 14th October 1898, an order granting execution was made and referred to the Collector under section 265 of the Code of 1882, as the estate was one assessed for payment of revenue to Government.

On the 26th November 1909, one of the respondents made a petition to the Court stating that he had learned that the Collector had lost the papers and asking the Court to make "*bundobust*" in the matter.

The Court ordered fresh warrant to be sent to the Collector for execution.

It is against this order that the appellant comes to us in second appeal.

If by the words 'fresh warrant' the Court intended to order fresh execution proceedings the order was without jurisdiction, for the Court cannot order execution except on an application for execution, and the petition of the 26th November 1909 was in no sense an application for execution. It merely prayed that the Collector should be expedited with reference to his proceedings on the pending execution application.

Mr. Mulchand seeks to support the order by urging that under the present Code the decree for partition must be treated as a preliminary decree; that the proceedings before the Collector are merely a continuation of the suit leading up to the final decree and that the Sub-Judge could, therefore, make the order irrespective of an execution application. But Order XX, rule 18, makes it clear that a preliminary decree for partition is only made under the second clause of the rule, when the property to be partitioned is not property assessed to Government revenue. In a case where the execution is worked out by the Collector the Court makes final decree, and the rest of the proceeding is worked out in execution as under the procedure of the old Code. This is also apparent from section 54 of the Code which occurs in part II relating to execution.

It seems to us, however, that the real intention of the Sub-Judge's order was to give authority to the Collector to revive and continue the old execution proceeding which was still pending before him. The application was, as said by the Privy Council in *Qumar-ud-din Ahmed* v. *Jawahir Lal* (1), "an application to revive and carry through a pending execution suspended by act or default of the decree-holder." The bar of limitation does not apply to such an application and the Sub-Judge is competent to entertain, for he has a right for control over the Collector's proceedings in execution. *Purushottam Bhaskar* v. *Balkrishna Pandurang*. (2).

We confirm the order of the lower Court and dismiss this appeal with costs.

Appeal dismissed.

(1) 27 A. 334; 1 C. L. J. 381; 15 M. L. J. 258; 9 C. W. N. 601; 2 A. L. J. 397; 7 Bom. L. R. 433; 32 I. A. 102.

(2) 28 B. 238; 5 Bom. L. R. 949.

BHOLA NATH *v.* KARTIK PRASAD PANDE.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION NO. 132 OF 1914.

December 14, 1914.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

BHOLA NATH—PLAINTIFF—APPELLANT

versus

KARTIK PRASAD PANDE—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115, O. XLI, r. 10—Appeal, security for—Notice to show cause—Sufficient cause not shown—Dismissal of appeal on that day—Material irregularity.

Where a notice issued to the appellant to show cause why he should not be required to furnish security before his appeal was heard, does not put the appellant on his guard that the security must be ready in the event of sufficient cause not being shown, the dismissal of the appeal on failure to furnish the security not within a time under ordinary circumtances sufficient for him to furnish is a material irregularity within the meaning of section 115 of the Civil Procedure Code, 1908.

Civil revision against the decree of the Subordinate Judge of Mirzapur, dated the 14th of May 1914.

Mr. *P. L. Banerji*, for the Appellant.

Mr. *W. Wallach*, for the Respondent.

JUDGMENT.—This application for revision arises out of the following facts. An appeal was pending before the Subordinate Judge of Mirzapur in which 15th of May 1914 was fixed for hearing. On the 29th of April 1914, the respondent applied under Order XLI, rule 10, Civil Procedure Code, that the appellant might be ordered to furnish security for the costs of the first Court and of the Appellate Court before the appeal was heard. The Subordinate Judge passed an English order to the effect that notice should go to the appellant to appear before the Court on May the 14th, 1914, and to show cause why he should not be required to furnish security to the amount of Rs. 150 before the appeal was allowed. No sufficient cause being shown, an order was passed requiring security in the sum named to be furnished on the following day. This order was not complied with and the appeal was thereupon dismissed without having been heard on the merits. There had been one irregularity in the proceedings, in that the vernacular notice issued to the appellant was not in accordance with the Judge's English order. It directed the appellant to show cause on May 14th, 1914 why he should not be required to furnish security before the appeal was heard, and not before the appeal was allowed. The apparent object of the Subordinate Judge was that the question of the application by the respondent in the matter of the security should be disposed of in time to ensure the hearing of the appeal on the date fixed, that is to say, on May 15th, 1914. If he had seen fit to issue a notice so worded as to call upon the appellant either to furnish security on the date specified, or to show adequate cause to the contrary, his order would have been unassailable. The notice actually issued, besides being at variance with the Court's English order, did not put the appellant on his guard that the security must be ready in Court in the event of sufficient cause not being shown. In his order disposing of the matter, the learned Subordinate Judge admits that under ordinary circumstances an order giving the appellant, who was a resident of Benares, only one day in which to furnish the required security would not have been a proper order. He assumes, however, that the notice issued by the Court was sufficient to give the appellant warning that he must either come to Court on the 14th May 1914 with his security ready, or must be prepared to show adequate cause against his being required to furnish such security. This contention overlooks the fact that the notice issued by the Court was not calculated to warn the appellant to have his security ready on May the 14th. We think that the proceedings of the Court below were irregular and the irregularity was a material one, the case being a hard one, inasmuch as the appeal was dismissed unheard because of the appellant's failure to comply with an order which, the learned Subordinate Judge himself admits, was not on the face of it an order with which he could reasonably have been expected to comply. We accept this application, set aside the order dismissing the appeal and direct the Subordinate Judge to re-admit the appeal on to his file of pending cases and to give to the appellant reasonable time, not less than one week, within which to comply with the order requiring him to furnish security. The costs of this application will be costs in the suit.

Order of dismissal set aside.

AHMAD SAHIB SHUTARI *v.* MAGNESITE SYNDICATE LTD.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 859 OF 1913.

March 18, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

Syed AHMAD SAHIB SHUTARI—PLAINTIFF—APPELLANT

versus

THE MAGNESITE SYNDICATE, LTD., BY THEIR AGENT AND MANAGER G. TURNER AND OTHERS—DEFENDANTS NOS. 1, 2 AND 4 TO 8—RESPONDENTS.

Ejectment, suit in — Trespass — Tenant-in-common, right of one to sue alone—Civil Procedure Code (Act V of 1908), O. XXVI, r. 9—Personal inspection by Judge, finding based on—Judgment, if valid.

As against a trespasser in possession of immoveable property any one of co-owners or co-tenants can alone maintain an action in ejectment. [p. 60, col. 2.]

Radha Proshad Wasti v *Esuf*, 7 C. 414: 9 C. L. R. 76; *Harendra Narain Singh Chowdhry* v. *Moran*, 15 C. 40; *Hira Lal* v. *Bhairon*, 5 A. 602; A. W. N. (1883) 155 and *Gopalasami* v. *Periasami Tevar*, 6 M. L. J. 27, followed.

Gopal Ram Mohuri v. *Dhakeswar Pershad Narain Singh*, 35 C. 807; 7 C. L. J. 483 and *Pateshri Pratap Narain Singh* v. *Rudra Narain Singh*, 1 A. L. J. 543; A. W. N. (1903) 119; 26 A. 528, referred to.

A judgment solely based on knowledge gained by the Judge during local inspection is illegal. An inspection which a Judge makes should be used by him only to test the accuracy and value of the evidence let in. He should not, without submitting himself to the test of cross-examination, make his knowledge the sole evidence for determining the question raised before him. [p. 61, col. 1.]

Second appeal against the decree of the District Court of Salem, in Appeal Suit No. 43 of 1912, preferred against the decree of the Court of the Principal District Munsif of Salem, in Original Suit No. 292 of 1911.

FACTS.—The plaintiff, a tenant-in-common with others of the suit property, sued the 1st defendant, a lessee, in ejectment and for damages, alleging that the latter had trespassed upon the property in suit, which was not included in his lease. The 1st defendant denied the trespass. The District Munsif, however, decreed the suit. On appeal the District Judge dismissed the suit, holding that one co-owner cannot, without joining the other co-owners as parties, sue to eject a trespasser and further basing his judgment on personal knowledge gained in a local inspection made by him. The plaintiff preferred this second appeal.

Mr. *T. Rangachariar*, for the Appellant:—A co-owner is entitled to sue a trespasser in ejectment. *Radha Proshad Wasti* v. *Esuf* (1), *Harendra Narain Singh Chowdhry* v. *Moran* (2), *Hira Lal* v. *Bhairon* (3) and *Gopalasami* v. *Periasami Tevar* (4). See *Pateshri Pratap Narain Singh* v. *Rudra Narain Singh* (5) as to members of a joint Hindu family. Further the District Judge erred in basing his judgment solely upon what he observed at the local inspection. *Kessowji Issur* v. *G. I. P. Railway Company* (6) and *Rai Kishori Ghose* v. *Kumudini Kant Ghose* (7).

Mr. *D. Chamier*, instructed by Messrs *King and Partridge*, for the Respondents:—The appellant is not entitled to sue alone. *Gopal Ram Mohuri* v. *Dhakeswar Pershad Narain Singh* (8). It was perfectly competent to the Judge to make a local inspection and give judgment based on the knowledge gained at such inspection. The procedure not having seriously prejudiced the appellant, he is not entitled to any relief on that ground.

JUDGMENT.—In this suit the plaintiff complains that the 1st defendant has trespassed on property not included in the lease, and prays for an injunction and for damages. The trespass was denied. The District Munsif found for the plaintiff and awarded damages.

In appeal, the District Judge held that as the plaintiff was only one of the tenants-in-common who laid claim to the property, he was not entitled to maintain the suit alone. The Judge personally inspected the locality and on the strength of that inspection found that the property was included in the lease.

We are unable to agree with the District Judge. Although there is a difference of opinion regarding the right of one of the tenants-in-common to eject the lessee from the leased premises, there is no doubt that as against a trespasser any one of the co-owners

(1) 7 C. 414; 9 C. L. R. 76.
(2) 15 C. 40.
(3) 5 A. 602; A. W. N. (1883) 155.
(4) 6 M. L. J. 27.
(5) 1 A. L J. 543; A. W. N. (1903) 119; 26 A. 528.
(6) 31 B. 381; 6 C. L. J. 5; 11 C. W. N. 72; 17 M. L. J. 347; 4 A. L. J. 461; 9 Bom. L. R. 671; 34 I. A. 115 (P. C.); 2 M. L. T. 435.
(7) 14 Ind. Cas. 377; 15 C. L. J. 138.
(8) 35 C. 807; 7 C. L. J. 483.

can maintain an action. *Radha Proshad Wasti* v. *Esuf* (1); *Harendra Narain Singh Chowdhry* v. *Moran* (2), *Hira Lal* v. *Bhairon* (3) and per Best, J., in *Gopalasami* v. *Periasami Tevar* (4). Even in *Gopal Ram Mohuri* v. *Dhakeswar Pershad Narain Singh* (8), which lays down that one of the co-sharers is not entitled to sue the lessee in ejectment, it is recognised that the case of a trespasser will be different. This principle has been extended to members of a joint Hindu family. See *Pateshri Pratap Narain Singh* v. *Rudra Narain Singh* (5). We have not been referred to any authority in support of the position taken by the learned District Judge.

The District Judge is equally in error in basing his decision on the knowledge gained by him during the local inspection. The language of Order XXVI, rule 9, slightly differs from that of section 392 of the old Code. Under the Act of 1882, a Commissioner should be appointed only if the inspection "cannot be conveniently conducted by the Judge in person." Under rule 9, no such condition is imposed. Even under the old Code, it was held by the Judicial Committee of the Privy Council that a judgment should not be based solely on the result of the personal inspection by the Judge. *Kessowji Issur* v. *G. I. P. Railway Company* (6). The same reasoning applies to cases instituted under the new Code. See *Rai Kishori Ghose* v. *Kumudini Kanta Ghose* (7). The inspection which a Judge makes should be used by him only to test the accuracy and value of the evidence let in. He should not, without submitting himself to the test of cross-examination, make his knowledge the sole evidence for determining the question raised before him. We have no hesitation in holding that the procedure of the learned Judge has seriously prejudiced the appellant.

For both these reasons, we must reverse the decree of the District Judge and direct him to dispose of the appeal according to law. Costs will abide the result.

Appeal allowed

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 11 OF 1913-14
OF ETAWAH DISTRICT.
March 22, 1915.

Present:—Mr. Holmes, S. M. and
Mr. Campbell, J. M.

NARAIN DAS—APPLICANT
versus
MIR KHAN AND OTHERS—RESPONDENTS.

Proprietary title, question of—Issue not decided—Appeal, whether lies to District Judge—Onus on wrong party—Finding based on no evidence—Revision, grounds for.

Where an issue which affected the claim to proprietary right under section 158 was decided neither by the Assistant Collector nor by the Commissioner:

Held, that no appeal lay in the case to the District Judge. [p. 61, col. 2.]

The mistaken view that the burden of proof is on the defendant to show that the land should not be resumed and a finding arrived at without any evidence to support it constitute a gross and palpable error of law in justifying interference in revision. [p. 62, col. 1.]

Application for revision of an order of the Commissioner of the Allahabad Division, dated the 17th March 1914, confirming the order of the Assistant Collector of Etawah, in the case of resumption of *muafi*.

JUDGMENT.

HOLMES, J. M.—The respondent raises a point that no appeal lay to the Commissioner at all, but that as a question of proprietary title was involved, the appeal should have lain to the District Judge. This point was not raised before the Commissioner.

The only point the Commissioner decided was as to the land being liable to resumption, and neither the Assistant Collector nor the Commissioner decided the other issue which affected the claim to proprietary right under section 158. The appeal seems to me to have been properly before the Commissioner.

It seems to me that both Courts have come to an entirely wrong conclusion on the question of resumption. No copy of the *wajib-ul-arz* of 1833 is on the record. Apparently the Court allowed the present appellant to send for that record and it was sent back. In such cases the proper procedure is to oblige parties to put a certified copy on the record. However, for present purposes, the *wajib-ul-arz* of 1833 is immaterial. The Record Officer has found that the present grant was sub-

sequent to 1833, and the conditions of any former grant which has been resumed are immaterial. There is no condition in the *wajib-ul-arz* as to resumption at the pleasure of the grantor, though there is a condition as to assessment of rent. A copy of the *wajib-ul-arz* is not on the record, but presumably it was not attested by the rent-free grantees, or the lower Courts would have mentioned it.

I would hold, therefore, that it is not established that the land falls within section 154 as held rent-free at the pleasnre of the grantor.

I would, therefore, set aside the orders of the lower Court and remand the case under rule 23, Order XLI of the Code of Civil Procedure, for determination of the suit after trial of the remaining issue. Costs will follow event.

The Commissioner's mistaken view that the burden of proof is on the defendant to show that the land should not be resumed and the finding of the lower Courts in the absence of any evidence to support it that land is liable to resumption under section 154 (1)(*a*) constitute a gross and palpable error of law which has caused substantial injustice, and the Board's interference on revision is, therefore, called for.

I have seen the *Wajib-ul-arzes* of settlements of 1883 and 1873, to see which after recording the above order I adjourned the case. The above order will hold good.

CAMPBELL, J. M.—I agree.

Application allowed; *Cause remanded.*

MADRAS HIGH COURT.

CITY CIVIL COURT APPEAL No. 16 OF 1913.

March 19, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

AUTHIKESAVALOO NAICKER—PLAINTIFF—APPELLANT

versus

Syed SHAH ABDULLA HUSSAIN SAHIB KHADIRI AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (*IV of* 1882), *s.* 53—*Right of simple mortgagee to bring suit under s.* 53 *of Transfer of Property Act to declare an alienation void—Creditor—Decree for sale of mortgaged property—Personal remedy if barred—Limitation Act* (*IX of* 1908), *Sch. I, Arts.* 120, 91, 95—*Civil Procedure Code* (*Act V of* 1908), *O. XXXIV, r.* 14.

A simple mortgagee who has obtained a decree for sale and whose right to a personal decree is not barred, is a "creditor" within the meaning of section 53 of the Transfer of Property Act and can bring a suit to set aside an alienation made in fraud of creditors. [p. 63, col. 2.]

To such a suit Article 120 and not Article 91 or 95 of Schedule I of the Limitation Act, 1908, applies. [p. 62, col. 2.]

Pachamuthu v. *Chinnappan*, 10 M. 213; *Tallapragada Sundarappa* v. *Boorugapalli Sreeramulu*, 30 M. 402; 17 M. L. J. 288; 2 M. L. T. 360, followed.

Appeal against the decree of the City Civil Court, Madras, in Original Suit No. 56 of 1913.

FACTS.—The plaintiff instituted Original Suit No. 89 of 1909 in the City Civil Court at Madras on a mortgage executed in his favour and obtained a decree therein. His right to a personal decree was still subsisting. The mortgagor having alienated other portions of his properties to the 1st defendant, the plaintiff filed the present suit for a declaration that the said alienation was null and void as against him and the other creditors of the mortgagor under section 53 of the Transfer of Property Act and that the properties covered by the alienation were liable to be proceeded with in execution of the decree in Original Suit No. 89 of 1909. He also prayed that the 1st defendant might be restrained by an injunction from alienating the suit properties during the pendency of this suit.

Later on he put in petitions for amending the plaint by adding a new party and for inserting an allegation therein to the effect that he apprehended that he would not be able to recover his decree-amount in full by the sale of the properties mortgaged to him. Both these petitions were dismissed. The learned City Judge dismissed the suit. The plaintiff appealed.

Mr. *T. R. Venkatarama Sastri*, for the Appellant:—The plaintiff is entitled to bring the suit as he has done. He clearly comes within the scope of section 53 of the Transfer of Property Act. The learned Judge ought to have allowed the amendments prayed for.

The Court certainly erred in stating that the plaintiff had not tried to add one Hakim Muhammad Ghouse Sahib as a supplemental defendant. The residuary Article 120 of the Limitation Act, and not 91 or 95, applied to the case. *Vide Tallapragada Sundarappa* v. *Boorugapalli Sreeramulu* (1) and *Pachamuthu* v. *Chinnappan* (2). The decision of the learned Judge cannot, therefore, be supported.

The Respondents were unrepresented.

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiff is the appellant. The learned City Civil Judge correctly describes the suit as praying for a declaration that the sale of the property mentioned in the plaint on 1st April 1909, in favour of 1st defendant is null and void against plaintiff and that it is liable to be proceeded against in execution of the decree in Suit No. 89 of 1909 passed in favour of the plaintiff. The learned Judge further describes the suit as praying for an injunction restraining the 1st defendant from alienating the plaint property, but this seems inaccurate.

Turning to that portion of paragraph 12 of the plaint which refers to injunction, the prayer contained in that portion is that the 1st defendant be restrained by an injunction from alienating the plaint property in any manner "*pending the disposal of this suit.*" This cannot be treated as a prayer for an injunction to be embodied in the decree to be passed in the suit, but only as a prayer for an interlocutory order of injunction. Treating then this suit as a suit for a declaration of the invalidity of the alienation in favour of the 1st defendant as against the plaintiff, who is a creditor under a simple mortgage bond and who has obtained a decree for sale and who expected to get a decree on the personal covenant contained in the mortgage-deed after the mortgaged property was sold in execution of the decree passed in Suit No. 89 of 1909, the questions for decision are (1) whether he is a creditor within the meaning of section 53 of the Transfer of Property Act and, therefore, entitled to bring a suit to have it declared that the alienation was in fraud of him and other creditors and is void as against him and them, and (2) whether his suit is barred by limitation.

Having regard to Order XXXIV, rule 14 of the Civil Procedure Code (Old section 90 of the Transfer of Property Act), it cannot, in my opinion, be argued that a simple mortgagee, whose rights under the personal covenant have not been barred, is not a creditor of the mortgagor and that he is not entitled to bring a suit to declare the invalidity of the alienations of other properties by his mortgagor (debtor).

As regards the question of limitation, I think the cases of *Tallapragada Sundarappa* v. *Boorugapalli Sreeramulu* (1) and *Pachamuthu* v. *Chinnappan* (2) establish that the limitation for a suit of this nature is provided for by the general Article 120 (6 years) and not by Article 91 or 95 of the first Schedule to the Limitation Act. The decision of the learned City Civil Judge that the suit is barred by the three years' period of limitation cannot be sustained.

I must also state that the observation of the learned City Civil Judge in his judgment, dated 10th May 1913, that the plaintiff had taken no steps whatever to add Hakim Muhammad Ghouse Sahib as a party to the suit, is not accurate as the plaintiff on the 12th March 1913 had applied to the lower Court for bringing Hakim Muhammad Ghouse Sahib on record as the 8th defendant in the case and also prayed for an amendment of the plaint. Another amendment petition, filed on the 18th March 1913, also makes it clear that he wanted Hakim Muhammad Ghouse Sahib to be made a party and to amend the plaint by inserting additional allegations, to the effect that the plaintiff apprehended (and I take it that he meant it was a reasonable apprehension) that the sale of the mortgaged properties in execution of the decree in Suit No. 89 of 1909 could not fetch the whole of the amount due under the decree. I would, therefore, further set aside the orders of the learned City Civil Judge refusing the prayers of the two petitions, dated 12th and 18th March 1913, and would grant the prayers of those petitions. The amendments should be made by the plaintiff within two weeks of the receipt of the records by the City Civil Court or such other time as may be allowed by that Court. The

(1) 30 M. 402; 17 M. L. J. 288; 2 M. L. T. 360.
(2) 10 M. 213.

decision of the City Civil Judge is set aside and the suit remanded for disposal on the other issues, which arise on the pleadings already on record and which might hereafter be raised in due course of law.

Costs hitherto incurred will abide the result.

NAPIER, J.—I concur.

Appeal allowed; Suit remanded.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 30 OF 1912-13 OF ALLAHABAD DISTRICT.

December 13, 1913.

Present:—Mr. Baillie, S. M., and Mr. Tweedy, J. M.

Chaudhri KAMAL-UD-DIN—PLAINTIFF—APPLICANT

versus

RAMZAN ALI—DEFENDANT—RESPONDENT.

Sir *land—Co-sharers—Share of one co-sharer sold —No separation—Expproprietary right*—Sir, *character of.*

S sold his share of 7 pies out of a 5 annas and 9 pies share in the *mahal* to the plaintiff long ago, but *S* neither claimed expropriatary rights in the *sir* to the extent of his 7 pies share out of the *sir* of the 5 annas 9 pies co-sharers, nor was this portion of land separated from the rest. The plaintiff brought the present suit for the ejectment of the tenant who claimed occupancy rights. The Courts below held that in consequence of this sale, the land lost its character of *sir* to the extent of 7 pies share and that the respondent who was the tenant of the *sir* land held partly as occupancy tenant and partly as sub-tenant and could not be ejected:

Held, that had the portion of the land, corresponding to *S*'s share, been divided off, it would have ceased to be *sir*, but this not having been done, it still retained its character as *sir*.

Application for revision of an order of the Commissioner of Allahabad Division, dated the 31st March 1913, confirming that of the Assistant Collector of Allahabad District, in the case of ejectment.

JUDGMENT.

BALLIE, S.M. (*December 4th*, 1913.)—The land now in question was part of the *sir* of a 5 annas and 4 pies share in the *mahal*. Out of this 5 annas and 4 pies a co-sharer, Sadik Ali, sold his rights extending to something over 7 pies to one of the plaintiffs. The lower Court and the Commissioner have held that as a consequence of this sale the land lost its character of *sir* to the extent of a 7-pies share, that respondent, who was the tenant of the *sir*, held partly as occupancy tenant and partly as sub-tenant, and this being so could not be ejected. There cannot be the slightest doubt that this view of the law is entirely erroneous. The land in question was the *sir* of the 5 annas 4 pies co-sharers. The right of the co-sharers other than Sadik Ali extended to every part of the *sir* area and even when Sadik Ali transferred his share the whole of the land in question still remained the *sir* of the other co-sharers. Nothing had occured to affect their rights in the entire area and occupancy rights could not, therefore, be acquired in it. It is true that if Sadik Ali had claimed ex-proprietary rights and had a portion of the land corresponding to his share divided off, then such portion would have ceased to be *sir*. But this has not been done and beyond doubt the entire *sir* area still retains its *sir* character. The only question on which doubt can be entertained is whether there is, in the mistake of law committed, ground for revision. That it causes serious injustice cannot be doubted. There is no process of law by which this holding can be divided up and the part in which ex-proprietary rights accrued separated off from the rest. The result, therefore, is that the *sir* rights of the persons entirely unconcerned with the sale by Sadik Ali disappear in the area now in question and that a person who was undoubtedly a tenant of *sir* land and knew that he was a tenant of *sir* land, has obtained a possession which cannot now be disturbed.

I consider that the erroneous view of the law taken by the Commissioner was such as to justify revision. I would allow this application with costs on respondent.

TWEEDY, J. M. I entirely agree.

Application allowed.

BOMBAY HIGH COURT.

CRIMINAL REVISION PETITION No. 407 OF 1914.

February 27, 1915.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

JAMNADAS VASANJI—ACCUSED —APPLICANT

versus

EMPEROR—PROSECUTOR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 179—Penal Code (Act XLV of 1860), s. 415—Cheating—Deceit—Jurisdiction—Court within whose jurisdiction complainant deceived.

The accused, a trader of Salem in the Madras Presidency, deceived a trader in Dhulia in Bombay Presidency by leading him to believe that he was buying clean ground-nut oil when, in reality, he was buying a mixture of ground-nut oil with rock oil. The Dhulia trader was induced by the deceit to pay the price agreed upon on the understanding that it was clean oil:

Held, that the complainant was deceived in Dhulia and the Courts at Dhulia had jurisdiction to hear the case.

Criminal revision from an order passed by the first Class Magistrate of Dhulia.

Messrs. *Inverarity* and *Setalvad* (with them Messrs. *D. G. Dalvi* and *Bicknell, Merwanji Romer & Co.*), for the Accused.

Mr. *Strangman*, Advocate-General (with him Messrs. *J. G. Rele* and *Mehta, Dalputram & Lalji*), for the Complainant.

Mr. *S. S. Patkar* (Government Pleader), for the Crown.

JUDGMENT.

HEATON, J.—This may be a hard case, but it seems to me to be a case as to which the law is quite clear. There is an accusation of cheating against a trader of Salem in the Madras Presidency. The alleged cheating is that he deceived a trader in Dhulia in this Presidency by leading him to believe that he was buying clean ground-nut oil when, in reality, he was buying a mixture of ground-nut oil with rock oil. The Dhulia trader, it is said, was induced by the deceit to pay the price agreed upon on the understanding that it was clean oil. If the facts are as I have stated, there is a case of cheating. One of the essential ingredients of cheating, one of those things without which there cannot be cheating as defined in the Indian Penal Code, is deceit. There must be a person who deceives and a person who is deceived. Here, according to the allegations, the person who was deceived was at Dhulia, it

was there that he was the victim of the deceit, there that he was led to believe that which was untrue. Section 179 of the Criminal Procedure Code says that when a person is accused of the commission of any offence by reason of anything which has been done, then the offence may be inquired into by a Court within the local limits of whose jurisdiction the thing has been done. Here the thing which has been done is the deceiving of the complainant. He has been deceived in Dhulia, and to me, at least, it is clear, absolutely clear, that under the law the Courts at Dhulia have jurisdiction in this case. Whether the Courts at Dhulia are the Courts which, with the best regard for the administration of justice, ought to hear the case is another matter. But we are here concerned with the bare question of law. There is no application before us of any kind except to interfere on the ground that the Dhulia Court is without jurisdiction, and we are unable to say that the Dhulia Court is without jurisdiction. Therefore, I think, the Rule should be discharged.

SHAH, J.—I agree.

Rule discharged.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 181 OF 1915.

March 26, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Piggott.

EMPEROR—APPLICANT

versus

MOHAN LAL—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 423 (1), 439 (3)—Reference Power of Sessions Judge in appeal —Acquittal — Procedure — Enhancement of sentence whether a fit ground for ordering re-trial.

Where a Sessions Judge sitting in appeal is of opinion that an accused should be acquitted, he ought not to refer the case to the High Court. It is his duty to allow the appeal and acquit the accused. [p. 66, col. 1.]

Where a Sessions Judge sitting in appeal thinks that the case ought to have been tried by the Court of Sessions, he should himself set aside the conviction and order a commitment under section 423 (1) (b) of the Code. [p. 66, col. 1.]

Queen-Empress v. *Maula Bakhsh*, 15 A. 205; A. W. N. (1893) 105, followed.

The power of ordering a new trial merely for the purpose of enhancing the punishment is a power that ought to be very sparingly exercised. [p. 66, col. 2.]

In re DYAWAPPA BASGUNDA PATIL.

Criminal reference made by the Sessions Judge, Barielly, as per his letter No. 82/111, dated the 19th February 1915.

The *Assistant Government Advocate*, for the Crown.

JUDGMENT.—This case comes before us as a reference from the learned Sessions Judge of Bareilly. Four persons, Mohan Lal, Baldeo Prasad, Debi Sahai and Ram Ghulam, were all tried by a Magistrate on charges under section 408 read with section 114 of the Indian Penal Code, and convicted. They all appealed to the Sessions Judge. He seems to have been of opinion that the case against Debi Sahai was not proved. He was also of opinion that the punishments awarded to the other three were insufficient. He has submitted the case to this Court with a recommendation that we should acquit Debi Sahai and enhance the sentences passed on the other three. So far as his recommendation that we should acquit Debi Sahai is concerned, it is quite clear that it was his duty to either dismiss or allow the appeal of Debi Sahai. The learned Sessions Judge ought not to have referred the case of Debi Sahai to this Court at all. With regard to his recommendation for enhancement the learned Sessions Judge seems to have overlooked the provision of section 439 (3) of the Code of Criminal Procedure which is as follows:—"Where the sentence dealt with under this section has been passed by a Magistrate acting otherwise than under section 34, the Court shall not inflict a greater punishment for the offence which, in the opinion of such Court, the accused has committed than might have been inflicted for such offence by a.....Magistrate of the first Class." The Magistrate of the first Class has given the full amount of imprisonment which he could give under the law. It follows, therefore, that a higher sentence could not be passed without a re-trial. If the learned Sessions Judge thought that the case ought to be re-tried by the Court of Session, he ought himself to have set aside the conviction and ordered a commitment under section 423 (1) (*b*). That he has power to do this has been ruled in the case of *Queen-Empress* v. *Maula Bakhsh* (1). We think, however, that the power of ordering a new trial merely for the purpose of enhancing the punishment is a power that ought to be very sparingly exercised. We do not for one moment wish to be taken as saying that the offence for which the accused have been found guilty (particularly under the present circumstances), was not a most serious one. Nor do we wish to say that it would not have been better if the accused had been committed in the first instance to the Court of Sessions. At the same time the sentences cannot be said to have been nominal sentences. There is a strong principle that a man ought not to be tried a second time unless there are very grave reasons for so doing.

The only order we feel bound to pass is that the record be returned to the learned Sessions Judge that he may complete the disposal of the appeals. We order accordingly.

Record returned.

(1) 15 A. 205; A. W. N. (1893) 105.

BOMBAY HIGH COURT.

CRIMINAL REVISION APPLICATION No. 384 OF 1914.

January 29, 1915.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

In re DYAWAPPA BASGUNDA PATIL —DEFENDANT—APPLICANT.

Criminal Procedure Code (Act V of 1898), ss. 145 146—Order "not to obstruct" without taking evidence, if final—Procedure.

In a proceeding under section 145, Criminal Procedure Code, the preliminary order was made, the statements of the parties as required by clause (4) of the section were put in, but the Magistrate without examining the parties or taking any evidence ordered a party "not to obstruct":

Held, that the order was not a final order under the section and that if there was still a danger of a breach of the peace, the Magistrate must complete the proceedings as required by section 145 and make a proper order either under that section or under section 146. [p. 67, col. 1.]

Criminal application for revision from an order passed by the Sub-Divisional Magistrate, Bijapur.

Mr. *V. V. Bhadkamkar*, for the Applicants.

Mr. *P. D. Bhide*, for the Opponents.

MULLA *v.* EMPEROR.

JUDGMENT.

HEATON, J.—We have been applied to in this case to interfere in our revisional jurisdiction with what purports to be an order made under section 145 of the Criminal Procedure Code. The view of the case that I take is that no final order has been made under section 145 The preliminary order was made, the statements of the parties as required by clause 4 of the section were put in, but thereafter there was no oral examination of the parties or taking of evidence. There was no decision as required by clause 6, nor was there a declaration as required by that clause. There was simply an order that a person was " not to obstruct, etc. " Where, as here, all the most essential things that go to the making of the order were absent, I can only say that I regard the order made as not a final order under the section.

The position, therefore, stands thus: if there is still a danger of a breach of the peace, the Magistrate must complete the proceedings as required by section 145 and make a proper order either under that section or under section 146. If, however, there is no longer any danger of a breach of the peace, the proceedings may be dropped.

SHAH, J.—I agree.

Ordered accordingly.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 159 OF 1915.

April 8, 1915.

Present:—Justice Sir George Knox, KT.

MULLA—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), *s.* 456—*Lurking house trespass—Criminal intent—Burden of proof.*

The accused who was a complete stranger was found inside the complainant's house at 2 A. M. in the morninn, having entered the house by a door which the complainant had taken care to secure at night. When arrested, the accused said that he had gone inside the house in connection with an illegal intimacy with the complainant's aunt, who was a widow:

Held, that the accused was guilty under section 456 of the Penal Code. [p. 69, col. 2.]

Held, further, that as the intent with which he went inside was a matter within the knowledge of the accused, the burden of proving that his intention was an honest intention lay on him. [p. 67, col. 2.]

Criminal revision against an order of the Sessions Judge of Cawnpore.

Mr. *Kailas Nath,* for the Applicant.

Mr. *Malcomson,* for the Crown.

JUDGMENT.—The facts found in this case are as follows. Suraj Kumar, a Brahmin and cultivator left his house on the 26th of December 1914. His intention was to catch a train and go into Cawnpore. He took the precaution of having his house carefully closed for the night. He returned, having missed his train, somewhere about 2 A. M. He found the door which had been securely closed wide open. He says that somewhere inside his house, he caught hold of Mulla, a *gadaria,* who was trying to escape and that on Mulla's person were certain jewels, the property of Suraj Kumar. This portion of the evidence has apparently been discredited by both Courts and for the purpose of this case this alleged fact may be omitted from consideration altogether. The accused, when he was caught by Suraj Kumar, said that he had gone inside the house in connection with an illegal intimacy with Suraj Kumar's aunt, who is said to be a widow.

The facts then that have to be faced are a complete stranger is found inside a Brahmin's house at 2 A. M. in the morning having entered that house by a door which the Brahmin had taken care to secure at night. He is inside the house and when discovered is trying to escape. He does not, when arrested by the owner of the house, make any statement to the effect that he is there with any lawful intent. The intent with which he went was a matter within his knowledge, the burden of proving that his intention was an honest intention lies upon him. In the present case he alleges that he went with the intention of pursuing an intimacy, I will not call it criminal just now, but an intimacy with a Brahmin widow. He is not able to establish that any illegal intimacy of any kind had existed at any time between him and the Brahmin widow. Looking to the words contained in section 3 of the Evidence Act, I hold that both the Courts below were right in holding that it had been fully proved that the accused had committed lurking house trespass by night and that it is very doubtful whether they erred in holding that an offence under section 457 had been established against the accused.

I am asked to interfere in revision against this conviction and sentence, because no offence under section 457, Indian Penal

Code, has been made out and the conviction is bad in law. A long and laboured argument has been addressed to me which really rests on this, at its strongest point, that it was for the prosecution to establish criminal intention and that until they proved that criminal intention the accused was entitled to an acquittal.

The learned Vakil who appeared for the applicant took his stand upon the case of *Emperor* v. *Jangi Singh* (1), and drew my attention in particular to the words to be found in this ruling at page 195: "His intention possibly was to obtain possession contrary to law, but this of itself would not constitute criminal trespass. Proof of an intention to commit an offence or to intimidate, insult or annoy was necessary. There was no evidence of any such intention, or from which such an intention might be reasonably inferred." The facts of that case are somewhat peculiar. A *zemindar* had a quarrel with an occupancy tenant and when he was absent from the village by reason of ill-health, he induced the *patwari* to record that the occupancy tenant had left the village and abandoned his holding, and thereupon took possession of it. The learned Chief Justice, who decided *Emperor* v. *Jangi Singh* (1), evidently arrived at the conclusion that the facts found in this case were not sufficient to establish a *prima facie* case of criminal trespass and it was necessary to consider further what was the intention of the *zemindar* who entered on this occupancy holding.

I was also referred to the ruling of *In the matter of the petition of Gobind Prasad* (2).

The line of argument in this case, if carefully considered, will be found to be much the same. In that particular case the Pleader who appeared to support the case went so far as to say that where an entry upon property is in itself illegal, that is sufficient to establish one of the criminal intents required by section 441, and it was held by Mr. Justice Straight "that the intent with which the act is done must be established by clear and convincing evidence of such character and description as the particular nature of the case requires". With all due respect to the learned Judge, this has, in my opinion, been too broadly stated and I note that it has not been followed by some of the Courts. Cases of this kind really rest upon the facts which are found. If those facts are such that a person of ordinary prudence and ability would come to the conclusion that they point to a guilty intent on the part of the accused, it is for the accused to rebut that guilty intention, and if he does not so rebut it, the guilty intent is as much found against him as his entry into or upon the property

In *Sellamuthu Servaigaran* v. *Pallamuthu Karuppan* (3) the learned Judges who decided that case, and one of them was a Hindu Judge of great experience, referred to a previous case of *Queen-Empress* v. *Raya Padayachi* (4) and held that the law on this point was correctly laid down in that case: "Although there is no presumption that a person intends what is merely a possible result of his action or a result which though reasonably certain, is not known to him to be so, still it must be presumed that when a man voluntarily does an act, knowing at the time that in the natural course of events a certain result will follow, he intends to bring about that result. In the present case the ordinary and natural consequences of the petitioners' acts would be to annoy the owner of the house and to intimidate and annoy his servant who was holding possession for his master, and the petitioners, as reasonable men, must have known that such consequences would flow from their acts. They must, therefore, in my judgment, be held to have acted with intent to intimidate and annoy within the meaning of the section, and the petitions must be dismissed."

In a previous case of this Court which came before me where I had to do with a very similar case, *Emperor* v. *Ishri* (5), I held that when an accused was found inside the house of the complainant at midnight, and his presence was discovered by the wife of the complainant crying out that a thief was taking away her *hansli*, it was for the accused to prove that his intention was an innocent one and in that case I referred to a previous case of *Brij Basi* v.

(1) 26 A. 194; A. W. N. (1903) 230; 1 Cr. L. J. 362
(2) 2 A. 465.
(3) 9 Ind. Cas. 152; 21 M. L. J. 161; 9 M. L. T. 283; 12 Cr. L. J. 30; 35 M. 186.
(4) 19 M. 240; 1 Weir 537.
(5) 29 A. 46; A. W. N. (1906) 279; 3 A. L. J. 652; 4 Cr. L. J. 291.

Queen-Empress (6), which I distinguished from the case before me. I see no reason to depart from what I then laid down.

The learned Vakil for the applicant drew my attention to another case, *Premanundo Shaha* v. *Brindabun Chung* (7). In that case the learned Judges delivered themselves of certain observations which were *obiter dicta*, which otherwise went to support the contention set up by the Vakil.

In my mind to hold that if a stranger who is found inside a *zenana* at two in the morning can escape from the consequences of his act by saying that he came there at the bidding of the wife or other inmate, would be a most dangerous doctrine and the act is deserving of severe punishment. This brings me to the third point raised in this application *i.e.*, that the sentence of six months is unduly severe. I am not prepared to accede to this. The result is that I find the accused guilty under section 456 of the Indian Penal Code, but I do not interfere with the sentence passed. The accused is said to be on bail, he will surrender to his bail and complete his sentence.

Petition dismissed.

(6) 19 A. 74; A. W. N. (1896) 178.
(7) 22 C. 994.

BOMBAY HIGH COURT.

CRIMINAL REVISION APPLICATION NO. 450 OF 1914.

February 16, 1915.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

GULAM HYDER PANJABI—ACCUSED APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (*Act XLV of* 1860), *ss.* 337, 338—Hakim *performing operation on eyelids—Ordinary precautions not taken—Acting rashly and negligently—Hurt—Offence* —Hakim *giving himself out as skilled operator, liability of.*

The accused, a *Hakim*, performed an operation, on the outer side of the upper lid of the right eye of the complainant. The instruments used were a pair of scissors and a needle, which would be ordinarily used by a tailor and not by an eye-surgeon. The wound was sutured with an ordinary thread. The most ordinary precautions were entirely neglected. The operation was needless and was not in accordance with any recognized Indian method:

Held, that the accused acted so rashly and negligently as to endanger human life or the personal safety of another; that as there was not the permanent privation of the sight of either eye in consequence of the operation the accused was guilty of an offence under section 337, Indian Penal Code, and not under section 338, Indian Penal Code. [p. 69, col. 2; p. 70, col. 1.]

Where a *Hakim* gives out that he is a skilled operator and charges considerable fees, the public are entitled to the ordinary precautions which surgical knowledge regards as imperative. [p. 70, col. 1.]

Criminal application for revision from conviction and sentence passed by the Second Preisdency Magistrate, Bombay.

Mr. *P. N. Godinho*, for the Accused.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.—The applicant in this case has been convicted of causing grievous hurt by a rash and negligent act under section 338, Indian Penal Code.

It is urged on his behalf that his act was neither rash nor negligent as alleged by the prosecution, that he is protected by section 88 of the Indian Penal Code, as the complainant consented to suffer the harm caused to her, and that the hurt caused is not proved to be grievous hurt. As regards the first contention, the facts which are either proved or admitted are these: The accused, who is a *Hakim*, performed an operation on the outer side of the upper lid of the right eye of the complainant. The instruments used were a pair of scissors and a needle, which would be ordinarily used by a tailor and not by an eye-surgeon. The wound was sutured with an ordinary thread. As the Magistrate correctly finds, the most ordinary precautions, such as using proper instruments for the operation as well as for protecting the eye-ball, disinfecting and sterilizing the instruments and using antiseptics, were entirely neglected. The medical evidence shows that the operation was needless and performed in a primitive way. It is not shown that it was in accordance with any recognized Indian method. Dr. Prabhakar, who has been examined on behalf of the defence, says that he has not seen lid operations performed by *Hakims*, though he has seen cataract operations performed by them. On these facts, it was quite open to the learned Magistrate to find that the accused acted so rashly and negligently as to endanger

human life or the personal safety of others. For where, as here, a *Hakim* gives out that he is a skilled operator and charges considerable fees, the public are entitled to the ordinary precautions which surgical knowledge regards as imperative. To neglect such precautions entirely is negligence such as is contemplated by the criminal law. This case has been very fully argued before us; but we have heard nothing to induce us to think that the finding of the lower Court is not proper. The fact of the accused having treated a large number of cases and, according to him, successfully, was relied upon by Mr. Godinho. Quite apart from the infirmity of the evidence bearing on this point, which has been mentioned by the Magistrate, it appears that in many cases the diseases treated and the operations performed by the accused were quite different. And there is not a single case in which it is shown that the disease and the circumstances connected with the operation were the same as in this case. This renders the evidence relating to these several cases practically useless, if not irrelevant. The point in the case is not whether the petitioner is at liberty to use such skill as he may possess in performing such operations, but whether, in doing so, he has acted rashly or negligently. It matters not, for this purpose, whether a practitioner is trained or not; he is bound by law to avoid such rashness or negligence as would endanger human life or the personal safety of others, if he undertakes an operation. In our opinion, the petitioner has been properly found to have acted rashly and negligently.

As regards the argument based on section 88 of the Indian Penal Code, it is rather difficult to accept the learned Magistrate's finding that the accused acted without the complainant's consent and against her wish. If he did so, he would be guilty of causing hurt, simple or grievous, whichever it may be, quite independently of the consideration whether he acted rashly or negligently. This apparently is not the prosecution case, and that is not the charge against him. The gravamen of the charge against him is that he acted rashly and negligently. On the evidence, what appears to have happened is this. When the complainant was taken to the accused the latter pursuaded her to accept his treatment and her companion, Sayad Hassanally, who had taken her to the accused and who apparently had faith in the skill of the accused as a *Hakim*, wanted her to submit to his treatment. The complainant had neither time nor opportunity to realise what it was that she was asked to submit to; but on the pursuasion of both she submitted to the operation. In that sense she consented to the operation. But she hardly realised the harm or the risk of the harm which the operation involved, and did not consent expressly or impliedly to the harm or the risk of the harm as required by section 88 of the Indian Penal Code. It is not suggested—certainly not proved—in this case that the complainant had anything like a real opportunity to realise the nature of the accused's act, and the harm and the risk incidental to that act so as to be a consenting party to the operation in whatever manner it might be performed. It is clear, therefore, that the accused is not protected by section 88 of the Indian Penal Code, even if we assume that the other conditions necessary to invite the application of that section are fulfilled.

Lastly, it is urged that the hurt caused is not proved to be grievous. The medical evidence on this point is that as a result of the operation performed by the accused, complainant's eye-sight would be permanently damaged to a certain extent. This is not sufficient to establish that there has been a permanent privation of the sight of either eye in consequence of the operation. It is not suggested in this case that the hurt is otherwise grievous as defined by section 320 of the Indian Penal Code. This contention appears to be good, and must be allowed.

As regards the sentence, having regard to all the circumstances a substantial fine would meet the justice of the case and no sentence of imprisonment is necessary.

The result, therefore, is that the conviction under section 338 is set aside and the petitioner is convicted of causing hurt under section 337, Indian Penal Code. The sentence of imprisonment is set aside and that of fine confirmed. The order as to compensation must, of course, stand.

Conviction and sentence altered.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 375 OF 1913.

March 2, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

BODDU RAMAYYA—PETITIONER—APPELLANT

versus

CHITTURI SURAYYA AND ANOTHER—COUNTER-PETITIONERS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 195, cls. (6), (7)—Subordinate Judge empowered to entertain appeals, whether Court—Jurisdiction—Sanction, revocation of—Penal Code (Act XLV of 1860), s. 209—Claim, meaning of—Madras Civil Courts Act (III of 1873), s. 8.

Where, by a notification issued under the Madras Civil Courts Act (III of 1873), Government empowers all Subordinate Judges in the Madras Presidency situated in a place different from that of the District Court, to receive appeals direct and not by transfer from the District Court, such Subordinate Judges are Courts to which appeals "ordinarily lie" from the subordinate Courts within the meaning of section 195 (7) of the Code of Criminal Procedure, and such Subordinate Judgs have jurisdiction to revoke on appeal the sanction to prosecute for an offence under section 209, Penal Code, granted by a subordinate Court. [p. 71, col. 2.]

In re Anant Ramachandra Lotlikar, 11 B. 438, referred to.

In the matter of Subbamma, 17 M. 124; 2 Weir 206; *Ram Charan Chandra* v. *Tirupulla Sheikh*, 13 Ind. Cas. 1007; 39 C. 774; 13 Cr. L. J. 191; 16 C. W. N. 645, distinguished.

The word "claim" used in section 209, Indian Penal Code, cannot refer to a document produced in evidence to substantiate the relief asked for in a suit. [p. 71, col. 1.]

Civil miscellaneous appeal from an order of the Court of the Subordinate Judge of Kistna at Ellore, in Miscellaneous Appeal No. 3 of 1913, preferred against that of the Court of the principal District Munsif of Tanuku, in Miscellaneous Petition No. 4272 of 1911, in Original Suit No. 235 of 1911.

Mr. *P. Narayanamurthi*, for the Appellant.

Mr. *T. Prakasam*, for the Respondents.

JUDGMENT.—Mr. Narayanamurthi takes exception to the jurisdiction of the Subordinate Judge of Ellore to hear the appeal. The District Munsif of Tanuku refused to grant sanction in this case against the plaintiff. Thereupon the defendant appealed to the Subordinate Judge to grant the sanction. It is not disputed that the Government have, by a notification issued under the Civil Courts Act, empowered Subordinate Judges to receive appeals direct in all cases where the Sub-Court is situated in a place different from that of the District Court. The Ellore Sub-Court is one of the Sub-Courts thus empowered and appeals from the Tanuku Court will lie to that Court. It is argued by the learned Vakil for the appellant that as the Civil Courts Act directs all appeals to be presented to the District Court except in cases where there is a notification, the Court to which appeals *ordinarily lie* is the District Court within the meaning of clause (6) of section 195 of the Code of Criminal Procedure. We fail to see why a Court to which by a Government notification appeals are directed to be presented is not a Court to which appeals *ordinarily lie*. It is with a view to settle this question and to meet the suggestion made in *In re Anant Ramachandra Lotlikar* (1), that the term *ordinarily* refers to a tribunal to which the majority of the appeals are presented, that an explanation was added by the Legislature in the Act of 1898. That explanation is a complete exposition of the term *ordinarily* and under it, the Subordinate Court will be the forum to which the appeals *ordinarily lie*. The decision in *In the matter of Subbamma* (2) is not against this conclusion. Under section 407 of the Code of Criminal Procedure appeals lie only to the District Magistrate. The appeals may be transferred for disposal by the District Magistrate to such first Class Magistrates as have been empowered by the Local Government to hear appeals. Therefore, the first Class Magistrate is not a Court to whom appeals lie either ordinarily or otherwise. In *Ram Charan Chandra* v. *Tirupulla Sheikh* (3), the Court which heard the sanction appeal had only jurisdiction to hear civil appeals on transfer by the District Judge. In *Ram Charan Chandra* v. *Tirupulla Sheikh* (3), it was conceded that the High Court had not empowered the Subordinate Judge to entertain appeals. The language of clause 7 (*a*), section 195, leaves no room for doubt that in Madras all the Subordinate Judges who have been empowered by a notification to entertain civil appeals will be Courts to which appeals *ordinarily lie* under section 195 of the Code of Criminal Procedure.

On the merits, we feel no doubt that section

(1) 11 B. 438.
(2) 27 M. 124; 2 Weir 206.
(3) 13 Ind. Cas. 1007; 16 C. W. N. 645; 39 C. 774; 13 Cr. L. J. 191.

In re IRULA SADAYAN.

209 has no application. The word *claim* in that section cannot refer to a document produced in evidence to substantiate the relief asked for in the suit.

As for section 471, the materials placed before us by the appellant do not enable us to say whether the document was produced on a summons as a witness and how it came to be marked for the plaintiff. Under these circumstances, no case has been made out before us for granting sanction under that section.

We must dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CRIMINAL REFERENCE No. 1 OF 1915.

March 1, 1915

Present:—Mr. Justice Ayling, Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

In re IRULA SADAYAN *alias* PERIA SADAYAN—ACCUSED.

Penal Code (*Act XLV of* 1860), *s.* 379—*Accused found in possession of skin of missing goat—Charge of theft—Identification doubtful—Verdict of Jury, when can be set aside—Criminal Procedure Code* (*Act V of* 1898), *s.* 307 (3).

When the accused was found in possession of two freshly flayed skins of a goat and kid within 24 hours of the theft and was charged under section 379 of the Penal Code:

Held, (*Spencer, J., dissenting*), (1) that it was absolutely necessary for the prosecution to establish that the skins found on the accused were those of the goats recently stolen; [p. 74, col. 2.]

(2) that as the prosecution witnesses had not seen the skins for more than three weeks after the theft, the Jury were not wrong in holding that the identification was suspicious; [p. 73, col. 2.]

(3) that the accused was entitled to the benefit of the doubt and ought to be acquitted. [p. 74, col. 1.]

It is not necessary to show that the verdict of a Jury is perverse and manifestly unreasonable before the High Court can set it aside, but as the Jury are Judges of fact, before their verdict is set aside, it must be established that the conclusion come to by them does not follow from the evidence recorded in the case. [p. 73, col. 2.]

Emperor v. *Annada Charan Thakur*, 2 Ind. Cas. 417; 36 C. 629; 13 C. W. N. 757; 9 C. L. J. 638; 10 Cr. L. J. 32, referred to.

Reference under section 307 of the Code of Criminal Procedure, 1898, by the Sessions Judge of the South Arcot Division, in Case No. 1 of his Calendar for 1915.

This reference coming on for hearing on the 8th February 1915 and Counsel not appearing on behalf of the accused, upon perusing the Sessions Judge's Letter of Reference No. 170, dated 8th January 1915, and the record of the evidence and proceedings before the Court of Session, and upon hearing the arguments of the Public Prosecutor on behalf of Government and the case having stood over for consideration till the 11th February 1915, the Court (Spencer and Seshagiri Aiyar, JJ.) delivered the following

JUDGMENT.

SPENCER, J.—The reasons which the Jury voluntarily expressed as the ground of their verdict of 'not guilty' indicate, in my opinion, that they had no good reasons for their decision and that the verdict is one which should not be accepted.

The Judge had an equal opportunity of observing the demeanour of the witnesses and he was satisfied with the evidence of prosecution witnesses Nos. 1 and 2 that the skins were those of their missing she-goat and kid. The delay in putting in a formal complaint of theft has been accounted for by the prevailing floods. It could not be expected that any other witnesses would be forthcoming to speak to the identity of particular animals in a flock besides the shepherd and his son who assisted him in pasturing them; the knowledge that such shepherds possess as to the animals composing their flock is likely to be intimate; and in this instance the existence of two skins renders the chance of a mistaken identity doubly improbable.

Moreover, this is a case in which the Jury would be wrong if they laid undue stress on a question of identification. For it was not the accused's case that the skins were not stolen ones. He stated in the Magistrate's Court that a man dropped the skins near him when he was sleeping, that he chased him but was unable to catch him and that next day he picked up the skins and took them to Manalurpet to sell them.

Thus the first reason given by the foreman will not justify the Jury's verdict. The second reason, that the accused was prejudiced by not employing a Pleader to defend him is not a proper reason to give for acquitting him. As the Jury are shown to have acted on considerations which ought not to have influenced their decision, we may discard their verdict and see if there is sufficient evidence to convict the accused.

The 3rd prosecution witness is the person to whom the accused was about to sell the

skins. If his demeanour or answers were in any way suspicious, it would be consistent with his position as a would-be purchaser of stolen goods. The accused's possession of the skins is proved by other evidence and is not denied by him. The prosecution case does not depend on the 3rd witness's evidence. The accused was found in possession of stolen property the day after the theft and he failed to account satisfactorily for his possession of it.

Under these circumstances I have no hesitation in agreeing with the Sessions Judge that the guilt of the accused has been proved and I would convict him under section 379 of the Indian Penal Code.

But as my learned brother is of a different opinion, the case will be referred under section 429 of the Criminal Procedure Code to a third Judge.

SESHAGIRI AIYAR, J.—In this case, I have the misfortune to differ from my learned colleague. The accused was charged with having committed theft of a goat and its kid on the 21st November 1914. The story for the prosecution is that the next day the accused was seen in the stall of the 3rd witness for the prosecution with the skins of the two goats and as his explanation regarding the possession of the skins was not satisfactory, he was arrested. There was no complaint of the theft of the goats until the 4th of the next month. The evidence of the 1st prosecution witness is that these goats were stolen from his house on the night of the 21st November and that he is able to identify the skins as belonging to the stolen goats. In aswer to the Court he said "I saw the skin on the 4th Saturday after the loss." The 2nd witness is the son of the 1st prosecution witness, and he says that the two skins before the Court are those of the goat and of the kid which were stolen. The 3rd prosecution witness is a man who keeps a tannery and he stated that the accused had a bundle of salted skins in his possession, that the skins were fresh flayed, and that while he was bargaining for their purchase the Head Constable came there and arrested the accused. This is the whole of the evidence in this case. The Jury unanimously found the accused not guilty. Apparently the Sessions Judge asked their reasons for the opinion with reference to *Emperor* v. *Chellan* (1), and they replied that the identification was suspicious and that the absence of a Pleader for the defence prejudiced the accused. The Sessions Judge points out in his order of reference that the demeanour of the 3rd prosecution witness in the witness box very likely impressed the Jury against him. But he has referred the case to the High Court on the ground that the evidence establishes the guilt and that the Jury were wrong in their verdict. I am aware that it has been held that it is not necessary to show that the verdict of the Jury is perverse and manifestly unreasonable before the High Court can set it aside. See *Emperor* v. *Annada Charan Thakur* (2). At the same time applying the test which would ordinarily be enforced in any appeal, the High Court has to be satisfied that the verdict of the Jury is wrong. The Jury are the Judges of facts and before their verdict is set aside, it has to be established that the conclusion come to by them does not follow from the evidence recorded in the case.

The complaint as regards the theft was not made until 17 days after the occurrence. A number of explanations are given in Exhibit A as to the delay in presenting the complaint after such a length of time. One reason is that the complainant informed his master of the theft the next day; but his master has not been called to prove that this information was given. A second explanation is that there were heavy floods and the complainant could not "come this side." It is impossible to believe this story, for I find that the *monigar* of Manalurpet, to whom the complaint should have been made and who was examined as the prosecution 4th witness, says that the accused and the kins were brought to him on the 22nd and that he sent reports, Exhibits D and D1, to the Police and to the Magistrate on the very same day. No question has been put to him as to whether there were any floods between the place where the complainant was residing and the place where he was residing. The Jury might very well have disbelieved the story as to the theft, having regard to the delay in the presentation of the complaint. Then as regards identification, it is true that the 1st and 2nd witnesses for the prosecution said that the skins were those of the goat and of the kid which were stolen; but remembering that they saw the skins more than three

(1) 29 M. 91; 3 Cr. L. J. 371.

(2) 2 Ind. Cas. 417; 36 C. 629; 13 C. W. N. 757; 99 C. L. J. 638; 10 Cr. L. J. 32.

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weeks after the theft, a Jury will not be wrong in holding that the identification is "suspicious." Then, the demeanour of the 3rd witness for the prosecution in the witness box seems to have impressed the Jury very badly.

Under these circumstances I do not think that the Jury were not justified in holding that the case against the accused has not been proved beyond reasonable doubt. It may be, as was argued before us, that they were not right in disbelieving the story for the prosecution merely because the accused was undefended. But every good Judge looks into the evidence given by one of the parties, when the other party was not in a position to engage a Pleader, with some degree of care; and, if the Jury thought that the evidence in this case should be scrutinised minutely on that ground, I cannot say that they were not acting rightly in doing so.

Reference has been made by the learned Public Prosecutor to the unsatisfactory explanation given by the accused for the possession of the skins. I do not think that circumstance should be taken into account as proving the theft or as facilitating the identification.

On the whole I have come to the conclusion that on the evidence let in for the prosecution, it is not safe to convict the accused; and as the opinion of the Jury coincides with this view of mine I think the accused is entitled to the benefit of the doubt and should be discharged from custody.

This reference coming on for final hearing under section 429 of the Code of Criminal Procedure, on the 26th February 1915, and the case having stood over for consideration till this day, the Court (Mr. Justice Aiyling) delivered the following

JUDGMENT.— The accused in this case was charged with the theft of a goat and a kid from the *pail* of the house of prosecution 1st witness on the night of 21st November 1914. The Jury found him "not guilty": but the Sessions Judge differed and referred the case to this Court under section 307 of the Code of Criminal Procedure. The result was another difference of opinion between the two learned Judges, before whom the referenee came for disposal: Spencer, J., being in favour of conviction, and Seshagiri Aiyar, J., of acquittal. The case has, therefore, been referred to me under section 429 of the Code of Criminal Procedure.

It will be clear from the above that the case, while simple in its outline, is one not easy of decision.

The case against the accused rests entirely on his alleged possession of the skins of the stolen goats within 24 hours of the theft. I see no reason to doubt that he was arrested by the Police on suspicion on the evening of 22nd November in the village of Manalurpet with two freshly flayed skins of a goat and kid in his possession. These skins are identified by prosecution witnesses Nos. 1 and 2 as those of the stolen goats: and the difficulty is whether this identification can be accepted. If it is, the accused's guilt might be presumed: for his explanation of how he came by them is unsupported by any evidence and is not probable. But it is absolutely necessary for the prosecution to establish that the skins found on the accused were those of goats recently stolen.

It may be that the prosecution has been over-confident and has not adduced all the evidence available in support of its case; but certainly on the record before me I should hesitate to accept the identification evidence. There is nothing impossible in prosecution witnesses Nos. 1 and 2 recognising and identifying the skins after so long an interval of three weeks. But, as pointed out by Seshagiri Aiyar, J., there are suspicious circumstances about the evidence of these witnesses, which have not been adequately explained. No complaint either to the Police or the village Magistrate was preferred for 13 days after the disappearance of the goats. There is nothing to corroborate 1st prosecution witness's statement that he went to the Tirukoilur Police station four days after the theft, and was sent away again "finding nothing." It would seem from the rest of the evidence that the skins should then have been at Tirukoilur open to identification The 1st prosecution witness's statement that he found nothing and was sent away by a Constable, is difficult to understand. No questions were asked of any other witness regarding the floods which are said to have prevented prosecution 1st witness from going to Tirukoilur earlier. Prosecution 2nd witness is a boy of 11, and both he and his father, prosecution 1st witness, are *pariah* coolies, whose evidence carries no great

weight. The owner of the goats (a Brahmin *ex-monigar* under whom prosecution 2nd witness works) has not been examined at all.

It seems to me that the evidence both as to identification and as to the theft itself is so suspicious that the Jury were justified in refusing to accept it.

I acquit the accused and direct his release.

Conviction set aside.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 891 OF 1914.

April 7, 1915.

Present:—Justice Sir Donald Johnstone, KT., and Mr. Justice Shadi Lal.

DAULAT RAI—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 403, 477A—Debtor executing hundi *in favour of Bank—Managing Director paying off his own debt in discounting* hundi, *whether amounts to criminal misappropriation—Falsification of document.*

A debtor of the Hindustan Bank executed in its favour certain *hundis* for Rs. 30,000 payable after six months. The Bank being in need of ready money the Managing Director, the accused in the case, asked the Co-operative Bank to discount the *hundis*. But the Bank refused to do so unless the Director cleared his own account with it. In order to secure ready money the accused brought forward his own son, who put in an application for a loan from the Hindustan Bank for the exact amount of the accused's debt to the Co-operative Bank. The accused sanctioned the loan as agent on the security of his own moneys in the hands of the Hindustan Bank and then cleared his debit balance with the Co-operative Bank. This transaction formed the subject of the charges under sections 409 and 477A of the Penal Code:

Held, (1) that the prosecution had failed to establish the charge of criminal misappropriation inasmuch as the accused, in his anxiety to secure ready money for his Bank, chose a method which could not be said to have injured it; [p. 76, col. 2.]

(2) that the prosecution had failed to prove that the application of the accused's son for loan and the accused's order thereon of sanction were really ante-dated and the charge of falsification of documents could not, therefore, be sustained. [p. 77, col. 1.]

Appeal from an order of the Magistrate, 1st Class, Multan, exercising enhanced powers under section 30 of the Criminal Procedure Code, dated the 4th November 1914, convicting the appellant.

Messrs. *Kirkpatrick, Parker, Obedulla* and *Raghunath Sahai*, for the Appellant.

Mr. *Broadway* (Assistant Legal Remembrancer), for the Crown.

Mr. *M. N. Banerji*, for the Liquidator.

JUDGMENT.—In this case Daulat Rai, appellant, was sentenced by the first Class Magistrate, Multan, to five years' rigorous imprisonment and ten thousand rupees fine. The charge on which he was tried contains two heads, namely, misappropriation by him, as agent of the Hindustan Bank, Multan, of Rs. 8,180-4-9 (section 409, Indian Penal Code) and falsification of two documents in connection with that misappropriation (section 477A of the same Code.) He appeals against conviction and sentence, and we have heard the case argued at length and have carefully examined the record, with the result that in our opinion it cannot be safely said that either offence is proved to have been committed.

The facts of the case, so far as they are really important for us, are simple enough. In 1913 the public began to be suspicious as to the solvency of more than one Indian-managed Bank, and in consequence of withdrawals the cash in this Bank was in August low. Among the debtors of the Bank was one Maya Das, apparently a substantial trader, who owed the Bank at the moment some Rs. 60,000. Having no cash ready, he executed in favour of the Bank certain *hundis* for Rs. 30,000 payable after six months. The Co-operative Bank, Lahore, had previously accepted Maya Das's paper, so appellant approached that Bank and asked them to discount the *hundis*, so as to provide the Hindustan Bank with necessary ready money. At this time appellant owed some Rs. 8,000 to the Co-operative Bank on his private account, but had no money readily available to pay with; and that Bank, taking advantage of his position, refused to discount the aforesaid *hundis* except on the condition that he should clear his own account. Having Rs. 12,000 odd in fixed deposit in the Hindustan Bank, he might apparently have borrowed from that Bank, or might have used fixed deposit money which was falling due instead of renewing, or might have drawn on his hitherto untouched cash credit (as agent) of Rs. 25,000, but he did none of these things. Instead

he brought forward his own son Nainsukh, who, on August 11th 1913, put in an application for a loan from the Hindustan Bank of Rs. 8,180-4-9, the exact amount as on 15th August 1913 of appellant's debt to the Co-operative Bank. The loan was sanctioned by appellant as agent on the security of appellant's own aforesaid moneys in the hands of the Hindustan Bank, and with this money appellant cleared his debit balance with the Co-operative Bank. Then on 6th September 1913 Nainsukh handed in a pro-note for the amount of the loan.

The net result so far of the transaction may be stated thus: Rs. 30,000 of the debt due by Maya Das to the Hindustan Bank paid off by the *hundis*.

Discount charged by the Co-opertive Bank Rs. 1,350, and thus cash payment to appellant for the *hundis* Rs. 28, 650.

Of this sum Rs. 12,860 taken in the Lahore Branch of the Hindustan Bank, and Rs. 15,790 kept by appellant for the Multan Branch.

Of this Rs. 15,790, Rs. 7,609-10-3 credited in Multan Branch in Sundries Account, and Rs. 8,180-4-9 lent to Nainsukh as aforesaid.

This last transaction is the subject of the first head of the charge, and the documents denounced as false in the second head are Nainsukh's loan application bearing date 11th August 1913 and appellant's order thereon of sanction, bearing same date, both of which the prosecution contend were really written later and antedated.

We cannot help thinking that the prosecution have gone a little too far in insisting upon these charges. In paragraph 3 of the complaint it is even suggested that the crediting of Rs. 7,609-10-3 to "Sundries" was improper; but the evidence of Mr. Dignasse, and of Hari Chand, P. W. No. 7, late Manager of the Bank, shows that this was right enough. On 6th September the transfer to *hundis* account was duly made. Another thing in the complaint, which strikes us as not quite fair to the appellant, is that no mention is made of the apparently ample security for the loan to Nainsukh.

No lengthy discussion of the case is called for. Appellant's action can be fully accounted for by his solicitude for the Bank's interests. That he could only get money for the Bank from the Co-operative Bank on condition of clearing his own account is what he has always said—see his written statement before charge—and we think the allegation is sufficiently proved by the explicit statement on solemn affirmation of Mulk Raj, then Managing Director and now Liquidator of the Co-operative Bank. He was quite properly anxious that his Bank should get the Rs. 30,000 (or its "present value"), and out of the various ways indicated above of meeting the wish of the Co-operative Bank that he should clear his private account, he was right in choosing that way which was calculated least to injure his own Bank. He chose one way, which we are unable to see injured that Bank. He thought money was urgently wanted and he had to make a rapid election of methods. It is said he might have taken Maya Das's paper elsewhere for discount, but it was natural to deal with old correspondents, who had done the same business with his Bank before. And again he had to pay off the Co-operative Bank somehow, and it is not easy to see that the Hindustan Bank would have been any better off had he cashed the *hundis* elsewhere and then taken out of the cash balance in the Hindustan Bank Rs. 8,000 odd of his own (or as a loan against his cash credit aforesaid) to pay to the Co-operative Bank. Ready money was the important thing just then, and either plan necessarily involved the loss to the Bank of this Rs. 8,000 as ready money.

These things being so, we hardly see the motive for falsification of Exhibit P 2; and we are not at all clear that its antedating has been proved. The only grounds Mr. Broadway can indicate for the antedating theory are that on 11th August the exact amount of appellant's debt of Rs. 8,000 odd could not be known at Multan and was not as a fact known; and the non-entry of the application in the loans applications Register. In connection with the first ground he refers us to the evidence of Hari Chand, P. W. No. 7 aforesaid, where he says that, when appellant returned from Lahore, he said he had not the exact figures from Lahore and when they came the pro-note should be executed. It must be borne in mind that the witness was testifying more than a year after the event, and may have forgotten

the exact facts, *e. g.*, the appellant's instructions may have had reference to the entering up, after advice received from Lahore, of the whole transaction in detail. We see no real difficulty in believing that appellant, when in Lahore, ascertained what his debt would be on 15th August, promised to pay on that day and returned to Multan to arrange. As to the latter ground it is in evidence that local applications for loans were never entered in the Register, but only applications through out-station branches. Grounds like these cannot be taken as sufficient in the face of the facts that in the prosecution evidence there is nothing about antedating, and that P. W. No. 7 plainly says Exhibit P2 reached him on 11th August.

Mr. Kirkpatrick has argued the matter of non-charge against appellant of interest from 11th August to 6th September 1913 on the Rs. 8,180 4-9 kept back, but Mr. Broadway has not pressed this point; and we need only say that we can see no indication of dishonesty or fraud on the part of appellant here. The time for debiting interest had not come up to the date of the Liquidators taking over charge. If they have failed to charge interest for those weeks, how is this a crime of applicant's?

For these reasons we accept this appeal and acquit the appellant. Fine to be refunded.

Appeal accepted.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE NO. 216 OF 1915.

March 26, 1915.

Present:—Mr. Justice Tudball.

ZORAWAR—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 122—Sureties—Report by Police as to fitness of sureties, admissibility of.

A Magistrate called for a report from the Sub-Inspector of Police as well as from the Tahsildar as to the fitness of particular persons to act as sureties in a case: the Tahsildar reported in the affirmative and the Sub Inspector in the negative. The Magistrate accepting the report of the Police Sub-Inspector declined to accept the sureties:

Held, that the report of the Police Officer was not admissible in evidence and that it was the duty of the Magistrate to have taken evidence as to what was the basis of that report and he should have come to a decision thereon himself. [p. 78, col. 1.]

FACTS appear from the following Criminal Reference made by the Sessions Judge of Agra:

REFERRING ORDER.

Zorawar was ordered by a Deputy Magistrate of the Muttra District to furnish security for good behaviour under section 118 of the Criminal Procedure Code. Two persons offered themselves as sureties. The Deputy Magistrate called for a report from the Tehsildar as to the sufficiency of the security offered, and also as to the fitness of these persons to act as sureties. The Tehsildar recorded the evidence of six witnesses who all stated that these two persons were men of position and respectability and were in every way fit to act as sureties and he also found that the security offered by them was sufficient. The Deputy Magistrate also called for a report from the Sub-Inspector of the Police circle in which Zorawar lives. The Sub-Inspector reported that one of the persons was a nephew of Zorawar and that the other appeared to be associated with Zorawar in his criminal practices. The Deputy Magistrate thereupon, ignoring the report of the Tehilsdar and accepting the report of the Sub-Inspector, passed an order declining to accept the security offered. It is clear that the procedure of the Deputy Magistrate was illegal. He should not have come to a decision as to the fitness or unfitness of the persons to act as sureties merely on a one-sided report of the Sub-Inspector, which was not evidence. It was for the Magistrate himself to make enquiries as to their fitness. The Magistrate appears to be unaware of the ruling of the Allahabad High Court, *Emperor* v. *Pirthipal Singh* (1), which was followed in the cases of *Emperor* v. *Tota* (2) and *Emperor* v. *Balwant* (3).

JUDGMENT.—In so far as the the Magistrate's order refusing to accept the sureties is concerned, that order must be set aside. It is so obviously based upon the report of

(1) A. W. N. (1898) 154.

(2) 25 A. 272; A. W. N. (1903) 36.

(3) 27 A. 293; 1 A. L. J. 601; A. W. N. (1904) 231; 1 Cr. L. J. 912.

In re CHOITANO RANTO.

the Police, which is no evidence in the matter. In the evidence on the record there is no reason whatsoever to be discovered why the sureties should not be accepted. If any information was derived from the Police report, it was the duty of the Magistrate to have taken evidence as to what was the basis of that report and he should have come to a decision thereon himself. I, therefore, accept the reference. I set aside the order of the Magistrate and direct that the sureties offered be accepted, the necessary bond be taken and Zorawar released from prison. In regard to what the learned Sessions Judge has said in reference to alterations in the record of the case, I express no opinion, nor is it necessary for me to do so.

Order set aside.

MADRAS HIGH COURT.

CRIMINAL APPEALS NOS. 123 AND 124 OF 1915.

April 19, 1915.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

In re CHOITANO RANTO AND OTHERS—ACCUSED—APPELLANTS.

Penal Code (Act XLV of 1860), ss. 148, 149—Members of unlawful assembly—Only one member possessed of gun—Persons not in possession of any gun, offence committed by—Several offences—Acquittal of some of them—Sentence, reduction of.

Where of the several persons charged with rioting armed with a deadly weapon only one is proved to have been possessed of a gun, it is illegal to convict others who had no such dangerous weapon of an offence under section 149 of the Indian Penal Code.

Sabir v. *Queen-Empress*, 22 C. 276, followed.

Where there has been an acquittal of the accused of some of the offences of which they were convicted, there must be a proportionate reduction in the sentences also.

Appeals against an order of the Court of Session of the Vizagapatam Agency Division, in Case No. 32 of the Calendar for 1914.

Dr. *S. Swaminadhan* and *Mr. V. Ramesam*, for the Appellants.

Mr. *P. R. Grant*, for the Government.

JUDGMENT.—The first objection to the lower Court's decision taken by Dr. Swaminadhan is that all the accused before us have been convicted of offences punishable under section 148, Indian Penal Code, though only the 2nd accused is shown to have had a gun. The convictions were apparently based on an application of section 149. But *Sabir* v. *Queen-Empress* (1) is against that view of the law; and we have been shown no reason for dissent from the opinion of the Calcutta High Court. The convictions under section 148 of all except the 2nd accused are set aside.

Next it is urged that the 21st accused was really engaged in rescuing the Head Constable, not in dragging or threatening him. That was not alleged at the trial and there is nothing to support it.

Mr. Ramesam argues first that the 3rd accused is not shown to have taken any effective part in the riot and is unlikely to have done so, since he went with the Police to the search of the 1st accused's house. The evidence as to his conduct, which was such as to render him conspicious, is however clear, and we must confirm his conviction. We return to his sentence.

The case of the 19th accused seems to us doubtful. For the 2nd prosecution witness, the Head Constable, whom he is alleged to have attacked, did not recognise him at the identification parade. We give him the benefit of the doubt, which it entailed, and acquit him. He must be released.

As regards sentences, we give weight to the fact that the 1st accused is over 60 and that we can find no valid reason for treating the 3rd accused's case as a special case and we also make a reduction on account of the acquittals under section 148. In the result we confirm the conviction and sentence on the 2nd accused. We reduce the 1st accused's sentence to two years, 3rd to 10th accused's sentence to nine months, 11th to 13th accused's sentence to five months, 18th accused's sentence to 18 months, and 21st and 22nd accused's sentence to 13 months. We do not interfere with the sentences of fine. The appeals are allowed to this extent and dismissed in other respects.

Appeals partly allowed; Sentences modified.

(1) 22 C. 276.

LILADHAR UMERSI *v.* EMPEROR.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATIONS NOS. 178 AND 179 OF 1914.

November 5, 1914.

Present:—Mr. Pratt, J. C., and Mr. Fawcett, A. J. C.

LILADHAR UMERSI AND ANOTHER—APPLICANTS

versus

EMPEROR—RESPONDENT.

Bombay Prevention of Gambling Act (Bom. Act IV of 1887), ss. 6, 7, 10—Evidence Act (I of 1872), s. 125—Criminal Procedure Code (Act V of 1898), s. 342—Complaint on which special warrant issued—Right of accused to have it produced at trial—Extent of privileged nature of such complaint—Power of Magistrate to examine as witnesses persons challaned by Police as accused persons under Gambling Act—Special procedure—General procedure.

A Magistrate has power to examine as witnesses persons arrested and brought before him under section 6 (*b*). The whole procedure of the Gambling Act being a special procedure overrides the general law of procedure enacted in section 342, Criminal Procedure Code, and whenever it is inconsistent with it. [p. 80, col. 2.]

Emperor v. *Kaitan Duming Fernad*, 31 B. 438 at p. 445; 9 Bom. L. R. 695; 6 Cr. L. J. 60; followed.

Per *Pratt, J. C.* (*Fawcett, A. J. C. dissenting*). A complaint under section 6 of the Bombay Prevention of Gambling Act stands on the same footing as a first information of a cognizable offence recorded under section 154, Criminal Procedure Code, or complaint of a non-cognizable offence under section 200, Criminal Procedure Code, and although it is not a necessary part of the evidence for the prosecution, yet it is evidence and the accused have a right to call for it, and if the warrants are challenged, their production would be necessary. [p. 80, col. 1.]

Section 125 of the Indian Evidence Act rests upon public policy and it protects the name of a spy or secret informant, not the nature of the information and it has no application whatever to an informant who lays a sworn information and thereby initiates criminal proceedings. [p. 80, col. 1.]

Per *Fawcett, A. J. C.*—The Bombay Act requires the complaint to be on oath merely as an additional guarantee of the truth of the complaint. It is not intended to imply that the complaint is a document on which proceedings against any persons that may be arrested under the warrant are based. These proceedings are based on the fact of the arrest of the accused and their production before the Magistrate and not on the complaint which is merely the basis of the warrant which leads to their arrest. [p. 84, cols. 1 & 2.]

The rule stated in section 125, Evidence Act, is clearly applicable and appropriate in regard to gambling cases and, therefore, a Magistrate is perfectly right in refusing to order the production of the complaint under section 6 of the Bombay Act (IV of 1887). [p. 82, col. 1.]

Mr. *Wadhoomal Oodharam*, for the Applicants.

Mr. *E. Raymond* (Public Prosecutor for Sind), for the Crown.

JUDGMENT.

PRATT, J. C.—These are applications in revision made by two convicts, who were accused No. 12 and accused No. 16 before the Magistrate. Accused No. 12, Liladhar, has been convicted under section 4 of the Bombay Gambling Act and sentenced to rigorous imprisonment for one month. Accused No. 16 has been convicted under section 5 and sentenced to rigorous imprisonment for three months.

The two points raised in the applications are (1) that the Magistrate did not bring on to the record the complaint on which the special warrant was issued as he considered it to be a privileged document, and that the accused were, therefore, unable to show that the house referred to in the complaint was not that described in the warrant, and that, therefore, the presumption under section 7 of the Gambling Act did not arise, and (2) that the Magistrate had no power to examine as witnesses two persons, Abdul Satar and, Rama who had been arrested by the Police in the house and were in the position of accused persons.

Now the offences made punishable under the Bombay Gambling Act, 1887, seem to me to occupy a position intermediate between the offences classed as cognizable and non-cognizable by the Code of Criminal Procedure. These are non-cognizable offences because it would not be safe to entrust the Police with authority to enter and search private houses on suspicion of gaming or on an information for the truth of which there is no guarantee. On the other hand, they are not on the same footing as non-cognizable offences for it would be impossible in a complaint before a Magistrate to apply for process against any particular person, for that person would have finished his gaming and have left the premises long before the process could be served. The Act, therefore, lays down a special

procedure. The informant has to make a complaint on oath as a guarantee of the truth of his information. The complaint is directed against the house, room or place and is made before a Magistrate of the first Class or a specially empowered Police Officer of rank. A special warrant then issues and the offenders are searched through the house, room or place that is searched.

The prosecution begins with the complaint on oath referred to in section 6. That complaint stands on the same footing as a first information of a cognizable offence recorded under section 154, Criminal Procedure Code, or complaint of a non-cognizable offence under section 200, Criminal Procedure Code. If in these two cases the first information and complaint are used as evidence, I do not see any reason for excluding the complaint made under section 6 of the Gambling Act. Section 125 of the Indian Evidence Act rests upon public policy. It protects the name of a spy or secret informant, not the nature of the information. And it has no application whatever to an informant who lays a sworn information and thereby initiates criminal proceedings.

Public policy rather requires that the man who lodges an information, which is a complaint, should undertake responsibility for his action. This will in no way interfere with the detection of gambling cases. A Police spy who does not wish his name to be known will refrain from giving his information on oath. But on that information it would be quite easy for the Police to verify the fact and secure a sworn complaint. No form of special warrant is given in the Gambling Act, but the form given in the schedule to the English Act 8 & 9 Vict., c. 109, expressly recites the name of the person on whose sworn information the warrant was issued.

I still adhere to the opinion expressed in *Abdulla* v. *Emperor* (1), that the complaint is not a necessary part of the evidence for the prosecution. But it is evidence and the accused have a right to call for it and if the warrants were challenged, its production would be necessary, for, unless the warrant had been issued on a complaint sworn before the specified authorities the presumption under section 7 would not arise.

(1) 9 Ind. Cas. 895; 12 Cr. L. J. 149; 5 S. L. R. 40.

The Magistrate was, therefore, in my opinion, wrong in refusing to bring the complaint on the record, but I agree that this irregularity does not affect the case. Even if there were no presumption under section 7, the convictions would stand on the evidence of Abdul Satar and Rama. They state that accused No. 16 was paid for the use of the house and that he kept watch outside, that *'nal'* was taken and that accused No. 12 was a sharer in the business of gambling.

I consider that the evidence of these two witnesses is admissible. Section 10 implies that the Magistrate has power to examine as witnesses persons arrested and brought before him under section 6 (*b*). The section can apply to no other but persons so arrested. The whole procedure of the Gambling Act is a special procedure and overrides the general law of procedure enacted in section 342, Criminal Procedure Code, whenever it is inconsistent with it.

The corresponding section of the English Act contains a provision even more drastic than section 10, for the Justice of the Peace is empowered to compel the persons arrested to take an oath and give evidence as to the unlawful gaming.

I would, therefore, confirm the convictions of both the applicants, accused No. 12, Liladhar, and accused No. 16, Motilal. I would also confirm the sentence of Liladhar, but as there is no previous conviction against accused No. 16, Motilal, I think the maximum punishment is not asked for. I would reduce the sentence in his case to rigorous imprisonment for one month.

FAWCETT, A. J. C.—The Magistrate in convicting the applicant, Motilal, under section 4 of the Bombay Prevention of Gambling Act, 1887, has mainly relied on the evidence of Abdul Satar and Rama against him. These two persons were among those arrested and brought before the Magistrate in accordance with section 6 (*b*) of that Act, and it is contended that they were accused persons and their evidence was inadmissible, as they had neither been tried and convicted or acquitted, nor had the prosecution been withdrawn against them under section 494 of the Criminal Procedure Code. It appears from the proceedings that in the Police report sent with the accused it was requested that Abdul Satar should be examined as a witness.

under section 10 of the Act, and the Magistrate recorded that both he and Rama were "struck off" under that section. The point, then, for determination is whether the provisions of that section enable the Magistrate to examine any of the persons brought before him in accordance with section 6 (*b*) of the Act or whether all such persons must be treated as accused persons, who cannot be examined unless they have been tried or the prosecution has been withdrawn against them.

In my opinion the former is the correct conclusion. Section 10 follows with some verbal changes the provisions of section 3 of the Gambling Act, 1845, and 9 Vict. c., 109, and similar provisions are contained in the Gaming House Act, 1854, (17 and 18 Vict. c. 38) where, however, section 3 of the Act of 1845 is split into two sections 5 and 6 (with some additional provisions). Section 5 expressly enacts that "it shall be lawful for the Justices before whom any persons shall be brought who have been found in any house, room, or place entered in pursuance of any authority granted under the provisions of the said Act, 8 & 9 Vict. c. 109, to require any of such persons to be examined on oath and give evidence touching any unlawful gaming in such house, room, or place" etc. Section 6 contains the remaining provisions of section 3 of the Act of 1845. The provisions of section 5 of the Gaming Houses Act, 1854, may in these circumstances clearly be referred to as a "parliamentary exposition" of the meaning of the first part of section 3 of the Act of 1845, on which the provisions of section 10 of the Bombay Act are based. *Cf.* Hard-Castle on Statutory Law, 3rd Edition, page 155. But even without this aid to the interpretation of the earlier enactment, the power to examine as a witness any person found in an alleged common gaming-house is clearly implied in the words "who shall be examined as a witness by or before a Magistrate.....touching such gaming." The maxim "*ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest*" applies to the case. In my opinion, therefore, section 10 confers on the Magistrate power to examine as witnesses any of the persons who may be brought before him in accordance with section 6 (*b*), so long as it does on the trial of any charge against the owner, keeper or occupier, or other person having the care or management of any common gaming-house. In this case Abdul Satar and Rama were examined on such a charge against the applicant, and their evidence against him is quite admissible, inspite of the provisions of the Criminal Procedure Code to the contrary. As said in *Emperor* v. *Kaitan Duming Fernad*(2): "Where the Gaming Act has provided for the manner, or place of investigating or inquiring into any offence under it, its provisions must prevail and the Criminal Procedure Code must give way." It is simply an instance of the ordinary rule "*generalia specialibus non derogant.*" The legislation contained in the Bombay Prevention of Gambling Act, 1887, is based on analogous English legisation; and sections 7 and 10, which go against the provisions of ordinary law, are special provisions enacted in order to get over the difficulty of obtaining evidence against keepers and frequenters of gaming houses. Thus 25 Geo. 2, c. 36, s. 8 recites, " And whereas, by reason of the many subtle and crafty contrivances of persons keeping bawdy houses, gaming-houses, or other disorderly houses, it is difficult to prove who is the real owner or keeper thereof, by which means many notorious offenders have escaped punishment ; be it enacted, " etc. Again the preamble of the Gaming Houses Act, 1854, which contains the provisions on which section 10 of Bombay Act IV of 1887 is based, recites that "the keepers of common gaming-houses contrive, by fortifying the entrances to such houses or by other means, to keep out the officers authorised to enter the same until the instruments of gaming have been removed or destroyed, so that no sufficient evidence can be obtained to convict the offenders, who are thereby encouraged to persist in the violation of the law. "

The evidence of Abdul Satar and Rama was, therefore, admissible on the charge against the applicant, Motilal ; and the objection raised is, therefore, no sufficient ground for interfering with the Magistrate's finding, so far as it is based on that evidence. Their evidence taken in conjunction with the other circumstances mentioned by the Magistrate, which corroborate that evidence, supplies sufficient legal material for his finding that Motilal did use the house for the purpose of a common gaming-house.

(2) 31 B. 438 at p. 445 9 Bom. L. R. 695; 6 Cr. L. J. 60.

The applicant has been convicted under section 4 and not section 5 of the Act. It is immaterial, therefore, whether he was present or not when the house was raided. The evidence of Abdul Satar and Rama that he was watching outside the house is, consequently, no obstacle to his conviction. He was in fact assisting in conducting the business, within the meaning of clause (*c*) of section 4.

It is next objected that the Magistrate erred in not allowing the defence access to the complaint, on which the special warrant under section 6 was issued. The allegation is that, if it had been produced, the defence might have been able to show that the house complained against was not the one actually raided, but another. On the other hand the Public Prosecutor asserts that the whole object of this request was to ascertain who was the informer. Whichever may have been the actuating motive of the request, I can see no sufficient ground for not giving full operation to the provisions of section 125 of the Evidence Act, which is a general provision applicable as much to cases under the Gambling Act as any other cases. I can find nothing in that Act which either expressly or impliedly overrides the provisions of section 125. I do not think the mere fact that under section 5 the complaint must be on oath implies that it must be disclosed, in spite of the provisions of section 125 of the Evidence Act. I am aware that it was ruled otherwise in Criminal Ruling No. 5 of the Sadar Court for June 1902, but I would respectfully dissent from the view there taken. That view is based on the proposition that the complaint under section 6 is a formal complaint used as evidence against an accused person in a criminal proceeding, to which the provisions of section 125 of the Evidence Act cannot apply. It is said to be used as evidence in this way, because the provisions of section 7, involving a departure from the ordinary principle of law which imposes on the prosecution the duty of proving all essential elements of an offence, are based on the presumption that *prima facie* proof has already been furnished in a judicial, though *ex parte*, proceeding of the fact that the house is a common gaming-house within the definition, and "the proper construction of section 7 of the Act is that the warrant issued is *prima facie* evidence that the house is a common gaming-house." But the presumption allowed by the section is not based on the mere issue of the warrant or on the complaint and inquiry under section 6. It is based on evidence that when the house was entered in pursuance of the warrant, cards, dice or other instruments of gaming were found in the house. Without such evidence, however strong might be the grounds on which the warrant was issued, the presumption in question cannot arise. The warrant merely enables the house to be unexpectedly entered, so as to obtain evidence; it is not itself any evidence of the truth of the allegation that the house entered is a common gaming-house. Nor can the complaint made under section 6 be in any way used as evidence at the trial, except perhaps to corroborate or discredit the person who actually made it, should he be called as a witness. I, therefore, entirely disagree with the grounds on which it is said that section 125, Evidence Act, does not apply to such a complaint.

The rule embodied in section 125, Evidence Act, is one based on public policy. As said by Lord Chief Justice Eye in the leading case of *Rex* v. *Hardy* (3), (cited in Taylor's Law of Evidence. 5th Edition, Volume 1, page 830): "It is perfectly right that all opportunities should be afforded to discuss the truth of the evidence given against a prisoner; but there is a rule, which has universally obtained on account of its importance to the public for the detection of the crimes, that those persons, who are the channel by means of which detection is made, should not be unnecessarily disclosed." In *Marks* v. *Beyfus* (4), Lord Esher, M. R., says: "I do not say it is a rule which can never be departed from: if upon the trial of a prisoner the Judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to shew the prisoner's innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man cannot be condemned when his innocence can be proved, is the policy that must prevail. But except in

(3) 24 St. Tr. 751.

(4) (1890) 25 Q. B. D. 494 at p. 498; 59 L. J. Q. B. 479.

that case, *this rule of public policy is not a matter of discretion: it is a rule of law* and as such should be applied by the Judge at the trial, who should not treat it as a matter of discretion whether he should tell the witness to answer or not." Accordingly (page 500) he held that even if the Director of Public Prosecutions had been willing, to answer the questions put to him as to the persons from whom he had received information and the nature of the information received, the Judge ought not to have allowed him to do so. A similar view was taken by Wills, J., in *Hennessy* v. *Wright* (5), and the learned authors Messrs. Woodroffe and Ameer Ali, in their Law of Evidence, 5th Edition, page 811, are of opinion that, upon these authorities and upon a consideration of the foundation of the rule, the protection afforded by this section 125 does not depend upon a claim being made and that it is the duty of the Judges, apart from objection taken, to exclude the evidence. I am content to follow this opinion, which is supported by such good authority as well as by the second proviso to section 165, Evidence Act; and I think it is a rule which is, at any rate, clearly appropriate in regard to gambling cases, where an informer will naturally incur considerable odium. If he can be ascertained in all such cases by the simple expedient of making some excuse for the production of the complaint on which the warrant was issued, the obvious result will be that informers will be less ready to come forward and offences under the Act will be more difficult to detect than they are even as it is. A mere suggestion that the complaint would show that the house raided was not the one referred to in the complaint is not sufficient to justify any departure from the rule embodied in section 125, Evidence Act, and I think the Magistrate was perfectly right in refusing to order the production of the complaint.

Even if it had been urged that there had been no complaint or that it was one not *on oath*, and so the warrant was not a legal one under section 6 of the Act, still I do not think that the complaint should, therefore, necessarily be put on the record. In my opinion, in view of section 125, Evidence Act, this should be avoided. The officer who issued the warrant could be examined on this point without the informer's name being disclosed, and the Court could, if necessary, inspect the complaint under section 162, Evidence Act. In any case I think it should not be put on the record without giving an opportunity to the Police Officer or Magistrate before whom the information was laid to object to its production under section 125, Evidence Act.

In support of the view taken above, I would also cite the remarks of Field, J., in *Blake* v. *Beech* (6). That was a case where a house was entered and searched on information of its being used as a common gaming-house under section 3 of the Gaming Act, 1845, (8 & 9 Vict., c. 109), and the question was whether a separate information (apart from that on which the warrant was issued) should have been laid against the accused. Field, J., in answering this in the negative says (at page 115):—"The Statute in question in this case does in fact, require that the warrant to search the premises and apprehend the persons found therein, which is to be granted upon an *ex parte* application, shall be preceded by a complaint upon oath, as is almost, if not quite, invariably the case whenever a Magistrate is required upon an *ex parte* application to issue a warrant of apprehension. But in the present instance, inasmuch as the offence to be dealt with is one, like that of gaming, usually committed in secret and under circumstances rendering it ordinarily difficult to say beforehand what the precise offence is, and who are the persons who may be found committing it, the Statute seems to me to substitute, for the ordinarily requisite statement in an information or complaint of the specific person and offence, the general allegation of a suspicion that particular premises are used for the purpose of committing the offence, in order that by means of the entry and seizure of cards and lists, it may be discovered whether any and what offence has been committed, and who are the persons, if any, committing it." It is true that in that particular case the majority of the Court held that the accused's conviction was wrong, but that was

(5) 21 Q. B. D. 509; 57 L. J. Q. B. D. 530; 59 L. T. 823; 53 J. P. 52.

(6) (1876) 45 L.J.M.C. 111; 1 Ex. D. 320; 34 L.T. 764.

based (1) on the fact that the accused was charged with a different offence to that alleged in the information on which the warrant was issued and (2) on certain sections of the Betting Act of 1853 (16 & 17 Vict., c. 119), the Act under which the accused was charged, which showed that proceedings by information and summons were contemplated. Neither of these considerations apply to the present case. And it may be noticed that section 10 of the Bombay Act in reproducing the terms of section 9 of the English Act of 1845 is careful to substitute the words "on the trial of any charge" for the words "on the trial of any indictment or information," which might support the view that the information was the *foundation* of the proceedings, and should, therefore, be before the Court. Under clause (*b*) of section 6 of the Bombay Act, the Police Officer authorized by the especial warrant under that section is empowered to bring before a Magistrate all persons whom he finds in the house entered and searched and on their appearance before the Magistrate the latter has jurisdiction to try them in accordance with the ordinary procedure for the trial of summons cases, without any regular complaint. Field, J., in the case of *Blake* v. *Beech* (6) (see at page 116) points out that the same can be done under the analogous English Law; but the case is stronger under the Bombay Act by reason of the substitution of the word 'charge' in section 10 already referred to.

The fact that under section 6 the complaint has to be *on oath* does not, in my opinion, affect the question at issue. This merely follows the English Law, which requires the information to be on oath before a warrant is issued: and the reason is that this was the ordinary rule in the case of warrants, as stated by Field, J., in the remarks already cited. But an exception is made in section 6 of the English Act of 1845, under which in London a warrant can issue on the mere report in writing by a Police Superintendent that there are good grounds for believing, and that he does believe, a house to be kept as a common gaming-house. It is quite clear that the Bombay Act requires the complaint to be on oath merely as an additional guarantee of the truth of the complaint, and that it is not intended to imply that the complaint is a document on which proceedings against any persons that may be arrested under the warrant are based. These proceedings are based on the fact of their arrest and production before the Magistrate, and not on the complaint which merely was the basis of the warrant which led to their arrest.

Nor am I impressed by the argument that section 7 of the Act requires that the persons should have been found in any house, etc., "under warrant issued under the provisions of the last preceding section." In order to satisfy this condition of the circumstances which justify the presumption allowed by section 7, it is, in my opinion, quite sufficient for the warrant to be produced before the Court. As I have already pointed out, this is not the main circumstance which justifies the presumption, and if any question arises as to the complaint not having been made *on oath* or the warrant being not in conformity with the complaint, the Court can satisfy itself on the point without infringing the provisions of section 125 of the Evidence Act.

No doubt the form of warrant prescribed by the English Act of 1845 expressly recites the name of the person upon whose sworn information the warrant is issued; but the Bombay Gambling Act contains no corresponding provision, and in the somewhat analogous case of a warrant under section 98 of the Criminal Procedure Code the form of warrant contained in No. IX of Schedule V, though it recites the fact of the required information being laid, omits all references to the informant's name.

In *Abdullah* v. *Emperor* (1), it has been held that the complaint on oath is not a *necessary* part of the evidence for the prosecution. For the reasons given above, I would go further and say that it is not a *proper* part of that evidence, and that (in accordance with the rule adopted in England) its production should not be allowed by the Court, unless it is shown that this is necessary or right for the purpose of establishing the prisoner's innocence. In this particular case the maxim "*omnia rite esse acta præumuntur*" justifies the Court in presuming that th

warrant followed the complaint in its description of the house alleged to be used as a common gaming-house; and a mere suggestion *contra* is no good ground for acquiring the production of the complaint.

Even, however, if the Magistrate committed an error in not requiring its production, this would be no good reason for our interference in revision, unless the error occasioned a failure of justice (section 537, Criminal Procedure Code), and there is no ground whatever for saying this is the case.

I would, therefore, confirm the conviction in the case of the applicant Motilall as well as in that of the applicant Liladhar, the objections to whose conviction are based on similar grounds. The sentence of one month's rigorous imprisonment imposed on Liladhar is confirmed, but for the reasons given in the learned Judicial Commissioner's judgment the sentence of three months' rigorous imprisonment imposed on Motilal is reduced to one month.

Convictions upheld; Sentence modified.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 678 OF 1914.
CRIMINAL REVISION PETITION No. 572 OF 1914.
March 26, 1915.

Present:—Mr. Justice Kumaraswami Sastri.

In re B. DASAPPA—ACCUSED No. 1—PETITIONER.

Penal Code (Act XLV of 1860), ss. 217, 411—Police Officer retaining property found in search for theft—Property not part of stolen property—Offence—Criminal Procedure Code (Act V of 1898), s. 523—Failure to report.

A Police constable, who retained for himself a piece of gold found in a search for stolen property but not proved to be part of the stolen property and failed to report his possession to his superior officers under section 523 of the Code of Criminal Procedure, is guilty of an offence under section 217 of the Penal Code. [p. 86, col. 1.]

Bomanjee Cowasjee's case, 34 I. A. 55; 11 C. W. N. 370; 5 C. L. J. 123; 9 Bom. L. R. 3; 17 M. L. J. 67 (P. C.); 2 M. L. T. 96; 34 C. 129; 5 Cr. L. J. 50, followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Joint Magistrate of Coondapur, in Criminal Appeal No. 53 of 1914, preferred against that of the Tahsildar, second Class Magistrate of Udipi, in Calendar Case No. 34 of 1914.

Mr. *B. Sitarama Rao*, for the Petitioner.

The *Public Prosecutor*, for the Government.

ORDER.—The petitioner has been convicted under sections 217 and 411 of the Indian Penal Code. The grounds urged in revision are:—

(1) that there is no evidence that the property was stolen property, and

(2) that the accused did not disobey any direction of the law.

Both Courts found that the petitioner who was a Police constable, having received a complaint of theft, held an investigation on his own responsibility (without reporting the fact that he received a complaint to his superior officers), got possession of a piece of gold (said to be a portion of the stolen property) and only delivered it to the Sub-Inspector when he was about to be searched.

There can be little doubt that the accused took possession of a bit of gold during his investigation and the first question is, whether it was part of the stolen *kasitali*. Kittachari, P. W. No. 2, who was accused of the theft denies that the piece, M. O. No. 1 which was found on the petitioner was part of the stolen property. He retracts the statements in Exhibit D and having regard to the ruling of the Privy Council in *Bomanjee Cowasjee's* case (1), it is difficult to see how Exhibit D can be used for any purpose except to contradict the evidence of the witness. The retracted statement, Exhibit D, cannot be taken to represent the truth and a conviction based thereon. There is nothing in the prosecution evidence to prove that the piece of gold found in the possession of the accused was part of the stolen *kasitali*. The second Class Magistrate speaks in paragraph 3 of admissions made by the accused, that P. W. No. 2 had stolen a *kanti* and melted it. Defects in the prosecution evidence cannot be supplied by admissions by the accused during the

(1) 34 I. A. 55; 11 C. W. N. 370; 5 C. L. J. 123; 9 Bom. L. R. 3; 17 M. L. J. 67 (P. C.); 2 M. L. T. 96; 34 C. 129; 5 Cr. L. J. 50,

course of the argument, and in the present case the admissions referred to in paragraph 3 of the Magistrate's judgment do not go to show that the piece M. O. 1, which nobody identifies as part of the *kasitali* was stolen property. The conviction under section 411 cannot stand.

As regards the conviction under section 217, I am of opinion that the accused, whose duty it was, under section 523 of the Criminal Procedure Code, to see that the recovery of M. O. 1 was reported to the Magistrate either directly by himself or through his superior officers, deliberately failed to do so. It is clear that he did not report the recovery of M. O. 1 which he got from P. W. No. 3 during the search. The evidence in the case and the conduct of the petitioner show that his object was to screen the culprit and appropriate the piece of gold found.

I set aside the conviction under section 411, but confirm the conviction under section 217 and reduce the sentence to three months' rigorous imprisonment.

Conviction partly set aside: Sentence reduced.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 890 OF 1914.

April 3, 1915.

Present:—Justice Sir Donald Johnstone, KT., and Mr. Justice Shadi Lal.

DAULAT RAI—CONVICT—APPELLANT

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 409—Managing Director of Bank borrowing money in his own name—Subsequent transfer of liability to Bank, whether amounts to criminal breach of trust—Adequacy of motive.

The accused, the Managing Director of the Hindustan Bank, executed in favour of the Amritsar Bank, four *hundis* for an aggregate sum of Rs. 5,000 payable six months after date and after deducting the discount he received the balance Rs. 4,772-11 and got it credited in his floating account with the Hindustan Bank. Some months before due date the accused caused entries to be made in the books of the Hindustan Bank by which the liability for re-payment on the date of maturity of the *hundis* was transferred from himself to the Hindustan Bank:

Held, (1) that the prosecution had failed to prove that the accused was guilty of the offence of criminal breach of trust; [p. 87, cols. 1 & 2.]

(2) that the motive for the crime was under the circumstances of the case wholly inadequate; [p. 87, col. 2.]

(3) that the evidence on the record led to the inference that the loan was contracted *ab initio* for the Hindustan Bank for meeting immediate or prospective demands. [p. 87, col. 2; p. 88, col. 1.]

Appeal from an order of the Magistrate, first Class, Multan, exercising enhanced powers under section 30 of the Criminal Procedure Code, dated the 4th November 1914, convicting the appellant.

Messrs. *Kirkpatrick*, *Parker*, *Obedulla* and *Rughunath Sahai*, for the Appellant.

Mr. *Broadway* (Assistant Legal Remembrancer), for the Crown.

Mr. *M. N. Banerji*, for the Liquidator.

JUDGMENT.—The appellant, Daulat Rai, who was the Managing Director of the Hindustan Bank, Limited, Multan, now being wound up by the Court, was prosecuted at the instance of the Liquidator of the Bank for committing criminal breach of trust in respect of the money of the Bank entrusted to him in his aforesaid capacity. The Magistrate found the accused guilty of the offence with which he was charged, and sentenced him under section 409, Indian Penal Code, to suffer rigorous imprisonment for five years and to pay a fine of Rs. 5,000. Against this order of conviction the convict has preferred through Counsel an appeal to this Court, and after hearing Mr. Kirkpatrick for the appellant and Mr. Broadway for the Crown, and examining the evidence on the record and the law bearing on the subject, we have arrived at the conclusion that the guilt of the appellant has not been established and that this appeal must be accepted.

The main facts of the case do not admit of much dispute and may be stated in a few words. It appears that Daulat Rai, either in his personal capacity as alleged by the prosecution, or in his capacity as the Managing Director of the Bank, as urged by the defence, was in a great need of money in the beginning of 1913, that, on the 24th of January 1913, he executed in favour of the Amritsar Bank, Limited, four *hundis* for an aggregate sum of Rs. 5,000, payable six months after date, and that after deducting the discount, amounting to Rs. 227-5, he received the balance, Rs. 4,772-11, on different dates from the said Bank. It is quite clear

that this amount was credited to Daulat Rai in his floating account with the Hindustan Bank on the following dates:—

		Rs.	a.	p.
(1)	On 31st January 1913. ...	1,528	0	0
(2)	On 10th February 1913 ...	1,528	0	0
(4)	On 12th February 1913 ...	1,716	11	0

The due date of the *hundis* was the 24th July 1913, but some months before that date Daulat Rai caused on the 2nd of May 1913 entries to be made in the books of the Hindustan Bank by which the above-mentioned sum of Rs. 4,772-11-0 was debited to him in his account and Rs. 5,000 were credited to the Amritsar Bank. The result of these entries was that the liability for payment of Rs. 5,000 on the date of the maturity of the *hundis* to the Amritsar Bank was transferred from Daulat Rai to the Hindustan Bank and that the latter in lieu thereof debited Rs. 4,772-11-0 to Daulat Rai in his account. The prosecution contend that this transfer of liability caused the Hindustan Bank a loss, and Daulat Rai a gain, of Rs. 227-5-0, and that as this action of the latter was dishonest, he, as the trustee of the funds of the Bank, has been guilty of the offence of criminal breach of trust. We may at once correct a mistake made by the prosecution by pointing out that as the loan transaction was transferred nearly three months before the due date of the *hundis*, the loss, if any, resulting to the Hindustan Bank amounted, not to the sum specified above, but to that sum *minus* the discount for the period from the 2nd May 1913 to the 24th July 1913. This loss does not exceed Rs. 120 in all.

The version of the defence, on the other hand, is that the loan was from the very beginning taken for the Hindustan Bank, that Daulat Rai executed the *hundis* in his personal capacity because the Amritsar Bank did not consider the Hindustan Bank a safe concern and was not, therefore, prepared to accept its pro-notes, that the money borrowed was used for the purposes of the latter Bank, and that the entries were made on the 2nd of May 1913 not with the intention of carrying out any dishonest scheme on the part of Daulat Rai, but to give effect in the books of the Bank to the real nature of the transaction.

We have considered these rival theories and are of opinion that the prosecution have failed to substantiate their version and that there is a good deal to be said in favour of the defence theory. To start with, we observe that the sole reason, which the prosecution could assign for the alleged dishonest act on the part of Daulat Rai, was the gain of Rs. 227-5-0, or to be more correct, of nearly Rs. 120. Now we regard this as a very improbable explanation and we are not at all convinced that a man of Daulat Rai's position and resourcefulness would resort to the commission of an offence of this nature simply with the object of obtaining the paltry sum specified above. The motive for the crime is, in our judgment, wholly inadequate.

The evidence on record conclusively establishes that out of the money which was borrowed from the Amritsar Bank, Rs. 1,716-11-0 were used by the Lahore Branch of the Hindustan Bank and that the balance was remitted to Multan. Though the entire sum was credited to Daulat Rai, an examination of his floating account with the Hindustan Bank shows that on the 31st of January 1913, before the receipt of any money from the Amritsar Bank, there was a balance of Rs. 225-6-9 to his credit and that on the 2nd of May 1913, after cancelling the debt and credit entries for Rs. 4,772-11-0, Daulat Rai was a debtor to the extent of Rs. 455-1-4. It is, therefore, clear that out of the money advanced by the Amritsar Bank he utilised only Rs. 455-1-4 to his private purposes and that the rest of the money remained all the time with the Hindustan Bank and after the 2nd of May 1913 was at its complete disposal. In fact, as observed already, part of it, *viz.*, Rs. 1,716-11-0 was actually used by the Lahore Branch of the Bank.

From the above, an inference may be drawn that the loan was contracted *ab initio* for the Hindustan Bank, and this receives further support from the evidence of Notan Das, P. W. No. 2, a clerk of the Amritsar Bank, who deposes to the fact that his Bank did not want to advance money to the Hindustan Bank and that Hari Chand told him that money was urgently required for the latter Bank. So much for the defence theory.

The prosecution assert that in January 1913, Daulat Rai needed money for some private purpose of his own and accordingly took the loan from the Amritsar Bank, and

that when later on he found that he did not require the money, he caused the entries to be made on the 2nd of May 1913 to get rid of his liability. It is to be observed that the alleged necessity, which compelled Daulat Rai to negotiate this loan, has not been disclosed, and even if we assume the existence of some pressing need which the complainant has been unable to discover, we fail to understand why Daulat Rai should cash the *hundis* by paying the discount before he actually required the money and should thereby suffer a loss of interest. One could expect that he would keep the *hundis* in his possession and present them for payment to the Bank just when he wanted the cash. Instead of adopting this reasonable procedure he, it is to be noted, received the entire consideration *minus* the discount and placed the money so received to his credit in his floating account with the Hindustan Bank. This does not strike us as a businesslike method and the reasonable explanation appears to be that the money was borrowed for meeting immediate or prospective demands on the Bank.

Our attention has also been drawn by the prosecution to the fact that at the end of the half year Daulat Rai got credit in his floating account for Rs. 16-8 on account of interest on the three items aggregating Rs. 4 772-11 and it is urged that this could not have been the case if the money had really belonged to the Bank from the very beginning. The point is not of much importance and the answer may be easily given. It is probable that, in accordance with the usual practice, the clerk of the Bank at the end of the half year took the account as it stood, calculated the interest on the different items, and made a credit entry accordingly. It is not shown that Daulat Rai was cognisant of the fact or that he ever authorized the clerk to do so.

These are the salient points of the case and after considering the *pros et cons* we are unable to sustain the charge on the slender material placed on the record by the prosecution. No doubt, the straightforward course for Daulat Rai to adopt was to credit the Amritsar Bank with the money as soon as it was received, but it may be that he honestly believed that as in the books of the Amritsar Bank he was himself shown as a debtor, the money should, to make the entries consistent, be credited to *him* in the books of the Hindustan Bank. Be that as it may, the evidence on the record is insufficient to justify a conviction under section 409, Indian Penal Code. We accordingly accept the appeal, set aside the conviction and sentence and acquit the appellant.

Appeal accepted.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 848 OF 1914.
CRIMINAL REVISION PETITION No. 701 OF 1914.
March 12, 1915.

Present:—Mr. Justice Kumaraswami Sastri.

In re MIR HYDER SAHEB—ACCUSED No. 2 —PETITIONER.

Penal Code (Act XLV of 1860), ss. 109, 352—Inducing others to beat without taking part—Abetment.

A person who merely says "beat" but does not take any part himself, can only be convicted of abetment of an offence under section 352 of the Penal Code.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Joint First Class Magistrate of Madanapalli, in Criminal Application No. 56 of 1914, preferred against that of the Second Class Magistrate of Madanapalli, in Calendar Case No. 367 of 1914.

Mr. *E. R. Osborne*, for the Petitioner.

The *Public Prosecutor*, for the Government.

ORDER.—All that appears from the evidence is that 2nd accused, who was sitting on the *pial*, said "beat." I am of opinion that the 2nd accused on the evidence can only be convicted of abetment of an offence under section 352 of the Indian Penal Code. The particular intention required to be proved before a conviction under section 353 or 355 can be sustained has not been made out. I convict the accused of abetment of an offence under section 352 and alter the sentence into one of imprisonment for the period he has already undergone and a fine of Rs. 100. As the fine has been paid, it is not necessary to fix any imprisonment in default.

Sentence reduced.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 117 OF 1915.

March 13, 1915.

Present:—Mr. Justice Chamier.

BHAJAN TEWARI—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 70—Local Government Rules under section 70, rr. 30, 31, 32—Execution—Power of Assistant Collector to order prosecution—Jurisdiction—Penal Code (Act XLV of 1860), s. 182.*

An Assistant Collector has no powers of either Civil, Revenue or Criminal Court while receiving an application under rule 30 of the rules framed by the Local Government under sections 68 and 70 of the Code of Civil Procedure, 1908. Hence if an offence as defined in section 182 of the Penal Code is committed in the course of making the application under the above rule, the Assistant Collector has no jurisdiction to order prosecution. [p. 90, cols. 1 & 2].

Criminal revision against an order of the Assistant Collector of Basti.

Mr. *R.K. Sorabji*, for the Petitioner.

The *Assistant Government Advocate*, for the Crown.

JUDGMENT.—This is an application for revision of an order passed by an Assistant Collector of the first Class in the Basti District directing the prosecution of the applicant for an offence under section 182, Indian Penal Code. A question might arise as to whether this application should not have been presented under section 115 of the Code of Civil Procedure and not under Chapter XXXII of the Code of Criminal Procedure. But in the view I take of the case, it is unnecessary to discuss the question.

It appears that one Bindhachal Tewari obtained a decree for money against Bhajan Tewari and others in the Court of the Munsif of Basti. In execution of that decree immovoable property was ordered to be sold and the execution of decree was transferred under section 68 of the Code of Civil Procedure to the Collector of Basti. On October 23rd, 1914 a sale took place and the property was knocked down to one Ramphal Misra. On November 3rd 1914 the judgment-debtor presented a petition under rule 30* of the rules made by the Local Government under sections 68 and 70 of the Code of Civil Procedure praying for permission to pay the sum decreed and five per cent. of the purchase money. Next day he presented a petition in which he said he had paid in the sum required by rule 30, and he prayed that the sale might be set aside. On November 5th he put in a petition, saying that some unauthorized person had paid the money into the treasury and he charged Bansi and others with having compelled him to put his thumb impression on a blank paper which was subsequently used for the petition under rule 30. It is quite clear that the Assistant Collector to whom these applications were presented was a public servant, and I will

*Rule 30. (1) Where immoveable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing with the Collector:—

(*a*) for payment to the purchaser, a sum equal to 5 per cent. of the purchase-money; and

(*b*) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

(2) where a person applies under Rule 31 to set aside the sale of his immoveable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

(3) nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale.

Rule 31. Where any immoveable property has been sold in execution of a decree, the decree-holder or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Collector to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it:

Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Collector is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

Rule 32. (1) Where no application is made under rule 30 or rule 31 or where such application is made and disallowed, the Collector shall make an order confirming the sale, and thereupon the sale shall become absolute.

(2) Where such application is made and allowed, and where in the case of an application under Rule 30 the deposit required by that rule is made within 30 days from the date of sale, the Collector shall make an order setting aside the sale:

Provided that no order shall be made unless notice of this application has been given to all persons affected thereby.

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made.

assume that a charge might properly be brought against Bhajan Tewari under section 182, Indian Penal Code, in respect of the statements made by him in his third petition. On behalf of Bhajan it is, however, contended that the Assistant Collector who ordered his prosecution had no power to do so not being a Civil, Criminal or Revenue Court. The Assistant Collector has the powers of a Magistrate of the first Class; but the application was not made to him as a Magistrate; it is clear that it was not made to him as a Revenue Court, and it is beyond question that even if the officer in question could be regarded as a Criminal or Revenue Court, the alleged offence was not committed before him or brought under his notice in the course of any judicial proceeding of a Criminal or Revenue Court. The question is whether the Assistant Collector was, or had the powers of, a Civil Court in respect of the application made by Bhajan Tewari. The rules made by the local Government above referred to contain provisions authorizing a Collector to make over to any Assistant Collector of the first Class any of the powers and duties conferred by the rules upon the Collector with certain exceptions. It seems that in respect of powers and duties delegated by the Collector to an Assistant Collector of the first class the latter may be a Civil Court, for section 70 of the Code of Civil Procedure authorizes the Local Government to make rules conferring upon a Collector or any gazetted subordinate of the Collector all or any of the powers which the Court, that is, the Civil Court, might have exercised in the execution of the decree, if the execution had not been transferred to the Collector. Among the powers of a Collector which may not be delegated to an Assistant Collector under the rules are the power to order a sale under paragraph (1) (c) and certain other paragraphs of the third Schedule to the Code of Civil Procedure and the power to confirm a sale or set aside a sale under rule 32 of the rules made by the Local Government. It thus appears that the Assistant Collector who has ordered the prosecution of the applicant had not power either to sell the property as a Court or to confirm the sale or to set it aside. The application in respect of which the prosecution has been ordered was presented to the Assistant Collector. Possibly no objection could be taken to this; but the Assistant Collector could not deal with the application. He could only pass it on to the Collector who would then dispose of it with the powers of a Civil Court. It appears to me that so far as the application in question was concerned, the Assistant Collector had no powers of a Civil Court and the application was not presented to him in the course of a judicial proceeding. That being so, I must hold that the Assistant Collector had no power to order the prosecution of the applicant. I, therefore, set aside his order.

Order set aside.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 613 OF 1914.
CRIMINAL REVISION PETITION NO. 519 OF 1914.
March 11, 1915.

Present:—Mr. Justice Seshagiri Aiyar.

In re VAYALAPPRA KELAPPAN NAIR AND OTHERS—ACCUSED—PETITIONERS.

Irregularity—Admission of evidence, when writing judgment—Charge of theft, assertion of right in answer to—Bona fides, *how negatived.*

A Magistrate cannot, after a trial is closed and while he is writing his judgment, admit in evidence a document without giving the accused an opportunity of raising objections to its relevancy or admissibility. [p. 91, col. 1.]

There cannot be a *bona fide* assertion of right in answer to a charge of theft when the accused knew that he had no possession of the property and gathered a produce grown by the complainant thereon. [p. 91, col. 1.]

Pandita v. Rahimulla Akundo, 27 C. 501; 4 C. W. N. 480, followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate of Tellicherry, in Criminal Application No. 47 of 1914, preferred against that of the Court of the second Class Magistrate of Payyanur, in Calendar Case No. 23 of 1914.

Dr. *S. Swaminadhan*, for the Petitioner.

The Acting Public Prosecutor, for the Government.

Mr. *C. Madhavan Nair*, for the Complainant.

ORDER.—Counsel for petitioners and the counter-petitioner have argued this case with some warmth before me. I have come to the conclusion that no case has been made out against the 2nd and 3rd accused. They assisted the first accused in gathering the pepper and there is nothing to suggest that they did not believe that the first accused had a right to the pepper. The conviction and sentence as regards these two accused must be set aside and the fine must be refunded to them.

The case of the first accused stands on a different footing. A good portion of the judgment of the second Class Magistrate is taken up with the discussion of the title relating to the 70 cents in dispute. The Appellate Magistrate fortunately has not followed this procedure. A Magistrate will not find it easy to decide the title of the contending claimants when the question is incidentally raised in a theft case. Moreover the documents produced in this case are not easily reconcilable. The second Class Magistrate has also admitted a new document in evidence when he was about to write a judgment without giving the accused an opportunity of raising objections to its relevancy or admissibility.

Notwithstanding these irregularities, he has given his finding on the evidence regarding possession. The Appellate Court has confirmed that finding, although the Appellate Magistrate has committed a few errors in the statement of the case. That finding, it is clear to my mind, negatives *bona fides* on the part of the 1st accused in gathering the pepper. It has to be remembered that the 1st accused denied that he went upon the premises. This again shows that his claim to the pepper is not a *bona fide* one: The decision in *Pandita* v. *Rahimulla Akundo* (1) shows that Courts will not conclude in favour of the *bona fide* assertion of a right when the accused knew that he had no possession of the property and gathered a produce grown by the complainant. I confirm the conviction of the 1st accused. Dr. Swaminadhan's argument that the assault was justifiable cannot be accepted, as the 1st accused had no right to be upon the *paramba*.

(1) 27 C. 501; 4 C. W. N. 480.

I think a fine of Rs. 100 will meet the ends of justice. I reduce the fine accordingly. The other Rs. 100 will be refunded to the 1st accused.

Revision allowed; Sentence reduced.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 60 OF 1915.

March 26, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Piggott.

RASUL KHAN AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 149, 302—Assault—Death caused by assault—Common object—Offence.

In an attempt to rescue certain cattle from being driven to the pound one of the persons of the accused party ordered the others to use their *lathis* and beat the other party. The *lathis* were at once used with the result that one of the opponents died:

Held, that the offence was committed in furtherance of the common object of the party and each one of the accused was guilty of an offence under section 302 of the Penal Code. [p. 92, col. 1.]

Criminal appeal from an order of the Sessions Judge of Aligarh.

Mr. *C. Dillon* (with him Mr. *Muhammad Hameed Ullah*), for the Appellants.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—This is an appeal by nine persons against convictions under section 302 read with section 149 of the Indian Penal Code and sentences of transportation for life. The main facts of the case are proved beyond all possible doubt. The cattle of the accused's party were trespassing and apparently doing considerable damage to the crop growing in a field belonging to the complainants. The complainants' party drove off the cattle and were bringing them to the pound. Some twelve or thirteen persons rushed down armed with *lathis* to rescue the cattle. Ranne Khan, appellant, at once gave the command to rescue the cattle and to use their *lathis*. The appellants' party at once proceeded to carry out the order. One of the complainants' party, a man named Lekha, ran away, for

about ten paces pursued by three men, all of whom are amongst the appellants, namely, Rasul Khan, Hakim Ali and Ashraf. They surrounded him, cutting off his retreat. All the witnesses agree that Rasul struck him with a *lathi* on the top of the head. The witnesses also agree that he was struck by Ashraf and Hakim Ali. There is some discrepancy as to which of these two last-mentioned persons actually struck him on the head, but he was struck again on the head with a *lathi*. He was struck with *lathis* even after he fell to the ground. The attack was unprovoked, save about the cattle, and the complainants' party were unarmed. The medical evidence shows that Lekha received two fractures of the skull,—on the right and left temple. He also had a contusion over the left side of the chest and over the left eye. Death resulted almost immediately. Another of the complainants' party, named Chuta, received injuries, which caused compound fractures of both bones of the right arm and a simple fracture of the left arm. Another man, Puran, suffered compound fracture of the right ulna.

We have first to consider what was the offence which caused the death of Lekha. These blows on the head with *lathis* were undoubtedly sufficient in the ordinary course of nature to cause death. They were intentionally struck and death resulted. The appellants' party seem to have acted with considerable ferocity and cruelty. In our opinion the evidence amply justifies the finding that an offence under section 302 was committed.

We have next to consider whether or not this offence was committed in "pursuance" of the common object of the appellants' party. All the members of this party came down armed with *lathis*, and the man who seems to have been the most influential amongst them, namely, Ranne, ordered them to use their *lathis*, and the *lathis* were at once used with the result which we have stated before. Taking the evidence as a whole, we think that it is impossible to say that the offence, which was in fact committed, was not committed in "prosecution of the common object." Section 149 provides "that where an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, every person, who at the time of the committing of that offence is a member of the same assembly, is guilty of that offence." Some attempt was made to show that the killing of Lekha was a separate transaction. We think that this contention cannot be sustained on the evidence, and that all the appellants were members of an unlawful assembly at the time that Lekha met his death. On these findings the appeals must necessarily be dismissed. We have no power to award any less punishment than the punishment of transportation for life. We, however, think it right to say that in our opinion the most guilty of the appellants were Ranne Khan, Rasul Khan, Ashraf and Hakim Ali. There is no evidence to show that Ranne struck any blow himself, but he was undoubtedly more responsible than any one else. It is said that he is a very old man, perhaps this was the very reason why his advice was followed. It is difficult to draw any distinction between Rasul, Ashraf and Hakim Ali. They were all beating the unfortunate Lekha at the same time, Rasul beyond doubt struck him one of the blows on the head which caused the fracture to his skull. If it were within our power to do so, we would award substantially less punishment to the other appellants. We dismiss the appeals.

Appeal dismissed.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 1528 OF 1914.

November 9, 1914.

Present:—Mr. Justice Shadi Lal.

EMPEROR—PROSECUTOR

versus

BAIJ NATH—ACCUSED.

Penal Code (Act XLV of 1860), ss. 420, 467—Current coin, title to—Proceeds of cheating paid in satisfaction of debt—Right of creditors to retain money—Criminal Procedure Code (Act V of 1898), s. 517.

Title to money which is current coin of the realm passes by mere delivery to a person who receives it in satisfaction of a lawful debt due to him. [p. 94, col. 1.]

In re Collector of Salem, 7 M. H. C. R. 233; 2 Weir 664, *Empress v. Joggessur Mochi*, 3 C. 379; 2 Ind. Jur. 786. *Kanshi Ram v. Secretary of State*, 83 P. R. 1890, referred to.

EMPEROR *v.* BAIJ NATH.

Where, therefore, during the Police investigation of a case under sections 420 and 467 of the Penal Code, it appeared that the accused had delivered over a sum of Rs. 1,168 to his creditors, this money being part of the proceeds of cheating, and the Police recovered it from the creditors:

Held, that the creditors were entitled to the money and that it must be returned to them. [p. 94, col. 1.]

Case reported by the District Magistrate, Hissar, with his No. 1949-G. of the 4th of August 1914.

FACTS.—In 1912 Duni, Jiwan, Bankia and others were *challaned* under sections 420/467, Indian Penal Code, for cheating in connection with some *hundis*. The case first was tried by the District Magistrate, but on one of the accused accepting a pardon, the case was transferred to the District Judge. All were found guilty and sentenced to various terms of imprisonment by Sultan Asad Jan, District Judge and Magistrate, 1st Class, with section 30 powers, on 31st of July 19 2. During the Police investigation the Police found that the accused had delivered over some Rs. 1,168 to his creditors, this money being part of the proceeds of his cheating. The Police recovered it from the creditors and by the order of District Magistrate, dated the 24th April 1912, it was handed over to the complainant. The appeal of Jiwan and Duni was rejected by the Chief Court on the 22nd of May 1913. On the 14th of February 1914 the creditors applied to Mr. Anderson, Magistrate, first Class, with section 30 powers to have the money recovered from the complainant and given over to them. On 20th of March 1914 (by an error it is entered as 20th of April 1914) that Magistrate held that this could not be done and referred the applicants to a Civil Court. On 23rd of March 1914 Counsel urged the point again and the Magistrate gave notice to the opposing parties and on the 15th of April 1914 the Magistrate ordered (thereby cancelling his order of 20th March 1914) that the money "must be returned to the persons from whom it was taken," *i.e.*, to the creditors of the accused.

The petitioner was, by District Judge, Hissar, exercising the powers of a Magistrate of the first Class in the Hissar District, sentenced, by order dated the 15th of April 1914, under sections 420/467 of the Indian Penal Code, to return and refund Rs. 1,168-2-6 to the persons from whom they were taken.

The proceedings are forwarded for revision on the following

GROUNDS.—*Firstly*, that when once a Court has passed an order it cannot *suo motu* review and cancel that order. *Secondly*, that the present Magistrate has no jurisdiction to hear the application, as the present Magistrate is not a successor of the Court which decided the section 420 case.

The first ground is certainly valid and no rulings need be quoted. As regards the 2nd ground *Phina Singh* v. *Empress* (1), *Muhammad Ishaq* v. *Muqim-ud-din* (2) apply, and they hold that a first class Magistrate's Court with section 30 powers is not a permanent Court which could pass an order under section 517 in a case decided by its predecessor. As the order of 15th of April 1914 is not a legal one, I recommend that it be set aside by the Chief Court. I have no doubt that in the Chief Court the parties will come forward with some suggestion as to what machinery should be used for the disposal of the money.

Lala *Sham Lal*, for the Creditors.

Lala *Bulwant Rai*, for the Accused.

ORDER.—The facts of this case are stated in the report submitted by the District Magistrate under section 438, Criminal Procedure Code, and need not be repeated here. It seems to me that it is unnecessary to determine the question whether Mr. Anderson could *suo motu* review his previous order, dated the 20th March 1914, and whether he was debarred from passing an order under section 517, Criminal Procedure Code, by the fact that another Magistrate exercising jurisdiction under section 30, Criminal Procedure Code, had decided the criminal case in which the three accused had been convicted. The case ultimately came up in revision before the Chief Court, and this Court was fully competent to pass such orders as to the disposal of the property as it thought fit.

In any case the record of the proceedings is now before me and I can correct

(1) 25 P. R. 1889 Cr.

(2) 9 Ind. Cas. 178; 7 P. R. 1913 Cr.; 207 P. L. R. 1913; 14 Cr. L. 178 Cr.

the mistakes of the subordinate Courts and make under section 439, Criminal Procedure Code, such orders as may be just and proper.

It appears that during the Police investigation, a sum of Rs. 1,168 was recovered from certain creditors of the accused to whom the money had been paid by them (the accused) after the commission of the offence of cheating. This money was, according to the prosecution, part of the proceeds of cheating, and the question arises whether it should be returned to the creditors or not.

Now it is a settled rule of law that title to money which is current coin of the realm passes by mere delivery to a person who receives it in satisfaction of a lawful debt due to him, *vide In re Collector of Salem* (3) and *Empress* v. *Joggessur Mochi*(4). The same view is taken by this Court in *Kanshi Ram* v. *Secretary of State* (5). As observed by Cave, J., in *Ex parte Wolverhampton and Staffordshire Banking Company; In re Campbell* (6): "There are no doubt cases in which money cannot be recovered by the rightful owner from the person who has obtained possession of it. This is one of the incidents attaching to a payment of current coin." The principle of these judgments applies to the present case and I fail to see how it can be seriously urged that the creditors are bound to return the money to the persons from whom their debtor acquired it by committing the offence of cheating. Money is not ear-marked and it cannot be said that the identical coins received from the complainant were paid to the creditors.

For these reasons, I have no hesitation in holding that the creditors are entitled to the money which was recovered from them by the Police. I accordingly direct that Rs. 1,168 be returned to them.

Revision accepted.

(3) 7 M. H. C. R. 233; 2 Weir 664.
(4) 3 C. 379; 2 Ind. Jur. 786.
(5) 83 P. R. 1890.
(6) (1884) 14 Q. B. D. 32 at p. 36; 33 W. R. 642; 1 Morrell 261.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 824 OF 1913.

November 30, 1913.

Present:—Mr. Justice Chevis and Mr. Justice Rossignol.

GAYAN SINGH AND OTHERS—CONVICTS—APPELLANTS

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 307—Infliction of many incised wounds on head—Inference—Murderous intent—Benefit of doubt.

A culprit who inflicts 10 incised wounds on the body of a person, most of which are aimed at his head, must be credited with murderous intent. [p. 96, col. 1.]

Where several persons profess to be eye-witnesses standing at a short distance from the scene of the crime but fail to explain satisfactorily why none of them did not come to the rescue of the injured man, the probability is that they did not see the assault. In such a case the evidence of the complainant should be accepted with reservations and the benefit of the doubt should be given to those against whom it is not sufficiently corroborated. [p. 96, col. 1.]

Appeal from an order of the Sessions Judge, Ferozepore, dated the 2nd September 1913, convicting the appellants.

Messrs. *Nand Lal* and *Meakins*, for the Appellants.

Kanwar *Dalip Singh* (for the Government Advocate), for the Respondent.

JUDGMENT.—The appellants, who are brothers, have been convicted of an attempt to murder Tek Singh, their collateral, and have been sentenced, Gayana to transportation for life, Jawala to tranportation for 10 years and Shama to five years' rigorous imprisonment, sentence of imprisonment to include three months' solitary confinement.

The alleged motive for the assault was that the complainant had sown a crop, and the two former appellants had reaped a portion of it. They were prosecuted by the complainant on a charge of theft and on the 9th May the Magistrate investigating the charge visited the disputed field and ordered the parties to appear before him on 10th May. He is said to have expressed an opinion that the complainant's charge was justified.

To turn now to the prosecution account of the events on which this case is based, complainant states that he slept on the night of the 9th May on his threshing floor, that at dawn all three appellants came to him

and begged him to compromise and not attend the Court that day. When complainant remained obdurate to their prayer, they attacked him. Gyana struck the first blow. He was armed with a *gandasi*, Jawala with an axe, and Shama with a *gandhala*.

There is direct corroborative evidence by Kharak Singh and Amar Singh, who were sleeping within a few paces of complainant and by Dyal Singh, who was only 30 *karms*= 50 yards away.

The questions for decision are, whether this evidence is trustworthy, what offence was committed and which, if any, of the three appellants took part in this offence.

The learned Sessions Judge has expressed surprise that the injuries inflicted, though numerous, were so slight, but finds that as most were probably aimed at the head, death was intended by the assailants; we share his surprise, but we cannot avoid the conclusion that the reason must be sought for in some false presentation of the events.

If the story given by the prosecution is true, then the appellants had complainant at their mercy, could have inflicted death with one good blow on the head, and to judge by the slight nature of the wounds inflicted, must have gone out of their way to inflict only superficial cuts.

It is true that the Sub-Assistant Surgeon found 20 injuries on the person of the complainant, but they had been stitched before he saw them, so that we are at a loss to understand how he was in a position to say that some of the wounds were more cleanly cut than others, and were, therefore, caused probably by different weapons.

The individual who first saw the wounds and stitched them was not called upon to depose as a witness.

On the forehead were two small bruises which were only skin deep. The Sub-Assistant Surgeon stated that most of the wounds could be caused with the edge of an ordinary *gandhala*.

Now a *gandhala* is an implement used for making holes for planting bushes, etc., its edge is not at all sharp and is generally 1 inch to $1\frac{1}{2}$ inches in length. It is not a cutting instrument, would not cause a clean wound, and would undoubtedly break the underlying bone, if used with such force as to penetrate the flesh.

We are convinced that none of the injuries found on complainant were produced with a *gandhala* blade.

As to the weapons used, there is a discrepancy between the evidence and the first report; the first report mentions a *takaya* (small hatchet) *gandhala* and *lathi*. The evidence is that Gayana used a *gandasi*, Jawala a hatchet, and Shama a *gandhala*.

The main witnesses in the case are Kharak Singh, Amar Singh and Dyal Singh. The first two were within a few paces, 10 to 12 yards, of Tek Singh, yet they say they made no attempt to defend Tek Singh nor to pursue and secure the appellants. It appears from the Police papers that several other men were in the neighbourhood, yet no attempt was made to rescue Tek Singh.

The learned Government Advocate admits the difficulty of the slight nature of the injuries inflicted and suggests that the appellants wished merely to torture the complainant and extort a compromise from him and consequently they inflicted cut after cut in order to induce him to a conclusion favourable to themselves, but Counsel admits that if we accept his suggestion, we must reject the prosecution evidence except in its bare outline.

The two junior brothers deny the charge entirely, whilst Gayana, the senior, admits striking complainant with a stick at his (Gayana's) *pir* during the night, he imagined complainants had come there to thieve. He also admitted that a shirt was taken from him and on it the Chemical Examiner found blood stains.

The complainant states that Gayana struck him with the *gandasi* on the forehead and the others only aimed blows at him before he fainted.

After careful consideration of the evidence and a perusal of the Police diaries, we see no reason to doubt that the appellant Gayana or Gayan Singh did commit this offence, but we have no confidence that either Jawala or Shama were participators in it. No doubt Jawala at any rate was equally interested with Gayana in the theft case, but he seems to be much younger than Gayana, and Shama was not a party to that case.

In view of their admitted failure to come to the rescue of complainant, we think it highly probable that Amar Singh, Kharak Singh and Dyal Singh did not see the assault,

and on the whole we find the only safe conclusion is that Gayan Singh alone took a part in this affair. The injuries borne by complainant entirely fail to suggest the employment of a heavy bruising weapon such as a *gandhala* or even a *lathi*. The slight nature of the incised wounds is probably due to the fact that the complainant was able to dodge them and his assertion that he received them as he lay unconscious on his bed is in all probability false. We accept his evidence, with certain reservations, against Gayana only. In these circumstances, in view of the fact that the blows were aimed at the head, Gayan Singh must be credited with murderous intent and we refuse to alter either the conviction or the sentence in his case. To the other two appellants we give the benefit of a very substantial doubt and they are accordingly acquitted.

Appeal partly accepted.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 320 OF 1914.

January 26, 1915.

Present:- Mr. Justice Ayling and Mr. Justice Tyabji.

In re ADAPALA VENKATA NARASA REDDY AND ANOTHER—APPELLANTS.

Letters Patent (Madras), cl. 15—Criminal trial—Revision—Appeal, if competent.

An order passed by a single Judge of the High Court in the exercise of its criminal revisional jurisdiction is one passed in a criminal trial if the proceedings which gave rise to the revision were a criminal trial, and no appeal lies under clause 15 of the Letters Patent against such an order.

In the matter of Ramasamy Chetty, 27 M. 510; 1 Weir 787; 1 Cr. L. J. 1087, followed.

Appeal against the judgment of his Lordship the Hon'ble Mr. Justice Spencer, dated the 28th of August 1914, in Criminal Revision Case No. 120 of 1914, preferred against that of the Court of the first Class Deputy Magistrate of Kavali, in Calendar Case No. 53 of 1913.

FACTS.—The appellants were charged with the offence of robbery in forcibly taking away a buffalo belonging to the complainant from the grazing ground, where it was in charge of her servant, and in assaulting the complainant and using abusive language towards her. The first Class Deputy Magistrate of Kavali, who tried the case, holding that the matter was grossly exaggerated, convicted the accused, the 1st under section 352, Indian Penal Code, and the second under section 504, Indian Penal Code, and sentenced them to a fine of Rs. 50 each. Against this conviction and sentence a revision petition was filed in the High Court. Spencer, J., who heard the revision petition, held that the convictions were correct, but reduced the fine to Rs. 20 each. The accused then preferred this appeal under the Letters Patent.

Mr *Sidney Smith* for the Public Prosecutor, for the Crown, raised a preliminary objection that no appeal lay and relied upon *In the matter of Ramasamy Chetty* (1).

Mr. *V. C. Seshachariar*, for the Appellants:—An appeal lies under the Letters Patent—Vide *In the matter of Horace Lyall* (2). The decision in *In the matter of Ramasamy Chetty* (1) does not apply to the facts of the case. Proceedings in revision are not criminal trials, but are in the nature of appeals—Vide *Shew Prosad* v. *Ram Chunder* (3). The law certainly makes a distinction between original trials and proceedings by way of appeal and revision. Even under the English Law, Courts of error are different from trial Courts. Further the opinion that the order in revision is in a criminal trial is that of a single Judge. The other learned Judge bases his decision upon a different point altogether. And the weight of the decision is considerably shaken by the ruling in *Puthukudi Abdu* v. *Puvakka Kunhikutti* (4), on which it is based, being in effect overruled by the decision of the Full Bench in *T. V. Tuljaram Row* v. *Alagappa Chettiar* (5).

ORDER.—The proceedings before the Deputy Magistrate were indisputably a criminal trial and there is clear authority in *In the matter of Ramasamy Chetty* (1) for holding that the order of Spencer, J., declining to interfere with the conviction was also an order in a criminal trial. It follows that no Letters Patent appeal lies.

The Letters Patent appeal is dismissed.

Appeal dismissed.

(1) 27 M. 510; 1 Weir 787; 1 Cr. L. J. 1087.
(2) 29 C. 286; 6 C. W. N. 254.
(3) 23 Ind. Cas. 977; 41 C. 323.
(4) 27 M. 340.
(5) 8 Ind. Cas. 340 35 M. 1; (1910) M. W. N. 696; 8 M. L. T. 453; 21 M. L. J. 1.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 175 OF 1914.

March 22, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

TILAK PANDEY AND OTHERS—APPLICANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 476—Time within which proceeding should be taken—Limitation.

There is nothing in section 476 of the Criminal Procedure Code which requires a Court to take action, if at all, immediately after the conclusion of the case in which the offences are said to have been committed or within any fixed time thereafter. [p. 98, col. 2.]

Nawal Singh v. *Emperor*, 14 Ind. Cas. 766; 13 Cr. L. J. 302; 34 A. 393; 9 A. L. J. 481; *Girwar Prashad* v. *Emperor*, 1 Ind. Cas. 306; 6 A. L. J. 392; 9 Cr. L. J. 219, followed

Emperor v. *Rustomji Hormusji Tarwalla*, 4 Bom. L.R. 778, *Lakshmidas Lalji, In re*, 32 B. 184; 3 M. L. T. 116; 10 Bom. L. R. 28; 7 Cr. L. J. 35; *Aiyakannu Pillai* v. *Emperor*, 1 Ind. Cas. 597; 4 M. L. T. 404; 9 Cr. L. J. 41; 32 M. 49; 19 M. L. J. 42 (F. B.), *Rahimadulla Sahib* v. *Emperor*, 31 M. 140; 3 M. L. T. 79; 17 M. L. J. 584; 7 Cr. L. J. 54, referred to.

Revision against the order of the Subordinate Judge of Basti, dated the 1st September 1914.

FACTS.—One Shiv Narain died leaving *Musammat* Mohra, a daughter, *Musammat* Abbraji, a widowed daughter-in-law, and *Musammat* Daulata, the widowed daughter-in-law of one of Shiv Narain's brothers. Every one of the three applied to the Revenue Court for mutation in her name. *Musammat* Daulata retired, but *Musammat* Mohra and *Musammat* Abbraji compromised and agreed that Abbraji's name should continue for her life and after that Mohra's name should be recorded, Later on Triloke Pande and others, collaterals of Shiv Narain, applied to the Revenue Court objecting to the compromise and the order of the Revenue Court thereon. Abbraji supported the collaterals. The Revenue Court referred them to the Civil Court. Two suits one by Mohra for possession and the other by Triloke for possession were brought before the Sub-Judge, Triloke's case being that Mohra was not Shiv Narain's daughter. The Sub-Judge held that Mohra was Shiv Narain's daughter and took action under section 476, Criminal Procedure Code, against the applicants for false verifications of pleadings and giving false evidence.

The applicants applied in revision to the High Court.

Mr. *Harnandan Lal* (with him Mr. *Lakshmi Narayan*), for the Applicants:—The Subordinate Judge had no jurisdiction to take action long after the case was decided. He gave his decision in the case on the 18th February 1914. He issued notice on the 21st March 1914, more than a month after the judgment, and he passed orders under section 476, Criminal Procedure Code, on 11th May 1914, three months afterwards. I submit his order was clearly without jurisdiction. He ought to have taken action either immediately at the close of the proceeding or so soon afterwards as to make it reasonably appear to be a part of that proceeding. It was so held in *Rahimadulla Sahib* v. *Emperor* (1), *Aiyakannu Pillai* v. *Emperor* (2). Moreover the Judge's order shows that there was no definite evidence of the offences charged before him. He seems to have acted more on suspicion than anything else. He ought to have been satisfied by *prima facie* evidence that the offence had been committed. His judgment shows that he decided on probabilities. I rely on *Mahomed Bhakku* v. *Queen-Empress* (3).

Mr. *A. E. Ryves*, for the Respondent, referred to *Girwar Prashad* v. *Emperor* (4), *Nawal Singh* v. *Emperor* (5) and was not called upon to reply.

JUDGMENT.—This is an application for revision of an order of the Subordinate Judge of Gorakhpur, under section 476 of the Code of Criminal Procedure, directing the prosecution of the applicants on various charges in connection with pleadings verified, and evidence given by them, in two cases tried by the Subordinate Judge. It appears that one *Musammat* Mohra brought a suit to establish her right to certain property as the daughter of Shiv Narain. The applicants and others brought another suit against *Musammat* Mohra for possession of property, on the ground th t she was not the daughter of Sheo Narain. The two

(1) 31 M. 140; 3 M. L. T. 79; 17 M. L. J. 584; 7 Cr. L. J. 54

(2) 1 Ind. Cas. 597; 32 M. 49; 19 M. L. J. 42 (F. B.); 4 M. L. T. 404; 9 Cr. L. J. 41.

(3) 23 C. 532.

(4) 1 Ind. Cas. 306; 6 A. L J. 392; 9 Cr. L. J. 219.

(5) 14 Ind. Cas. 766; 9 A. L. J. 481; 13 Cr. L. J. 302 34 A. 393.

cases were tried together, and the Subordinate Judge found that *Musammat* Mohra was the daughter of Sheo Narain. He waited for a month probably to see whether appeals would be filed against his decision, and as soon as the month had expired he took proceedings against the applicants under section 476 of the Code of Criminal Procedure. On the part of the applicants it is contended that the Subordinate Judge had no jurisdiction to take action against them a month or more after he had disposed of the cases in which the offences are alleged to have been committed. We have been referred to several decisions on the subject. A Full Bench of the Madras High Court (Miller, J, dissenting) has held that the power conferred by section 476, Criminal Procedure Code, can be exercised by the Court only in the course of the judicial proceeding or at its conclusion or so shortly thereafter as to make it really the continuation of the proceedings in the course of which the offence was committed or brought to notice. See *Aiyakannu Pillai* v. *Emperor* (2), which followed a previous decision of the same Court in *Rahimadulla Sahib* v. *Emperor* (1). The Madras High Court declined to follow the decision of the Bombay High Court in *Lakshmidas Lalji, In re* (6), in which the learned Judges said that they were unable to find anything in the language of section 476 making it incumbent upon a Court acting under it to take action, if at all, within any particular period or at any particluar time. There is also a reported decision to the effect that action should not be taken by a Court under section 476 before the close of the case in which the offence is brought to the notice of the Court. See *Emperor* v. *Rustomji Hormusji Tarwalla* (7). This Court in *Girwar Prasad* v. *Emperor* (4) declined to follow the decision of the Madras High Court referred to above, and held that a Munsif had jurisdiction to take action under section 476, 18 months or more after the conclusion of the case in which the offences were said to have been committed, and in *Nawal Singh* v. *Emperor* (5), Mr. Justice Banerji upheld the order of a Subordinate Judge passed under section 476 several years after the conclusion of the case in which the offences were said to have been committed. We agree with the view which has hitherto been taken by this Court that there is nothing in section 476 which requires a Court to take action, if at all, immediately after the conclusion of the case in which the offences are said to have been committed or within any fixed time thereafter. Cases can easily be imagined where it would be impossible or inadvisable to take action immediately on the conclusion of the case. In the present case the Subordinate Judge appears to us to have exercised a wise discretion in abstaining from taking action against the applicants until he knew that no appeal had been filed against his decision. It would have been useless to prosecute the applicants for the offences which they are supposed to have committed, if there had been an appeal in the case and the District Judge had held that *Musammat* Mohra was not the daughter of Sheo Narain. We express no opinion on the merits of the case or on the advisability of the prosecution which has been ordered. In our opinion the Subordinate Judge had jurisdiction to direct the prosecution of the applicants and we have, therefore, no power to interfere with his order. The application is dismissed with costs, including fees in this Court on the higher scale.

Application dismissed.

(6) 32 B. 184; 3 M. L. T. 116; 10 Bom. L. R. 28; 7 Cr. L. J. 35.

(7) 4 Bom. L. R. 775

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 710 OF 1914.
CRIMINAL REVISION PETITION No. 597 OF 1914.

March 26, 1915.

Present:—Mr. Justice Kumaraswami Sastri.

In re RUKMANI AMMAL AND ANOTHER—ACCUSED NOS. 1 AND 2—PETITIONERS.

Criminal Procedure Code (Act V of 1898), ss. 4 (h), 199—Complaint—Petition by husband simply for coercing wife, whether a complaint—Magistrate directing Police inquiry—Charge sheet preferred before another Magistrate—Jurisdiction.

Where the accused No. 1 leaving her husband's house went to the house of accused No. 2 with her jewels and some property, and the husband went to the house of

In re RUKMANI AMMAL.

the Deputy Magistrate at about 9 P.M., where was also the first accused, and presented a complaint not with the object of getting the Magistrate to take action but simply to coerce his wife to give back the jewels:

Held, that there was no complaint under section 199 of the Criminal Procedure Code such as could entitle the Magistrate to take cognizance of the case after the death of the husband. [p. 100, col. 2.]

Where a Magistrate having cognizance of a case refers it to the Police for inquiry and report, the Police have no power to prefer a charge sheet before nother Magistrate and such other Magistrate has no jurisdiction to take cognizance of the case. [p. 100, col. 2]

It is not open to persons after the husband's death to revive proceedings which were dropped during his life-time. [p. 100, col. 2.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate of Vellore in Calendar Case No. 35 of 1914.

Messrs. *J. L. Rosario* and *K. Narasimha Aiyar*, for the Petitioners.

The Acting *Public Prosecutor*, for the Government.

Mr. *N. S. Narasimhachariar*, for the Complainant.

ORDER.—This is an application to revise the order of the Sub-Divisional Magistrate of Vellore, on the grounds that he had no jurisdiction to try the charges against the accused and that his order dated 8th October 1914 is illegal.

On the 13th February 1914, the 1st accused, who is the wife of the deceased Seshachari, Inspector of Police, is alleged to have left her husband's house, gone to the house of the second accused with her jewels and some property. Seshachari went to the house of the Deputy Magistrate at about 9 P.M. and the 1st accused, his wife, was there. He presented a complaint (Exhibit E) describing himself as the complainant and the present 1st and 2nd accused as the accused. The complaint runs as follows :—"The 2nd accused enticed away the 1st accused, the wife of the complainant. The 2nd accused made away with the jewels valued at Rs. 2,050 and 3 silver vessels..... The 1st accused abetted this theft. So I charge the 1st accused under sections 498 and 379/109 and the 2nd under section 379, Indian Penal Code. Pray inquiry and justice." According to the evidence of the Deputy Magistrate, he received Exhibit E and explained the gist of it and the consequences to the 1st accused and told her that he would take the sworn statement of Seshachari and after going through that formality, he would take cognisance of the offence and issue a warrant for her arrest. This is what he says as to what subsequently happened: "The 1st accused then said she would deliver up the properties. There was, therefore, then no cause for further action in the matter. She went away with the late Mr. Seshachari. Seshachari did not afterwards come to me until the 20th idem. He mentioned to me that his wife had not delivered the jewels and that she was staying away from him in a separate house. He expressed that all endeavours at reconciliation had failed and he requested that I should take action on his complaint. I was going to take his sworn statement, when he happened to look at my watch on my table and said it was *Rahu Kalam* and that he would come again later on and make the sworn statement before me." In cross-examination he states: "I wrote on it (Exhibit E) 'sworn statement of T. M. Seshachari.' I wrote it with a view to examine him on oath. After writing this down, I explained the situation to accused, and as she agreed to surrender the properties, I did not record the sworn statement. After the woman agreed to surrender the properties, Seshachari did not press me to record a sworn statement. Seshachari did not tell me that he would recover the jewels from the woman and that no further action need be taken."

Seshachari committed suicide the next day and his son preferred a formal complaint to the 2nd Class Magistrate charging the two accused under the sections above mentioned. When he was examined by the Magistrate he stated as follows:—"My father presented only this statement (Exhibit E) to Mr. Saldanha on Friday. He did not present the complaint. Subsequently thinking that he may smoothly get back the properties he came away, saying that he would present a complaint. He was accordingly inquiring for the clue. He was saying that he would go and give the com-

plaint this morning, meanwhile he shot himself."

On receiving the complaint of the present complainant the second Class Magistrate took cognisance of the offence and issued a warrant for the 1st accused's arrest and apprehension. After issuing the warrant on the 22nd, he asked the Station House Officer to investigate the case. While matters were in this state, the Police laid a charge sheet before the Deputy Magistrate under sections 498 and 379 of the Indian Penal Code and he proceeded to inquire into the case. Objection was taken to the jurisdiction of the Deputy Magistrate on two grounds, namely, (1) that there was no complaint as required by section 199 of the Criminal Procedure Code so as to give the Court jurisdiction to take cognisance of the offence under section 498 and (2) that the second Class Magistrate having had cognisance of the case and having referred it to the Police for inquiry and report, the Police had no power to prefer a charge sheet before the Deputy Magistrate and that the Deputy Magistrate had no jurisdiction to take cognisance of the offence.

The first question is whether Exhibit E is a complaint satisfying the provisions of section 199 of the Criminal Procedure Code, which requires that a complaint should be made by the husband of the woman, or in his absence, by some person who had care of such woman on his behalf at the time when such offence was committed. "Complaint" is defined in section 4 of the Criminal Procedure Code as the allegation made orally or in writing to a Magistrate, with a view to his taking action under the Code, that some person, whether known or unknown, has committed an offence and the short point is whether when Seshachari went to the Magistrate's house at night and presented Exhibit E, he did so with a view to the Magistrate taking action under the Criminal Procedure Code or whether his object was simply to intimidate his wife and get the return of the jewels without having recourse to criminal proceedings. On a careful consideration of the evidence of the Deputy Magistrate, I am of opinion that the object of Seshachari was not to get the Magistrate to take action, but simply to have recourse to him for coercing his wife to give back the jewels which she had taken. He and his wife were in the house of the Deputy Magistrate at about 9 P M. and when the Deputy Magistrate wanted to take the sworn statement of Seshachari as required by section 209 of the Criminal Procedure Code, he was expressly asked not to do so on the ground that the accused had agreed to give back the jewels. The Magistrate himself says that he thought there was no cause for taking any further action in the matter. It is difficult to believe that, if the Magistrate was approached in his official capacity and the object of Seshachari was to prefer a complaint, the Magistrate would have allowed the parties to compound the offence of theft and to leave the place quietly together. The evidence of Seshachari's son, to which I have referred, also shows that, after the failure of negotiations with the accused for the return of the jewels, he wanted to file another formal complaint before the Magistrate. Even assuming that Exhibit E was sufficient as a complaint under section 199, Criminal Procedure Code, of an offence under section 498 of the Indian Penal Code, I am of opinion that when the parties left the place together, the husband agreeing to drop the proceedings owing to his wife having agreed to give back the jewels, a fresh complaint would be necessary and that it is not open to persons after the husband's death to revive the proceedings which admittedly had been dropped. Having regard to the evidence in the case and the conduct of the parties, I am of opinion that there was no complaint under section 199, Criminal Procedure Code, such as would entitle the Magistrate to take cognisance of the case after the death of Seshachari. I would, therefore, quash the charge under section 498, Indian Penal Code.

As regards the charge of theft the second Class Magistrate had cognisance of the case and it is difficult to see how the Police, to whom the charge of theft was referred for inquiry and report, can change the forum by preferring a charge sheet before the Deputy Magistrate. The case ought to be formally transferred and till then I do not think the Deputy Magistrate had any jurisdiction to try it. I think that the proper course is to quash all proceedings taken by the Deputy Magistrate and to transfer the case, in so far as it relates to theft against the 1st

accused which was filed before the Sub-Magistrate, to the Deputy Magistrate for disposal.

Proceedings quashed.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REPORT NO. 206 OF 1914.

December 17, 1914.

Present:—Mr. Pratt, J. C., and Mr. Fawcett, A. J. C.

EMPEROR—APPICLANT

versus

DINO *walad* PIARO—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 565—High Court, power of, to pass order under, in appeal or revision.

Where a trying Magistrate, not especially empowered in this behalf, passed an order under section 565, Criminal Procedure Code, and directed a convict to notify his residence for a period of two years and the District Magistrate moved the High Court to pass such an order on revision:

Held, that the Magistrate's order being without jurisdiction must be quashed, but that as section 565, Criminal Procedure Code required that the order should be made by the trying Magistrate at the time of passing the sentence, the Appellate Court or the Court of Revision could not make an order under that section where the original Court was not so empowered.

Emperor v. *Bhausingh Dhumalsingh*, 1 Ind. Cas. 454; 8 Cr. L. J. 267; 33 B. 33; 10 Bom. L. R. 759; *Dharam Das* v. *Emperor*, 7 Ind. Cas. 412; 33 A. 48; 11 Cr. L. J. 480; 7 A. L. J. 910, referred to.

Report made by the District Magistrate, Nawab Shah, against the order of the Resident Magistrate, Naushahro.

Mr. *E. Raymond*, (Public Prosecutor for Sind), for the Crown.

JUDGMENT.—The accused has been convicted in this case of the theft of a horse and was sentenced by the Resident Magistrate, Naushahro, to 18 months' rigorous imprisonment and was ordered under section 565, Criminal Procedure Code, to notify his residence for a period of two years.

The District Magistrate forwards the case under section 439 for revision and points out that the Magistrate was not empowered to make the order under section 565. The District Magistrate suggests that as the case was a proper one in which the order should have been made, we should cancel the Magistrate's order and make an order ourselves to the same effect.

The Magistrate's order must be quashed, for it was made without jurisdiction. But we regret we cannot substitute an order of our own for it. Section 565 requires that the order should be made by the trying Magistrate at the time of passing sentence. The section in that respect is similar to section 106, Criminal Procedure Code. This section was amended in the Code of 1898 by the addition of clause (B) in order to empower an Appellate Court or a High Court to make a similar order, and under this clause the High Court can make an order even when the original Court was not empowered: *Emperor* v. *Bhausingh Dhumalsingh* (1), and *Dharam Das* v. *Emperor* (2). The omission of similar provisions in section 565 leads to the inference that the Appellate Court or the Court of Revision cannot make an order under that section where the original Court was not so empowered.

We, therefore, make no such order and quash the order made by the Magistrate.

Order quashed.

(1) 1 Ind. Cas. 454; 8 Cr. L. J. 267; 33 B. 33; 10 Bom. L. R. 759.

(2) 7 Ind. Cas. 412; 33 A. 48; 11 Cr. L. J. 480; 7 A. L. J. 910.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL NO. 251 OF 1915.

April 6, 1915.

Present:—Mr. Justice Shah Din and Mr. Justice Rossignol.

NUR MUHAMMAD AND ANOTHER—CONVICTS—APPELLANTS

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Confession—Confession implicating co-accused retracted at trial—Independent corroboratio n essential.

Where one of two co-accused makes a confession implicating the other co-accused as well, independent evidence should be forthcoming to corroborate the confession in regard to each accused implicated. [p. 103, col. 1.]

Where *N* and *R*, husband and wife, were accused of the murder of *N*'s brother and *R* made a confession before the Committing Magistrate implicating her husband as well, but subsequently retracted the confession:

Held, that as there was no real corroboration of the retracted confession against *N* and against *R* herself there was merely the retracted confession corroborated solely by evidence of her absence from her house during the night of the alleged murder, the

NUR MUHAMMAD *v.* EMPEROR.

accused were entitled to the benefit of the doubt and must be acquitted. [p. 103, col. 2.]

Appeal from an order of the Sessions Judge, Jhelum, dated the 27th February 1915, convicting the appellants.

Dr. *Muhammad Iqbal*, for the Appellants.

Mr. *B. Bevan Petman* (for the Government Advocate), for the Respondent.

JUDGMENT.—The appellants, Nur Muhammad and Rahmtan, husband and wife, have been sentenced to death for the murder during the night of 27th-28th November 1914 of Fazla, the real brother of the male appellant.

The motive is to be found in the partition of the family property; the land had been partitioned but Nur Muhammad had successfully resisted Fazla's claim to share in the *dhok* or outlying farmstead, the supposed scene of the murder, which lies some 200 *karms* from the main *abadi*.

The animosity engendered by Fazla's claim had long been smouldering, but the immediate cause of the offence is to be found in Fazla's construction on the day preceding the offence of a manger on that portion of the *dhok* occupied by appellant.

It is proved, nay, admitted that Fazla slept in a room of the *dhok*, with the male appellant.

Deceased was married, but his wife being of tender years had not yet joined him. On the last evening of his life he supped with his wife and parents-in-law, P. W. Nos. 2, 3 and 4, and then went off to sleep at the *dhok*. The next morning his body was found lying in a ravine 513 *karms* by a round-about route from the *dhok*. Near it were found a pair of shoes and a *pagri*.

There is no eye witness of the offence, but witnesses Nos. 2, 3 and 4 prove the standing cause of enmity and the immediate provoking cause of the murder.

Against *Musammat* Rahmtan there is no evidence except her admission made before the committing Magistrate on 3rd December 1914, after the prosecution evidence had been recorded.

In that statement she said that she and her husband had strangled Fazla with a rope, that they had then carried his body with the shoes and *pagri* to the ravine, and she explained the presence of marks of a bite on her wrist by saying that Fazla deceased had bitten her during the death struggle.

Thirteen days after she put in a petition, alleging she had made the admission under Police torture. She was at once examined and the medical witness deposes unhesitatingly that the blisters displayed on her neck as well as the circular mark on her wrist could not have been inflicted on the 2nd December, the date on which she alleges she was subjected to torture.

It is worthy of remark that *Musammat* Rahmtan had not been in Police custody after 2nd December 1914.

We have no hesitation in agreeing with the learned Sessions Judge that the injuries displayed by *Musammat* Rahmtan on 16th December 1914 were not the handiwork of the Police and the reason she offers for her alleged false admission is clearly untrue.

The medical evidence shows that the death of Fazla was due to strangulation.

The learned Sessions Judges holds that the retracted confession by *Musammat* Rahmtan was true and that it is corroborated as evidence against her husband by three main circumstances.

The *first* is that the body was viewed by the villagers from the cliff overhanging the ravine and only Nur Muhammad could identify it from that distance, the *second* is the production from his straw stack by the appellant Nur Muhammad of a blood-stained rag; the *third*, that the murder took place at the *dhok* where none but appellant and deceased lived.

The first item does not greatly impress us; the depth of the ravine was only some 30 feet and it is difficult to believe that from that distance Fazla's body was unrecognisable; in any case his brother would naturally recognise him with greater ease than persons who were not relatives. Moreover, a perusal of the Police diaries does not lend support to this story that the body was not recognisable from the top of the ravine. To this circumstance we attach little value.

To the recovery of the blood-stained rag the Sessions Judge attaches little independent value, but this circumstance, linked up with the immediate identification of the corpse from a distance of 30 feet, he regards of great weight. Now it is not suggested that this blood-stained rag was identifiable as the property of the appellants and it

seems unnatural that Nur Muhammad should have risked polluting his own clothes by taking it away and hiding it in his stack. It should be noted that his clothes were examined when he reached the *thana*, but were found to be free from blood-stains, his person also bore no marks of a struggle.

Moreover, a perusal of the Police diaries reveals that a blood-stained rag lay near the body when the Police arrived. What became of that rag? No further mention of it is to be found in the diaries and it was not sent up with the case. Why should two rags have been used to staunch the flow of blood from deceased's nostrils and why was one only secreted by appellant Nur Muhammad?

The alleged production of the rag by Nur Muhammad from the stack appears to be a very suspicious matter and cannot be relied on.

The Sessions Judge's first two corroborative factors appear then to have very little value.

General corroboration of the story told by *Musammat* Rahmtan is no doubt to be found in the statement of *Musammat* Khan Bano, her sister-in-law, that *Musammat* Rahmtan was away from the house for the greater portion of the night of the murder, but corroboration should be in regard to each accused implicated.

The third reason given by the learned Sessions Judge is that the murder certainly took place at the *dhok*, where nobody but deceased and Nur Muhammad slept, and he arrives at this conclusion as to the scene of the murder on the strength of the Sub-Inspector's deposition that the soles of the corpse were smeared with cowdung, and that near the bed in the *dhok* was a patch of wet cowdung on which were foot prints.

Now the Sub-Inspector is the only witness of this important point and the diaries do not bear him out.

We find in the diaries that only one foot of the corpse was smeared with cowdung, further that no mention of a wet patch is made.

There were some foot marks in the ravine and on the floor of the *dhok*, but there is no evidence that they could be identified with the footprints of either appellant.

This factor too is thus shorn of all its value. Now deceased is said to have had an intrigue with the wife of Din Muhammad, and Din Muhammad was mentioned in the first report as a suspect. Din Muhammad's wife is *Musammat* Fatma, the sister of *Musammat* Rahmtan, and when the investigation opened it was ascertained that Mehdi, brother of *Musammat* Rahmtan, had left that morning on no intelligable errand and though sought for could not be found by the Police.

Thus it is possible that Din Muhammad and Mehdi were the culprits.

For the appellants it is urged that the admission of *Musammat* Rahmtan is meagre and unconvincing, the rope, the alleged lethal instrument, has not been produced and she may have been induced to implicate herself and her husband in order to screen her brother.

The admission is certainly not very rich in details of what preceded the strangling and it seems strange that the bite on the back of the wrist of *Musammat* Rahmtan should have been merely a set of small bruises and not penetrating injuries.

Thus against Nur Muhammad we have no real corroboration of the retracted confession, whilst against Rahmtan there is merely the retracted confession, corroborated solely by the evidence that she was absent from her house during the night.

No doubt there is grave suspicion that the appellants were privy to the murder, but there is no reliable evidence as to the scene of the murder or of their complicity in the deed.

In the circumstances, appellants must be given the benefit of the very real doubt that exists.

The appeal is accepted and they are acquitted.

Appeal accepted.

SIND JUDICIAL COMMISSIONER'S COURT.

CONFIRMATION CASE NO 23 OF 1914.
CRIMINAL APPEAL NO. 114 OF 1914.
December 3, 1914.

Present:—Mr. Pratt, J. C., and Mr. Fawcett, A. J. C.

DARHOON *walad* KHUDA BUX—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 299, 300 (3), 304—Murder, culpable homicide not amounting to—Injuries inflicted not sufficient but likely to cause death—Offence.

Where the injuries proved to have been inflicted were found not sufficient in the ordinary course of nature to cause death, but quite likely to have produced death:

Held, that the offence committed did not amount to murder, but only to culpable homicide not amounting to murder. [p. 104, col. 2; p. 105, col. 1.]

Appeal against the decision of the Sessions Judge, Larkana.

Mr. *Kimatrai Bhojraj*, for the Appellant.

Mr. *F. Raymond* (Public Prosecutor for Sind), for the Crown.

JUDGMENT.

PRATT, J. C.—The accused has been convicted by the Sessions Judge, Larkana, and sentenced to death. The accused had a quarrel with the deceased and is said to have attacked him on his way to the village of Bhuti where he was going to fetch home his wife. The accused suddenly emerged from some "Lai" bushes and gave the deceased a severe beating with a *lathi* which led to death 18 days later. I have no doubt on the evidence that the case of the prosecution is proved and that the accused was really the assailant of the deceased. There was an eye-witness to the beating called Lutif Ali. His evidence has been impugned, on the ground that he took no steps to succour the deceased who was lying injured in a pool of water. But the witness is only an ignorant goat-herd and the apathy of this class of witnesses as to matters which do not affect them personally is well known. In the interval between the beating and his death the deceased repeatedly named the accused as his assailant. He told this to the *bania* Phagun and also to his father-in-law, Khananshah, and his brother-in-law, Dinal Shah. The deceased made a dying declaration before the Magistrate in which he gave a long and detailed account of the assault. I have no doubt as to the truth of the declaration. There is a faint suggestion that the real offender was the father-in-law, Khananshah. I think it quite impossible that Khananshah, if he had been the real murderer, would have the courage to bring his victim to the Police Station, nor is it credible that the deceased knowing that he was beaten by Khananshah should deliberately make a false statement against an innocent man.

On the other hand I do not think that the offence amounts to a murder. The Doctor does not say that the injuries were sufficient in the ordinary course of nature to cause death. All he says is that it is quite likely that all the injuries would have produced death. This is the degree of probability referred to in section 299 only and falls short of that defined in section 300 (3). The Sessions Judge seems to have accepted the Doctor's estimate, for he says that the intention of the accused was at any rate to cause such bodily injuries as he must have known to be likely to cause death. Again, applying the test referred to by Melvill, J., in *Reg.* v. *Govinda* (1), the nature of the weapon used does not lead to the inference that the accused's intention was murder, for the injuries were inflicted with a stick measuring 3 inches in circumference. No doubt a large number of blows inflicted by a light stick might indicate an intention to cause bodily injuries sufficient in the ordinary course of nature to cause death. But there should be clear medical evidence to support such an inference and such evidence is in this case wanting.

I would, therefore, alter the conviction of murder to one of culpable homicide not amounting to murder under section 304, part I, and reduce the sentence to one of transportation for life.

FAWCETT, A. J. C.—I concur in holding it fully proved that the deceased's injuries, which led to his death, were inflicted by the appellant. I have felt some doubt whether, having regard to the number and nature of the injuries inflicted on the de-

(1) 1 B. 342.

ceased, the case does not fall under the third clause of the definition of murder in section 300, Indian Penal Code. But the evidence of the Sub-Assistant Surgeon is not quite clear on the point whether the injuries were sufficient in the ordinary course of nature to cause death; and, though I am inclined to think he probably meant this, yet the fact that he has not clearly said so is one which should be taken in the accused's favour, as a point of this kind in a murder case should not be left in any doubt and this Court in a case of this kind should lean in *Favorem Vitae*. There are also circumstances which justify the view that the injuries themselves may not alone have been sufficient to cause death. For instance the enlarged spleen of the deceased points to the probability of his suffering from malaria.

I, therefore, concur with my learned colleague in altering the conviction to one under section 304, Indian Penal Code, and the sentence of death to one of transportation for life.

Conviction altered.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 892 OF 1914.

April 8, 1915.

Present:—Justice Sir Donald Johnstone, KT. and Mr. Justice Shadi Lal.

DAULAT RAI—CONVICT—APPELLANT

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 409, 477A—Managing Director of Bank deceiving share-holders as to the real profits—Wrongful personal gain—Falsification of balance sheet—Balance sheet, whether a "writing" within the meaning of the section—Compensation to share-holders—Companies Act (VI of 1882), s. 214.

Where the accused, the Managing Director of the Hindustan Bank, wishing the Bank to make a better show than the real facts of its working would warrant, in order to maintain the confidence of the share-holders and the public and so to make possible a project for increasing largely the Bank's capital, on the 17th December 1912 got his son to present a pro-note for Rs. 3,000 to the Bank, treated this Rs. 3,000 as a *pro tanto* addition to the profits for 1912 by reducing on paper to that extent his remuneration account for Rs. 4,050, which he had actually drawn, to Rs. 1,050 and thus deceiving the share-holders at their general meeting in the following March as to the real profits, induced them to declare a dividend of 6 per cent. instead of some 3 per cent. which would otherwise have been the most possible;

Held, (1) that the accused was guilty under section 409 of the Penal Code, because being entrusted with the property of the Bank, he dishonestly used and disposed of some of that property contrary to the Bank's Articles of Association causing the share-holders to declare a dividend larger than the profits warranted: [p. 107, col 1.]

Emperor v. *Rash Behary Das*, 35 C. 450; 12 C. W. N. 581; 7 Cr. L. J. 378; *Jyotish Chandra Mukerjee* v *Emperor*, 4 Ind. Cas. 416; 14 C. W. N. 82; 10 Cr. L. J. 581, *Queen-Empress* v. *Moss*, 16 A. 88; A. W. N. (1894) 23, distinguished.

(2) that both the Managing Director and the Manager of the Head Office were guilty under section 477A of the Penal Code as they had "falsified" the balance sheet of 1912 and the books of the Bank by showing as profits Rs. 3,000 which were not profits, the falsification being nontheless complete because they had first manufactured pro-notes, etc., in order to give to the falsified balance sheet and books an appearance of correctness. [p. 107, col. 2.]

Queen-Empress v. *Moss*, 16 A. 88; A. W. N (1894) 23, referred to.

(3) that a Bank's balance sheet is a paper or writing belonging to the Bank; and [p. 107, col. 2.]

(4) that the Director was guilty of "misfeasance" "and breach of trust" and by inducing the share-holders to pay a dividend partly out of what was really capital he "misapplied" the Company's money and, therefore, could be compelled by the Court to contribute a reasonable sum by way of compensation. [p. 108, col. 1.]

Appeal from an order of the Magistrate, first Class, exercising enhanced powers under section 30, Criminal Procedure Code, Multan, dated the 4th November 1914, convicting the appellant.

Messrs. *Kirkpatrick, Parker, Obedulla* and *Raghunath Sahai*, for the Appellant.

Mr. *Broadawy*, Assistant Legal Remembrancer, for the Crown.

Mr. *Mohendra Nath Banerji*, for the Liquidator.

JUDGMENT.—This appeal and 889 of 1914 can conveniently be disposed of together. They were argued before us at great length, but we do not think any very protracted discussion is here required. Our final opinion on both cases is that the accused are certainly guilty as charged, Daulat Rai under section 409, Indian Penal Code, and section 477A, Indian Penal Code, and Hari Chand with abetment under each head; but that the sentences are in all the circumstances unnecessarily severe.

Daulat Rai was Managing Director of the Hindustan Bank, Multan, and Hari Chand, Manager of the Head Office there. The charges are very explicit as regards Daulat Rai. The *first* is that in the year 1913 he caused to be paid as dividend to

shareholders (of whom he was one himself) Rs. 3,000 in excess of profits and "thus dishonestly misapplied money against the terms of Articles of Association and against legal directions prohibiting payment of dividend from any money other than profit"; and the *second* charge is that, in order to prepare the way for the above misapplication of money, he did "on or about 17th December 1912", cause to be falsified (1) the balance sheet for 1912 by causing to be shown Rs. 1,050 only as his remuneration instead of Rs. 4,050, and (2) the account books of the Bank by debit and credit as between himself and his son, Nainsukh, and the Bank of Rs. 3,000 on the basis of a fictitious pro-note executed by his son. The way the date of the second charge is brought in is rather misleading. The gravamen of the whole charge really is that accused, wishing the Bank make better show than the real facts of its working would warrant, in order to maintain the confidence of the shareholders and the public and so to make possible a project for increasing largely the Bank's capital, on 17th December 1912 got his son to present a pro-note for Rs. 3,000 to the Bank, treated this Rs. 3,000 as a *pro tanto* addition to the profits for 1912 by reducing on paper to that extent his remuneration account from Rs. 4,050, which he had actually drawn, to Rs. 1,050, and thus deceiving the share-holders at their general meeting in the following March as to the real profits, induced them to declare a dividend of 6 per cent. instead of some 3 per cent., which would otherwise have been the most possible. For this pro-note there was really no security, Nainsukh being joint with his father and having at that time no independent resources whatever. Later, in January, *i.e.*, after the close of the financial year, the whole thing was re-adjusted, and matters returned to the *status quo ante* 17th December 1912, except that a small amount of interest stood to be charged against Nainsukh on the pro-note and a balance sheet could be framed on a profit some Rs. 3,000 in excess of the real profits.

This is the case for the prosecution shorn of details. The rival theory of the defence is that Daulat Rai's salary being Rs. 6,000 per annum, he had actually drawn in 1912 Rs. 7,850, of which Rs. 3,800 was on account of 1911 and Rs. 4,050 on account of 1912; that by a rule of the Bank he was not allowed to draw in any one year over Rs. 6,000 as remuneration, that before 17th December 1912 the Accountant, P. W. No. 6, intimated to him that he had overdrawn, but did not state the exact amount, that it was in order to satisfy the aforesaid Bank rule that he, not having money ready, got his son to execute the pro-note for Rs. 3,000, that in 1913 he was entitled to draw that Rs. 3,000 again as remuneration, which he did by simply showing the pro-note as paid up; and that there was no intention to deceive or defraud or act dishonestly.

It will be seen that there is no denial of the main facts stated by the prosecution. The intention to increase the capital of the Bank is admitted, as also the execution of the pro-note, the statement of profits in the balance sheet at the enhanced figure, the declaration of 6 per cent. dividend, and so forth. But the prosecution deny the story that the Accountant warned Daulat Rai of his excess drawing of remuneration and also deny the existence of the alleged rule limiting drawings in any one year to Rs. 6,000. In our opinion both these denials are fully justified by the record. There is no documentary proof of the warning, and it is impossible to believe that Daulat Rai would not, if so warned, have taken the trouble to inquire exactly what the excess drawing amounted to but would have hastily arranged for an adjustment to the unnecessary extent of Rs. 3,000, the real excess being only Rs. 1,850. The rule, too, has not been shown to have any existence. A little thought shows that it is an *impossible* rule; and examination of Exhibit P7, the accused No. 1's "remuneration account," as compiled by the Liquidator, further shows that more than once over Rs. 6,000 has actually been drawn by accused Daulat Rai in a single year—see 1909 and 1911 (Rs. 1,475 and Rs. 118 respectively in excess).

We must, therefore, reject the defence theory, and take the facts as stated by the prosecution as established. We also think that the accused's intentions were as stated by the prosecution, and it only remains to see how the facts *plus* intentions disclose offences under section 409 and section 477A

of the Indian Penal Code. Some minor points were argued before us, but we really do not see any need to discuss them, *e.g.* whether the Liquidator, who drew up Exhibit P7 and Exhibit P8, had authority from the Court to add the "Remarks" in the last column of the statement Exhibit P 8; that though there was no written rule* limiting drawings to Rs. 6,000 in any one year, this was the Accountant's (P.W No. 5) interpretation of Article 115 of the Articles of Association—an absurd explanation; that Daulat Rai might have drawn Rs. 3,000 against his cash credit (as Managing Director) of Rs. 25,000 and have used that money as he used the pro-note—a plan that would obviously not have served the purpose of inflating profits; that the Reserve Fund might have been drawn upon; that in December Daulat Rai could not have had any idea the real profits were going to be so low, which seems to us contrary to common sense and experience; that Hari Chand knew nothing of what was being done or of Daulat Rai's aims and intentions, a rather incredible proposition to put forward regarding the Manager of the Head Office.

We consider the accused Daulat Rai guilty under section 409, Indian Penal Code, because being entrusted with the property of the Bank, he dishonestly used and disposed of some of that property, namely, Rs. 3,000 which was not really profits, contrary to the Bank's Articles of Association (see Article 50) causing the share-holders by deception to declare a dividend larger than the profits warranted. Compare the above with section 405, Indian Penal Code, where "criminal breach of trust" is defined—"Whoever, being in any manner entrusted with any property.....dishonestly uses, or disposes of, that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, *express* or *implied*, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do." By his act he caused wrongful immediate gain to himself and the other share-holders to the extent of the enhanced dividend and so acted "dishonestly." It is idle to argue, as Mr. Kirkpatrick does, that the money was theirs and there could be no wrongful gain in their taking it. They and Daulat Rai were not private persons with no duty to their creditors: they and he were persons registered as a "limited" Company and admittedly under a legal obligation to take dividends only out of profits and he was under a legal contract to observe the Articles. Their property in the Bank, apart from profits, was not theirs to use as they liked. A few rulings have been quoted to us in connection with the legal aspect of this case, and we have noted them in the margin* (foot-note), but each case must depend on its own peculiar facts.

The second head of charge, as explained by us earlier in this judgment, is also fully made out. The accused were both officers or servants of the Bank. Their action was "wilful" and we think it was "with intent to defraud." The word "defraud" is not defined in the Code; but its ordinary meaning is clear enough, and after all if, as we have already found, the accused's action was *dishonest*, we need find no difficulty in importing into it also the idea of defrauding. Then the accused "falsified" the balance sheet of 1912 and the books of the Bank by showing as profits Rs. 3,000 which were not profits; and they falsified them nonetheless because they had first manufactured pro-notes and what not in order to give to the falsified balance sheet and books an appearance of correctness, See *Queen-Empress* v. *Moss* (1). As to the kind of documents covered by it section 477A is extraordinarily wide, "book, paper, writing, valuable security or document, which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer." We are unable to agree with Mr. Oertel (for Hari Chand) that a Bank's balance sheet is not a paper or writing belonging to the Bank, or that the Bank's books are not books belonging to the Bank.

We, therefore, uphold the convictions; but considering the comparative novelty of this sort of thing in the Punjab and our conviction that the experience of the past few years in these new fields of activity, coupled with moderate sentences, will prove a sufficient

(1) 16 A. 88; A. W. N. (1894) 23.

*N. B.—It is admitted that Gurdial, D. W. No. 2, is incorrect in saying there was one.

Emperor v. *Rash Behary Das*, 35 C. 450; 12 C. W. N. 581; 7 Cr. L. J. 378; *Jyotish Chandra Mukerjee* v. *Emperor*, 4 Ind. Cas. 416; 14 C. W. N. 82; 10 Cr. L. J. 58; 36 C. 955; *Queen-Empress* v. *Moss*, 16 A. 88; A. W. N. (1894) 23.

deterrent for the future, we accept these two appeals and reduce the sentences in the case of Daulat Rai (from seven years and Rs. 15,000 fine) to four years' rigorous imprisonment and a fine of Rs. 6,000 (one year's salary), or in default 18 months' rigorous imprisonment; and in the case of Hari Chand from two years' rigorous imprisonment to one year. In both cases the imprisonment to count from date of arrest.

An application has been made to us that the fine, in whole or part, should be awarded to the Bank, now under liquidation, for the benefit of its share-holders or creditors. Such an order could hardly be passed under section 545 (1), Criminal Procedure Code, for the "expenses" mentioned in sub-section (1) (*a*) appear to have been borne by Government, while as to clause (*b*) it is doubtful whether the Company could have sued Daulat Rai for damages on the facts of this case. But however this may be, we think that under section 214, Act VI of 1882, we can award to the Company damages by making the fine mentioned above over to the Liquidator for the benefit of the Company. By the devices adopted by him he was guilty of "misfeasance" and "breach of trust"; by inducing the share-holders to pay a dividend partly out of what was really capital, he "misapplied" the Company's money, and this Court can, therefore, compel him to contribute a reasonable sum by way of compensation

We, therefore, direct that the whole fine (Rs. 6,000), or so much of it as is recovered, be paid to the Liquidator on behalf of the Company as compensation.

Sentences reduced.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL TRANSFER APPLICATION No. 225 OF 1914.

January 12, 1915.

Present:—Mr. Pratt, J. C.

OTANDAS DWARKADAS – APPLICANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 526 cls. (1) (a) & 8—Transfer of case—Fair and impartial inquiry—Reasonable apprehension.

Where an application was made by the accused to the trying Magistrate, before the commencement of the hearing, notifying his intention to move the High Court under section 526, Criminal Procedure Code, for transfer and praying for an adjournment for that purpose, but the applications was rejected and some condemnatory remarks were made in a superfluous order by the Magistrate against the accused:

Held, that the Magistrate was bound to grant the adjournment and that as these irregularities coupled with the condemnation of the accused appeared to have created a reasonable apprehension in the mind of the accused that a fair and impartial inquiry could not be had, the case ought to be transferred. [p. 109, col. 1.]

Application for transfer of a case from the Court of the City Magistrate, Shikarpur.

Mr. *F. J. De Verteuil*, for the Applicant.

Mr. *E. Raymond*, (Public Prosecutor for Sind), for the Crown.

JUDGMENT.—This is an application for transfer to any other Magistrate of a case pending in the Court of the City Magistrate, Shikarpur. The application is based on many grounds, most of which have been dropped in view of the Magistrate's report. Two of the remaining grounds disclose irregularities in the procedure of the Magistrate. The case was a simple case of wrongful restraint and was fixed for hearing on the 8th October. The accused moved the Court to grant an adjournment in order to enable him to apply under section 526 for transfer. The accused says that he made this motion before the hearing began. The Magistrate in his report does not state distinctly whether this was so or not. He reports that the application was made after the commencement of the case. But as the case had been put for preliminary inquiry, it is not clear what the Magistrate considered was the commencement of the case. A general and somewhat discursive order on various matters was recorded by the Magistrate on the 8th after recording some evidence and this order appears to refer to the application as having been made before the evidence was led on the 8th. I take it, therefore, that the application was made before the commencement of the hearing. This being so, the Magistrate was bound to make an order granting the accused such an adjournment as would enable him to make his application and obtain an order from the High Court before being put upon his defence. I do not say that he was bound to stay proceedings the instant the application was made. Nor do I think that such is the necessary inference from the decision of *Crown* v. *Naoo* (1). There as here the Magistrate rejected the application

(1) 1 S. L. R. 35; 9 Cr. L. J. 274.

In re KUPPUSAMI AIYAR.

without any qualification as to a future adjournment. It was open to the Magistrate to order that the necessary adjournment should be given after the examination of such witnesses as were in attendance. He, however, merely rejected the application. * * * * *

These irregularities, coupled with the condemnation of the accused contained in the somewhat superfluous order recorded on the 8th October, do appear to have created a reasonable apprehension in the mind of the accused.

I accordingly order the transfer of the case to such other Magistrate as the District Magistrate, Sukkur, may direct.

Case transferred.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 667 OF 1914.
CRIMINAL REVISION PETITION No. 565 OF 1914.
March 26, 1915.

Present:—Mr. Justice Kumaraswami Sastri.

In re S. KUPPUSAMI AIYAR—ACCUSED—PETITIONER.

Criminal Procedure Code (Act V of 1898), s. 435—Charter Act, s. 15—High Court, power of, to quash proceedings at any stage—Penal Code (Act XLV of 1860), ss. 189, 504, offence under, essentials of—Abusing process-server, whether offence—Service of summons, when complete—Process-server, right of, to enter any house without permission.

A High Court has jurisdiction to interfere at any stage of the proceedings if it considers that, in the interests of justice, it should do so. [p. 110, col. 2.]

Before an offence under section 189 of the Indian Penal Code can be made out, it must be shown that there was a threat of injury to a public servant for the purpose of inducing him to do any act or forbear or delay to do any act connected with the exercise of his public function. [p. 110, col. 2]

The mere fact that the accused abused the process-server will not constitute an offence under section 189 of the Indian Penal Code, nor will it constitute an offence under section 504 of the Indian Penal Code without an intention to cause a breach of the peace or knowledge that a breach of the peace is likely to result. [p. 111, col. 1.]

Service of summons is complete when it is tendered to the witness and his refusal to sign the original makes no difference. [p. 111, col. 1.]

The fact of a subpœna being entrusted to a process-server does not give him a general right of entry into any house without obtaining the permission of the owner or person in charge. [p. 111, col. 1.]

Petition, under sections 435 and 439 o the Code of Criminal Procedure, 1898, praying the High Court to revise the order (charge) of the Court of the second Class Magistrate of Tranquebar, dated the 29th July 1914, in Calendar Case No. 229 of 1914.

The *Public Prosecutor*, on behalf of the Government.

Mr. *T. Ramachandra Aiyar*, for Messrs. *R. Sadagopachariar* and *U. Rajagopala Iyengar*, for the Petitioner.

ORDER.—This is an application under section 435 of the Code of Criminal Procedure and section 15 of the Charter Act, praying that the charge framed against the petitioner by the second Class Magistrate of Tranquebar may be quashed.

The case for the accused is that he was charged under sections 189 and 504 of the Indian Penal Code, that the evidence on record is insufficient to substantiate either of the charges and that the proceedings were instituted out of pure malice and with the object of harassing the petitioner.

A preliminary objection has been taken by the Public Prosecutor as to the maintainability of the petition and the power of the High Court to interfere. So far as the power of the High Court is concerned the point seems to be concluded by authority. In *Chandi Pershad* v. *Abdur Rahman* (1), it was held that the High Court had power to interfere at any stage of a case if it considers that the grounds have been made out for interference. Their Lordships at page 138 observe as follows :—" We feel bound to say that Mr. Pugh did not attempt to contend that the charges framed against Chandi Pershad could be sustained. He rather confined himself to urging the impropriety of our interference at a time when the case is still pending before the Magistrate. There can be no doubt, however, that we have the power to interfere at any stage of the case, and when it is brought to our notice that a person has been subjected for over two months to the harassment of an illegal prosecution, we think it is our bounden duty to interfere." In *Choa Lal Dass* v. *Anant Pershad Misser* (2), it was held that the Court had power to interfere in any case and at any stage and the above passage

(1) 22 C. 131.
(2) 25 C. 233.

from *Chandi Pershad* v. *Abdur Rahman* (1) was approved. While admitting the general power of the High Court, their Lordships state that the interference should be rare and only in exceptional cases and that the safe practical test would be to see whether a bare statement of the facts of the case without any elaborate argument should be sufficient to convince the Court that it is a fit case for interference at an intermediate stage. In *Jagat Chandra Mozumdar* v. *Queen-Empress* (3), the power of the High Court to interfere in any case and at any stage was referred to and their Lordships found that in cases where there is some manifest and patent injustice apparent on the face of the proceedings calling for prompt redress the High Court has power to interfere. Their Lordships quashed the proceedings in the particular case, as they were of opinion that "it is clearly most unfair to the accused that he should not be called upon to rebut a charge which, upon the evidence, is baseless in so far as it affects him." In *Queen-Empress* v. *Nageshappa Pai* (4), it was held that the High Court could interfere with an interlocutory order passed by a Magistrate and Mr. Justice Ranade observed as follows:—"A preliminary objection was raised by the Government Pleader that as the proceedings before the Magistrate were still pending, this Court could not interfere with an order passed by the Magistrate in an interlocutory stage. The words used in section 435 of the Code of Criminal Procedure are, however, very general, and empower the High Court to send for the record of a case not only when it wishes to satisfy itself about the correctness of any finding, sentence or order, but also as to the regularity of any proceedings in Subordinate Courts. In *Abdool Kadir Khan* v. *Magistrate of Purneah* (5), the High Court of Calcutta expressly ruled that it had jurisdiction to revise interlocutory orders. This power was again exercised by the same Court in respect of an illegal Municipal prosecution—*Chandi Pershad* v. *Abdur Rahman* (1). We follow these decisions and overrule this preliminary objection urged by the Government Pleader.

There can thus be little doubt that, though the power has to be exercised with great care, the High Court has jurisdiction to interfere at any stage of the proceedings, if it considers that, in the interests of justice, it should do so. No hard and fast rule can be laid down as regards the class of cases in which the High Court will interfere.

In the present case the accused is charged with offences under sections 189 and 504 of the Indian Penal Code.

A careful consideration of the evidence adduced by the prosecution and the Exhibits filed in the case leads me to the conclusion (1) that the ingredients necessary to constitute an offence under sections 189 and 504 have not been made out, and (2) that the case as presented to the Court bears considerable evidence of fabrication and that the development that the case has undergone from the date of the first report of the process-server dated 21st April 1914 shows that this is not a *bona fide* prosecution but that the complainant is a tool in the hands of others.

The case for the prosecution is that the accused (who is a respectable Pleader) obstructed the service of summons on his father, whom he had subpœnaed as a witness for his client. There is absolutely no motive suggested why accused should have done so and the whole story is on its face improbable.

Before an offence under section 189 of the Indian Penal Code can be made out, it must be shown that there was a threat of injury to a public servant for the purpose of inducing him to do any act or forbear or delay to do any act connected with the exercise of his public function.

In the present case it is admitted that the summons was tendered to the witness before the accused appeared on the scene. Though the complainant does not stick to one story as to when the witness signed his name, there can be little doubt that he was served with the summons. I cannot help observing that the story told by the prosecution 1st witness bears considerable traces of addition and improvement if reference be made to his sworn endorsement on the complaint. The endorsement shows that summons was served in the house of the accused and that there was no threat of violence but only abuse. The whole

(3) 26 C. 786; 3 C. W. N. 491.
(4) 20 B. 543.
(5) 20 W.R. 23 Cr.; 11 B. L. R., Ap. 28.

of the story about the street scene, which is inconsistent with the version in the endorsement on the summons, is an afterthought and in my opinion false.

There is nothing to show that the accused intended to obstruct service or as a matter of fact obstructed it. Service of summons is complete when it is tendered to the witness and his refusal to sign the original makes no difference. Rule 10 of Order V of the Code of Civil Procedure states that service of a summons shall be made by delivery or *tendering a copy* of a summons. If the party refuses to sign the acknowledgment, all that the process-server has to do is to affix it. Rule 8 of Order XVI of the Code of Civil Procedure enacts that service of summons on witnesses shall be in manner prescribed in Order V.

The endorsement on the summons is to the effect that after tender of summons to the witness the accused came up, abused the process-server and asked him to get out of the house and that the witness immediately afterwards received the summons and *batta* and signed his name. Assuming that accused abused the process-server, it will not constitute an offence under section 189 of the Indian Penal Code.

As regards the charge under section 504, mere abuse will not do without an intention to cause breach of the peace or knowledge that a breach of the peace is likely. There is nothing to show that the accused had any such intention or knowledge. The endorsement on the summons does not warrant any such inference.

It appears from the subpœna that it was to be served on the witness who is described as residing at No. 6, Pattamangalam Agraharam, Kasba Mayavaram. The process-server had power to enter that house in order to effect service. He, however, went inside the house of the accused in Vellalar in Koil Rettai Street without permission and the accused is said to have abused him and asked him to get out.

I do not think that the fact of a subpœna being entrusted to a process-server gives him a general right of entry into any house without obtaining the permission of the owner or person in charge. Such a general power to enter any house at any time is not given by any of the provisions of the Code and would, in my opinion, be a serious violation of private rights. The mere fact that the owner asked the process-server to go out of his house would not be an offence. Assuming that the request to go out of the house was accompanied by the words "*Badava*, rascal", it cannot be said that the object or intention was to provoke a breach of the peace, however, improper the language may be.

The case was fully argued on both sides and giving it my best consideration, I am of opinion that this is a case where I ought to interfere. It is easy to see what injury is likely to be inflicted on a respectable Pleader by a vexatious and protracted, criminal trial. It may be that after a protracted trial the accused will be acquitted, but that does not appear to be a sufficient ground for not saving him from what I consider to be a groundless and vexatious prosecution.

I quash the proceedings in the lower Court.

Proceedings quashed.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION NO. 197 OF 1914.

November 12, 1914.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

MUHAMMAD IBRAHIM AND ANOTHER—APPLICANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 122—Surety, evidence about fitness of, rejection of—Magistrate, duty of—Burden of proof.

The power of rejection of sureties conferred on Magistrates by section 122 of the Criminal Procedure Code, 1898, should not be used merely to prevent a *'badmash'* from giving security. [p. 112, col. 1.]

Although it is the duty of the accused to produce the evidence of the fitness of the surety, that burden is ordinarily discharged by the evidence of the surety himself. If the Magistrate is not satisfied with the evidence of the surety, that alone is not sufficient ground for rejection. Section 122 of the Criminal Procedure Code recognizes only one ground for rejection of the surety and the reason given by the Magistrate must be a positive reason for believing the surety to be unfit. If he is not so satisfied, he must make further inquiry and come to a definite conclusion one way or the other. [p. 112, col. 2.]

MUHAMMAD IBRAHIM *v.* EMPEROR.

Application for revision against an order of the Sub-Divisional Magistrate, Mehar.

Mr. *F. J. De Verteuil*, for the Applicants.

Mr. *E. Raymond* (Public Prosecuter for Sind), for the Crown.

JUDGMENT.—This is an application for revision of an order of the Sub-Divisional Magistrate of Mehar rejecting four sureties offered for two suspects, Mahomed Ibrahim and Abdul Hakim.

The order under section 118, Criminal Procedure Code, required that these suspects should execute bonds with three sureties each for a period of two years and was made on the 20th December 1913. The order required that the sureties should be of a class which fulfilled three conditions,

(*a*) that they should not be of inferior standingto the suspects;

(*b*) that they should be respectable;

(*c*) that they should be neighbours of suspects.

Condition (*c*) is reasonable: see *Imperator* v. *Manu* (1). Condition (*b*) is mere surplusage, for if a surety were not respectable that would be a personal disqualification. Condition (*a*) has been held to be valid in Revision Application No. 55 of 1914 [*Muhammad Ibrahim* v. *Emperor* (2)], though in my opinion the word "standing" is so vague that I doubt if it gives the suspect adequate and precise information as to the class of surety he should produce. At any rate some more precise definition of the class required would seem preferable. But it is settled in the same revision application that whatever else it may mean, it did not necessarily refer to a property qualification. The sureties rejected by the Magistrate were tendered under this order and the application stated that the sureties had brought their assessment books, had each land worth Rs. 1,000 besides moveable property and were willing and able to control the accused. Nevertheless the Magistrate dealt with the application in a summary manner, which indicates that he had paid little attention to the injunction given by this Court that the power of rejection should not be used merely to prevent a "*badmash*" giving security.

As to all the sureties the reason for rejection is that they have produced no evidence as to character. Now although it is the duty of the accused to produce the evidence of the fitness of the surety, that burden is ordinarily discharged by the evidence of the surety himself. If the Magistrate is not satisfied with the evidence of the surety, that alone is not sufficient ground for rejection. Section 122 recognizes only one ground, *i.e.*, "the ground that for reasons to be recorded by the Magistrate such surety is an unfit person." The reason given by the Magistrate must, therefore, be a positive reason for believing the surety to be unfit. It is not sufficient for the Magistrate to say that he is not satisfied with the evidence called by the accused. If he is not so satisfied, he must make further inquiry and come to a definite conclusion one way or the other. Two of the sureties, Sherkhan and Umer Usman, did call witnesses as to their character, but the Magistrate declined to consider their evidence as they were themselves tendered as sureties. It is unfortunate that the Magistrate should make a presumption against a witness's credibility merely because he has offered to be a surety for a bad character. The presumption ought to be the other way, for otherwise no respectable person will undertake the responsibility of being surety. As to Sherkhan, the Magistrate thinks he is not of equal standing to the suspects as he has only 16 acres of land, but it has been decided that that qualification does not necessarily or exclusively refer to property. As to Yusif Bhambe, the Magistrate says that he has only 8 acres of land and not the means to pay the penalty of the bond, but he has omitted to consider the moveable property of this surety.

These four sureties, Sherkhan Bahikhan, Khan Mahomed Ghulamali, Umar Usman and Yusif Bhambe are neighbours of the suspects and there is nothing against their character, nor does their social standing seem inferior to that of the suspects.

We, therefore, direct the Magistrate to accept their bonds.

Order reversed.

(1) 1 S. L. R. 46; 8 Cr. L. J. 166.

(2) 27 Ind. Cas. 148; 8 S. L. R. 173; 16 Cr. L. J. 100.

THUVOOR VENKATASUBBA REDDY *v.* BAGIAMMAL.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2404 OF 1912.

January 12, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Napier.

THUVOOR VENKATASUBBA REDDY—PLAINTIFF—APPELLANT

versus

BAGIAMMAL—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 82—Contribution—Properties of two owners mortgaged to secure one debt—One owner and his property, release of, on payment of one-half of debt—Major portion of property released—Liability of other mortgagor and remaining portion of mortgaged property.

Where properties of unequal value belonging to two owners were mortgaged to secure a single debt and the mortgagee, on receiving one-half of the mortgage amount from one of the mortgagors released his portion of the mortgaged properties, which were of higher value, and sought to realise the balance of the mortgage amount from the remaining properties belonging to the other mortgagor:

Held, that he was entitled to do so and that the suit properties were liable to be sold for the whole of the balance remaining due upon the mortgage and not only to contribute rateably towards the mortgage-debt. [p. 115, col. 2; p. 119, col. 1.]

Krishna Ayyar v. *Muthukumarasawmiya Pillai*, 29 M. 217 and *Mir Esuff Ali Haji* v. *Panchanan Chatterjee*, 6 Ind. Cas. 842; 15 C. W. N. 800; 11 C. L. J. 639, distinguished.

Ponnusami Mudaliar v. *Srinivasa Naicken*, 31 M. 333; *Norendra Nath Sircar* v. *Kamalbasini Dasi*, 23 C. 563; 23 I. A. 18; *Lala Dilawar Sahai* v. *Dewan Bolakiram*, 11 C. 258; *Roghu Nath Pershad* v. *Harlal Sadhu*, 18 C. 320; *Imam Ali* v. *Baij Nath Ram Sahu*, 33 C. 613; 10 C. W. N. 551; 3 C. L. J. 576 and *Webb* v. *Macpherson*, 31 C. 57; 5 Bom. L. R. 838; 8 C. W. N. 41; 13 M. L. J. 389; 30 I. A. 238 (P. C.), referred to.

Sheo Tahal Ojha v. *Sheodan Rai*, 28 A. 174 (F. B.); A. W. N.(1905) 244; 2 A. L. J. 630 and *Sanwale Singh* v. *Ganeshi Lal*, 20 Ind. Cas. 41; 35 A. 441; 11 A. L. J. 630, followed.

Per *Napier, J.*—A Court should not introduce such provisions as the Legislature has not thought fit to incorporate in Transfer of Property Act. [p. 117, col. 2.]

Second appeal against the decree of the District Court of North Arcot, in Appeal Suit No. 415 of 1911, preferred against that of the Court of the District Munsif of Sholingur, in Original Suit No. 547 of 1910.

FACTS.—The suit arose out of a mortgage executed by Arunachala Mudali and Sanjeevi Mudali for Rs. 1,800. The properties belonging both to Arunchala and Sanjeevi were comprised in the mortgage, the properties of Arunchala being of a higher value than those of Sanjeevi. In 1910, Arunachala paid one-half of the amount then due on the mortgage and the mortgagee released his properties from the mortgage. Sanjeevi having died in the meanwhile, the mortgagee instituted the present suit against the daughter-in-law of Sanjeevi for the recovery of the balance of the mortgage amount by the sale of the properties of Sanjeevi alone. Arunachala was not made a party to this suit. The defendant mainly contended that the suit properties were only liable to contribute rateably towards the mortgage debt and that as the properties mortgaged were worth Rs. 5,550 and as the suit properties alone were only worth Rs. 1,020, she was only liable to pay a sum of Rs. 450 as and for her share of the mortgage-debt. Both the lower Courts upheld this contention. The plaintiff appealed.

Mr. *L. A. Govindaraghava Aiyar*, for the Appellant:—The plaintiff never intended to exonerate or did exonerate Arunchala or his properties. There is nothing in Exhibit B or in the plaint to support such a position and the finding of the lower Courts to that effect cannot be upheld. Assuming, however, that there had been such a release, even then the plaintiff is entitled to recover the balance of the mortgaged amount from the properties of Sanjeevi alone. *Vide* section 82 of the Transfer of Property Act. The observations in *Krishna Ayyar* v. *Muthukumarasawmiya Pillai* (1) are only *obiter*. See also *Lala Dilawar Sahai* v. *Dewan Bolakiram* (2) and *Roghu Nath Pershad* v. *Harlal Sadhu*(3) referred to in *Krishna Ayyar* v. *Muthukumarasawmiya Pillai* (1), which have taken the the contrary view. In *Sanwale Singh* v. *Ganeshi Lal* (4), the case of *Krishna Ayyar* v. *Muthukumarasawmiya Pillai* (1) was considered and the Court held that the mortgagee was at liberty to realise the mortgage debt from any portion of the mortgaged property. See also *Sheo Tahal Ojha* v. *Sheodan Rai* (5) for the same position.

Mr. *V. V. Srinivasa Aiyangar*, for the Respondents:—The lower Courts have found as a fact that the plaintiff had released his rights so far as Arunachala and his

(1) 29 M. 217.
(2) 11 C. 258.
(3) 18 C. 320.
(4) 20 Ind. Cas. 41; 35 A. 441; 11 A. L. J. 630.
(5) 28 A. 174 (F. B.); A. W. N. (1905) 244; 2 A. L. J. 630.

properties were concerned. *Vide* endorsement of payment on Exhibit A and the plaint. A release need not necessarily be in writing. The parties went to trial on the footing that there had been a release and it is too late for the plaintiff to go back. The words 'are mortgaged' in section 82 of the Transfer of Property Act mean 'are at the date of suit liable on an existing mortgage.' They cannot mean that the right to contribution arises where several properties are mortgaged. The mortgagee's releasing Arunachala has necessarily the effect of extinguishing the debt so far as he is concerned, with the consequence that the other mortgagor is debarred from getting contribution from him. In consequence of this disability an equity arises in favour of the other mortgagor limiting the mortgagee's right to rateable contribution from him. The lower Courts were, therefore, right in basing their decision on the cases reported as *Krishna Ayyar* v. *Muthukumarasawmiya Pillai* (1) and *Mir Esuff Ali Haji* v. *Panchanan Chatterjee* (6). See also *Ponnusami Mudaliar* v. *Srinivasa Naickan* (7) and *Imam Ali* v. *Baij Nath Ram Sahu* (8).

Mr. *L. A. Govindaraghava Aiyar*, in reply:—The equity sought to be invoked in favour of the defendant is against the spirit of the Transfer of Property Act. Section 68 of that Act directly negatives such a contention and gives the mortgagee unrestricted liberty to realise the mortgage money from any portion of the mortgaged property. There is nothing in section 67 limiting that right. See also sections 43 and 44, Contract Act. As regards the applicability of the equity itself see *Norendra Nath Sircar* v. *Kamalbasini Dasi* (9) and *Webb* v. *Macpherson* (10). The case of *Krishna Ayyar* v. *Muthukumarasawmiya Pillai* (1) only holds that as between the mortgagee and holder of equity of redemption, the former is not bound to distribute his debt rateably. The case of *Ponnuswami Mudaliar* v. *Srinivasa Naicken* (7) also concerns the rights of an assignee of equity of redemption. Even in the case of *Mir Esuff Ali Haji* v. *Panchanan Chatteriee* (6), such a principle has been held to be inapplicable to cases of mortgagor and mortgagee. Vide *Mir Esuff Ali Haji* v. *Panchanan Chatterjee* (6).

(6) 6 Ind. Cas. 842; 15 C. W. N. 800; 11 C.L.J. 639.
(7) 31 M. 333.
(8) 33 C. 613; 10 C. W. N. 551; 3 C. L. J. 576.
(9) 23 C. 563; 23 I. A. 18.
(10) 31 C. 57; 5 Bom. L. R. 838; 8 C. W. N. 41; 13 M. L. J. 389; 30 I. A. 238 (P. C.).

JUDGMENT.

SPENCER, J.—In this case the separate properties of two owners were mortgaged to secure a single debt of Rs. 1,800. One of the mortgagors, Arunachala Mudali, paid up Rs. 1,631-14-0 and the mortgagee sought in this suit to recover the whole of the balance from mortgaged properties in the possession of the other mortgagor. The lower Courts refused to allow the plaintiff to recover more than what the property he proceeded against was rateably liable for.

The questions for our decision are, (1) whether there was in law an extinguishment of the mortgagee's lien over Arunachala Mudali's property, so as to preclude the plaintiff from recovering the whole of the balance due under the mortgage in this suit and the defendant from obtaining a contribution from Arunachala Mudali in a separate suit in proportion to the value his property bears to the whole debt secured by the mortgage, after deducting the amount already paid to the mortgagee; (2) whether assuming that it was understood by the parties that plaintiff released his right to proceed against Arunachala Mudali's property, this will prevent him from recovering the whole debt from the defendant. The statement in paragraph 6 of the plaint that Arunachala Mudali cleared off a portion of the interest and principal due upon the mortgage and that accordingly his properties have been *excluded from the suit* as arranged, does not in my opinion amount to an extinguishment of the mortgage lien over Arunachala Mudali's property.

No doubt there are words in Exhibit B showing that plaintiff at one time had an idea of relinquishing his lien over Arunachala Mudali's property, but as it was not a completed transaction and the document contains an admittedly false recital as to the payment of Rs. 1,621 in cash, it cannot affect the equities existing between the parties. Exhibit B, therefore, does not help the defendant as containing an admission of plaintiff that he had given up Arunachala Mudali's property. I consider the alleged extinguishment no proved, but as this is partly a question of fac upon which one of the lower Courts ha

pronounced in defendant's favour, I proceed to the second question.

Now as stated in *Mir Esuff Ali Haji* v. *Panchanan Chatterjee* (6). "It is a firmly settled doctrine that, as between the original parties, the release of a part of premises does not affect the lien of the mortgagee upon the residue, which is bound for the whole debt." There are no words in section 67 of the Transfer of Property Act to limit the mortgagee's right in this respect. Section 82 declares: "Where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage after deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage." The effect of this and other sections relating to mortgages has been fully considered in *Krishna Ayyar* v. *Muthukumarasawmiya Pillai* (1), where it was held that there was nothing in the provisions of the Transfer of Property Act to support the view that as between a mortgagee and the holders of the equity of redemption the mortgagee is bound to distribute his debt rateably upon the mortgaged properties. Reliance is placed by respondent's Vakil upon the *obiter dictum* at page 224: "It remains only to observe that, if the action of the mortgagee had the effect of extinguishing the mortgage lien upon any portion of the mortgaged property so as to relieve it from the liability to bear its proportion of the debt, he cannot recover more than what the property he proceeds against would be rateably liable for." The learned Judges were here dealing with an argument advanced on behalf of subsequent purchasers. The decision in *Ponnusami Mudaliar* v. *Srinivasa Naicken* (7) is also one relating to the rights of assignees of the equity of redemption. As observed by the Calcutta High Court in *Mir Esuff Ali Haji* v. *Panchanan Chatterjee* (6), 'the principle has no application as between the mortgagor and the mortgagee when the rights of no other person intervene and require protection." The decision in *Sanwale Singh* v. *Ganeshi Lal* (4) is to the same effect. I express no opinion as to the rights of subsequent transferees with or without notice. It was not necessary to join Arunachala Mudali as a party to this suit and there has been no application to have him made a party. He is not a person interested in the property which is the subject of this suit. Vide *Krishna Ayyar* v. *Muthukumarasawmiy Pillai* (1) and *Ponnusami Mudaliar* v. *Srinivasa Naicken* (7).

I consider for these reasons that the appeal should be allowed and that the appellant should be given a decree for sale of the plaint-mentioned properties for the whole of the balance due upon this mortgage with interest up to the date fixed for payment, and that he should recover his costs from the respondent throughout.

Time six months from this date.

NAPIER, J.—Two questions are raised in this appeal: *First*, whether the plaintiff has in fact extinguished the liability on the property of Arunachala Mudali under his mortgage; and, *secondly*, whether, if he has in fact done so, he is only entitled to recover a rateable proportion of the mortgage amount from the mortgaged properties in the possession of the defendant. The original liability arose on a simple mortgage executed on the 9th March 1898 by Arunachala Mudali and Sanjeeva Mudali, the father-in-law of the defendant (the mortgage amount being Rs. 1,800) with interest at 12 annas per cent. per mensem. Both executants mortgaged distinct items of the property belonging to each of them to cover the joint debt, and it is admitted that Arunachala Mudali, one of the original mortgagors, paid a sum of Rs. 1,631-14-0 in August 1910, which amount represented half the then existing liability. The plaintiff then brought a suit to recover the balance against the defendant and not making the co-mortgagor a party defendant, alleging that, in consequence of his having paid a sum of Rs. 1,631-14-0 to the plaintiff, he and his property out of the hypotheca were excluded from the suit, as was arranged with him. The defendant set up in paragraph No. 10 of the written statement that she was not liable for this balance of Rs. 1,600, as the plaintiff was bound to apportion the mortgage amount rateably on the value of all the mortgaged properties and, as Arunachala Mudali's properties were worth Rs. 5,550 and her property only Rs. 1,020, she was only liable for an amount of Rs. 450 as her share. The issue framed on this plea is: "Whether the plaint propertsie

are liable to be sold only for a rateable amount due, as the plaintiff has exonerated the other mortgagor and his properties." The District Munsif held in favour of the defendant on this issue.

On appeal to the District Court two points were taken, *first*, that the lower Court had erred in holding that the non-inclusion of Arunachala Mudali, the co-mortgagor, and his properties operated as an extinguishment of the mortgage to that extent: and, *secondly*, that the plaintiff was entitled to recover his debt on any portion of the mortgaged properties. Before the District Court the first point seems hardly to have been pressed: for the learned Judge states that the only question argued in this appeal related to the second point, it having been assumed that the plaintiff had exonerated the other mortgagor and his properties.

A long and careful argument has been addressed to us by Mr. Govindaraghava Aiyar urging that the plaintiff did not intend, by the language used in his plaint, to allege that he had exonerated the other mortgagor and his properties. I am unable to accept this contention. It is clear to me from the language of the plaint that the parties went to trial on this footing and, seeing that there can be an oral release, I accept the finding of both Courts that there had been such a release and that the endorsement on Exhibit A of the payment is evidence of that release.

Assuming, therefore, that the plaintiff had discharged one of the mortgagors from liability under the mortgage by receipt of half the amount due, the question remains whether he is thereby debarred from seeking to recover more than a rateable proportion of the balance from the co-mortgagor Both Courts have held that he is so debarred, relying on the language of *Krishna Ayyar* v. *Muthukumarasawmiya Pillai* (1) and also on the *dictum* of Mookerjee, J., in *Mir Esuff Ali Haji* v. *Panchanun Chatteriee* (6). The language used by the learned Judges on page 224 is as follows:—"It remains only to observe," etc. It is to be noted that in the view of the learned Judges the limitation of the mortgagee's rights arises where his action has had the effect of relieving the discharged property from its liability to bear its proportion of the debt; and the argument addressed to us is based on the assumption that section 82 of the Transfer of Property Act, which creates the right to contribution, does not apply where one of the mortgaged properties has, at the time of the suit, been discharged from liability. The words are: "Where several properties are mortgaged to secure one debt, such properties are liable to contribute rateably to the debt." It is argued that the words "are mortgaged" mean "are, at the date of suit, liable on an existing mortgage," and that they cannot be read as meaning "where several properties have been mortgaged to secure one debt the right to contribution arises" and that, therefore, the mortgagee having put it out of the power of one mortgagor to get contribution, an equity arises in favour of the remaining mortgagor which limits the mortgagee's right to rateable contribution. It is, to my mind, a little difficult to see how a mortgage can be extinguished so as to prevent contribution but be kept alive for the purpose of ascertaining rateable proportion. But I do not think it necessary to decide here whether the right of contribution has, in fact, been lost. That question may arise in another suit. I am unable, however, to accept the view that even if it is lost, this right of equitable limitation exists. It seems to me that we should be very slow in introducing equities into the statutory mortgage law of this country, based on equitable doctrines applied to English mortgagors. The right of contribution is itself an equity, and an equity specifically introduced by Statute. If, under the English Law of mortgages, there is an equitable limitation to the mortgagee's right, it was perfectly open to the framers of the Act to introduce that equity by suitable provision. They have not chosen to do so and in my humble opinion, it is not the function of the Courts to do so for them. The learned Judges in *Krishna Ayyar* v. *Muthukumarasawamiya Pillai* (1) examine the provisions of the Transfer of Property Act with great minuteness. They point out that there are only 4 or 5 sections which need be considered, namely, sections 56, 81, 82, 95 and 60 and conclude as follows:—"It is scarcely necessary to say that there is nothing in any of these sections suggesting the view that as between a mortgagee in the position of the plaintiff and holders of the equity of redemption, such as the appellants

are, the law compels the former to distribute his debt, upon the mortgaged property rateably so as to entitle the latter to insist upon their interest not being proceeded with until after the nephew's one-third share has been proceeded against." Section 81 deals with marshalling; section 82 is the contribution section. Section 95 creates a charge by a co-mortgagor, who has redeemed the whole debt, on the share of the other co-mortgagors in the property for their due proportion; section 60 states the rights of a mortgagor to redeem; section 56 gives a right to a purchaser of one of two properties subject to a common charge, as against the seller, to have the charge satisfied out of the other property as far as such property will extend. It is to be noted that sections 56, 81, 82 and 95 are statutory equities in favour of persons owning properties liable to a charge against other persons and other properties equally liable on that charge. It has not been argued, and it cannot be argued, that any of these provisions raises the equity sought for here. The first difficulty in the way of this equity seems to me to be this. If the equity can be used as a defence to a mortgage suit, it obviously should be available to a mortgagor in a redemption suit; for it is illogical to say that the mortgagee cannot claim more than a rateable proportion, but that the mortgagor in a suit to redeem would have to pay the whole amount. Therefore, the right must be exercisable in redemption. Unfortunately, however, the Transfer of Property Act is definite in negativing this right. Section 60 gives a right to the mortgagor to redeem *on payment of the mortgage money* and specifically provides that nothing in the section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only on payment of the proportionate amount of the money remaining due on the mortgage, except where a mortgagee has acquired another such share. Here is to be found the only statutory limitation to the liability of the mortgagor to pay the whole amount due on the mortgage, if he seeks to redeem. Section 67 states the rights of the mortgagee. It gives a right to a foreclosure, or an order for sale, to the mortgagee as long as the mortgage money has not been paid. Among all the following sections from 69 to 84 there is not a single provision limiting the right of the mortgagee to recover the amount of his mortgage from any property made liable thereto by the mortgage document, except where he has lost his priority by fraud, misrepresentation or gross neglect, and except as to the right of a second mortgagee without notice of a former mortgage to have the securities marshalled so as to protect himself as far as possible. It is clear, therefore, that this equitable limitation of the mortgagee's right is one which is directly opposed to the language of various sections, introduces a right in the mortgagor impliedly negatived by section 60, and is, of course, in direct conflict with the rights and liabilities arising from the language of the document. When I am asked to read this equity into the Statute and am pressed with the language used by the learned Judges of this Court and of other Courts, I can only refer to the language of Lord Macnaughten in *Norendra Nath Sircar* v. *Kamalbasini Dasi* (9), adopting the language of Lord Herschell in the *Bank of England* v. *Vagliano* (11) which is in effect as follows, that the proper course is to examine the language of the Statute—uninfluenced by any considerations derived from the previous state of the law. If the Statute is intended to embody in a Code a particular branch of the law, the purpose of such Statute surely was that the law should be ascertained by interpreting the language used and not by enquiring how the law previously stood. Bearing in mind that the Chapter relating to mortgages in the Transfer of Property Act is as distinctly a 'Code" as any enactment could be, in that it begins by defining a mortgage, and seeing that its provisions contain several equities known to English Law I must, with the greatest deference to the views taken by the other Judges, decline to introduce provisions which the Legislature has not thought fit to incorporate in the Act.

I now proceed to consider the question from another point of view. The mortgage is a simple mortgage, under which each of the mortgagors bound himself personally to the mortgage money. Under section 68 of the Transfer of Property Act, the mortgagee has a right to sue the mortgagor *for the mortgage money* where the mortgagor has bound himself to re-pay the same. There is no equitable limitation here and a reference to the Contract Act shows that no such limita-

(11) (1891) App. Cas. 107; 60 L. J. Q. B. 145; 64 L. T. 353; 39 W. R. 657; 55 J. P. 676.

tion can be introduced. Section 43 of the Indian Contract Act provides that any one of joint promisors may be compelled to perform the whole of the promise and section 44 specifically enacts that where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor. This is the very point under consideration in this case and it is to be noted that these two sections 43 and 44 give the right of contribution to joint promisors and also specifically provide that the release of a joint promisor by the promisee does not free such promisor from responsibility to the other joint promisors. I fail to see how it can be argued that a mortgagee in a mortgage suit can only ask for sale of mortgaged property for a rateable proportion of the mortgage debt, when on his claim on the covenant to pay he is entitled to judgment for the whole amount with, as a necessary corollary, a right to levy execution against the land. If there is an equity here, it operates strangely, for its only result will be, not to protect the mortgagor, but to give some advantage to a subsequent mortgagee, if there be one.

Reliance is placed on the view embodied in *Ponnusami Mudaliar* v. *Srinivasa Naicken* (7). There the learned Judges accept the statement of the law contained in Mr. Ghose's 'Law of Mortgages," dated 1875, prior to the Transfer of Property Act. With the very greatest deference, I cannot follow the Court in disposing of the case without reference to the provisions of the Act, but this case does not help the respondent as the proposition stated is covered by sections 56 and 81 of the Act. The learned Judges in *Krishna Ayyar* v. *Muthukumarasawmiya Pillai* (1), the case containing the *obiter dictum* relied on by the lower Court, quote with approval two cases, *Lala Dilawar Sahai* v. *Dewan Bolakiram* (2) and *Roghu Nath Pershad* v. *Harlal Sadhu* (3), which lay down that the mortgagee is entitled to realise the whole debt upon the whole property, the right to contribution being only as between the defendants, though they limit it in a manner expressly provided by section 81. The decision in *Krishna Ayyar* v. *Muthukumarasawmiya Pillai* (1) was considered by the High Court of Allahabad in a later case reported as *Sanwale Singh* v. *Ganeshi Lal* (4) and the Court adopted as correct the broad proposition, without any reservation, that where two properties are jointly mortgaged for the same debt, each of these properties is liable for the whole debt and it is open to the mortgagee to proceed either against the whole of the mortgaged property or against a part only of such property; and the proposition is stated equally broadly by a Full Bench of the same Court in an earlier case, *Sheo Tahal Ojha* v. *Sheodan Rai* (5). It is true that a different view appears to have been taken by the High Court of Calcutta in *Imam Ali* v. *Baij Nath Ram Sahu* (8). But there the learned Judges were considering the case of an assignee of the equity of redemption, a case which is covered by section 56 of the Act, and no authority on the construction of any section of the Act is quoted for the proposition stated on page 622 that "a mortgagee, who has a security upon two or more properties, which, he knows, belong to different persons, cannot release his lien upon the one so as to increase the burden upon the others, without the privity and consent of the persons affected." With the greatest deference, I know of nothing in the Act to support this limitation and it is to be noted that in a later case reported as *Mir Esuff Ali Haji* v. *Panchanan Chatterjee* (6) Mr. Justice Mookerjee, who was a party to the prior case, limits it specifically to cases where the release took place after the purchase of an interest in the mortgaged premises and considers it inapplicable to the case where the mortgagors alone were the persons affected by the release.

Nothing could be more definite than the following language used by that learned Judge in this last case: —

"It is a firmly settled doctrine that, as between the original parties, the release of a part of the premises does not affect the lien of the mortgagee upon the residue which is bound for the whole debt (*vide* page 647)."

In this view I entirely concur, for the simple reason that, both by the language of the mortgage and the language of the sections of the Transfer of Property Act, no equity arises as between mortgagors and mortgagee which limits the mortgagee's rights, and I would refer the language used by Lord Davey in *Webb* v. *Macpherson* (10) with reference to an endeavour to apply

English equities to the Transfer of Property Act. The question arose as to a vendor's charge under the Act and the Board's view is stated on page 72. The English vendor's lien "was a creation of the Court of Equity, and could be modified to the circumstances of the case by the Court of Equity. But in the present case there is a statutory charge..... Such a charge, therefore, stands in quite a different position from a vendor's lien. You have to find something, either express contract or at least something from which it is a necessary implication that such a contract exists, in order to exclude the charge given by the Statute."

What was sought to do in that case was certainly different to what is sought here. But it appears to me that the Privy Council were insisting in that case, too, on the construction of the Statute, apart from equitable principles introduced by Courts of Chancery in England.

For the above reasons I would reverse the decision of the lower Courts and make a preliminary order for sale as prayed for in the plaint.

Appeal allowed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 45 OF 1914.

March 10, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

P. M. A. VELLIAPPA CHETTIAR AND ANOTHERS—DECREE-HOLDERS—APPELLANTS

versus

S. N. SUBRAHMANIYAM CHETTY—JUDGMEMT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 24 (1) (b), 148—Civil Rules of Practice, r. 161A—Transmission of decree for execution by one Court to another—Transmission of that decree to another Court—No steps taken for six months to execute decree—Proceedings thereafter, whether void.

Where a public officer is directed by a Statute to perform a duty within a specified time, the provisions as to time are only directory. In considering whether a Statute is imperative, a balance may be struck between the inconvenience of rigidly adhering to, and the inconvenience of sometimes departing from, its terms. [p. 120, col. 1.]

Caldow v. *Pixell*, 2 C. P. D. 562; 46 L. J. C. P. 541; 36 L. T. 469; 25 W. R. 773, followed.

In deciding whether a rule is mandatory or directory, the possibility of justice suffering from a too rigid application of the time limit should be taken into account. [p. 120, col. 1.]

Queen v. *Ingall*, 2 Q. B. D. 199; 46 L. J. M. C. 113; 35 L. T. 552; 25 W. R. 57; *Brumfitt* v. *Bremner*,, 9 C. B. (N. S.) 1; K. & G. 352; 30 L. J. C. P. 33; 7 Jur. (N. S.) 371; 3 L. T. 375; 9 W. R. 144; 142 E. R. 1; 127 R. R. 582; *Queen* v. *Lofthouse*, 1 Q. B. 433; 7 B. & S. 447; 35 L. J. Q. B. 145; 12 Jur. (N. S.) 619; 14 L. T. 359; 14 W. R. 649, followed.

A Court has under section 24, clause (1) (*b*) of the Civil Procedure Code, power to withdraw to its own file a transmitted execution proceeding and to dispose of it. [p. 120, col. 1.]

An omission to take within six months steps to execute a transmitted decree does not render the proceedings taken after six months infructuous and void *ab initio*. In such cases time is not of the essence of the stipulation. [p. 120, col. 1.]

Rule 161A of the Civil Rules of Practice, Madras, is a rule, of convenience issued by the High Court with the object of inducing decree-holders to take early steps to execute the decree. It is directory in its nature, and not mandatory. [p. 120, col. 2.]

Appeal against an order of the District Court of Ramnad at Madura in Original Petition No. 249 of 1913 (Execution Petition No. 179 of 1913, on the file of the Court of the Subordinate Judge of Ramnad, in Original Suit No. 467 of 1909, on the file of the High Court of Judicature at Fort William in Bengal).

Mr. *A. Krishnaswami Aiyar*, for the Appellant.

Mr. *A. Venkatarayaliah*, for the Respondent.

JUDGMENT.—The appellants obtained a decree for money against the respondent in the Calcutta High Court. As the respondent was residing within the jurisdiction of the Subordinate Judge's Court of Ramnad, the decree was transmitted on the 2nd September 1912 under the latter portion of Order XXI, rule 5, to the District Court of Ramnad for execution. This latter Court sent the decree to the Subordinate Judge. An application for execution was made to him on the 22nd of April 1913, and certain properties were attached. While the application was pending in the Sub-Court, the respondent moved the District Court to call up the records from the Sub-Court on the ground that under rule 161A of the Civil Rules of Practice, the proceedings taken in execution were void as they were instituted more than six months after the transmission of the decree by the Calcutta High Court,

The District Judge upheld this contention and ordered "that the decree will be re-called from the Sub-Court and returned to the High Court of Calcutta." The present appeal has been presented against this order.

Mr. Krishnaswami Aiyar has argued a number of points against the view of the District Judge. He contended that there will be a further period of six months from the date of the District Court transferring the decree for execution to the Sub-Court. This is obviously untenable. He next contended that the District Judge had no power to re-call the decree from the Subordinate Judge. Section 24, clause (1) (*b*), is comprehensive enough to enable the District Court to withdraw a transmitted execution proceeding to its own file and to dispose of it. The learned Vakil has also argued that the exceeding of the time limit does not render the proceedings infructuous.

The aim of the rule is to compel the decree-holder to take prompt steps to enforce the decree. The rule is in the nature of an instruction or direction to the Court to return the papers to the transmitting Court, if no steps were taken by the decree-holder within six months to execute the decree. A violation of this rule does not render the proceedings taken void *ab initio*. In such cases, time is not of the essence of the stipulation. Mr. Justice Denman points out in *Caldow* v. *Pixell* (1): "The cases cited before us establish that, where a public officer is directed by a Statute to perform a duty within a specified time, the provisions as to time are only directory, and also that in considering whether a Statute is imperative a balance may be struck between the inconvenience of rigidly adhering to, and the inconvenience of sometimes departing from, its terms." Mr. Justice Lopes says that in deciding whether a rule is mandatory or directory, the possibility of justice suffering from a too rigid application of the time limit should be taken into account. In *Queen* v. *Ingall* (2), both Mellor and Lush, JJ., enunciate the same principle. Reference may also be made to *Brumfitt* v. *Bremner* (3) and to *Queen* v. *Lofthouse* (4). We think the reason underlying these pronouncements is applicable to the present case. The effect of holding that the Sub-Court was *functus officio* after six months and that the proceedings in execution are a nullity would, be to allow the judgment-debtor to escape the liability which the law subjects him to. The rule in question is not an adjunct to the Code of Civil Procedure. It is a rule of convenience issued by the High Court with the object of inducing decree-holders to take early steps to execute their decrees. Although section 148 of the Code of Civil Procedure may not apply in terms to the present case, its analogy may be utilised for the purpose of showing that the Legislature regards such provisions as directory in their nature and not mandatory.

We must reverse the order of the District Judge and direct him to return the records to the Sub-Court to enable the appellants to execute the decree under the process already issued.

Appellants are entitled to their costs in this Court.

Appeal allowed.

(1) 2 C. P. D. 562; 46 L. J. C. P. 541; 36 L. T. 469; 25 W. R. 773.

(2) 2 Q. B. D. 199; 46 L. J. M. C. 113; 35 L. T. 552; 25 W. R. 57.

(3) 9 C. B. (N. S.) 1; K. & G. 352; 30 L J. C. P. 33; 7 Jur. (N. S.) 371; 3 L. T. 375; 9 W. R. 144; 142 E. R. 1; 127 R. R. 582.

(4) 1 Q. B. 433; 7 B. & S. 447; 35 L. J. Q. B. 145; 12 Jur. (N. S.) 619; 14 L. T. 359; 14 W. R. 649.

CALCUTTA HIGH COURT.

REVIEW IN APPEAL FROM APPELLATE DECREE No. 2381 OF 1912.

March 10, 1915.

Present:—Mr. Justice Fletcher and Mr. Justice Richardson.

KRISHNA BAR—DEFENDANT—APPELLANT—APPLICANT

versus

Srimati RANAMOYI DEBI—PLAINTIFF—RESPONDENT—OPPOSITE PARTY.

Mortgage suit, decree in, application for order absolute for sale of—Limitation Civil Procedure Code (Act V of 1908), O. XXXIV, r. 5.

An application for an order absolute for sale in a

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mortgage-suit is a proceeding in execution and must be made within the time prescribed by the Limitation Act. [p. 122 col. 1.]

Batuk Nath v. *Munni Dei*, 23 Ind. Cas. 644; 36 A. 284; 18 C. W. N. 740; 12 A. L. J. 596; 19 C. L. J. 574; 16 Bom. L. R. 360; 27 M. L. J. 1; 16 M. L. T. 1; 1 L. W. 729 and *Abdul Majid* v. *Jowahir Lal*, 23 Ind. Cas. 649; 12 A. L. J. 624; 16 Bom. L. R. 395; 18 C. W. N. 963; 19 C. L. J. 626; 27 M. L. J. 17; (1914) M. W. N. 485; 16 M. L. T. 44; 1 L. W. 483; 36 A. 350 (P. C.), followed.

In the matter of an application for review of judgment passed by the Hon'ble Mr. Justice Fletcher and the Hon'ble Mr. Justice Richardson, on the 26th May 1914, in appeal from Appellate Decree No. 2381 of 1912, being an appeal preferred on the 13th of August 1912, against the decree of the Subordinate Judge, 1st Court, of Zillah Midnapore, dated the 7th May 1912, reversing that of the Munsif, 2nd Court, at Contai, dated the 21st August 1911.

FACTS of the case appear fully from the following judgment of Fletcher and Richardson, JJ., dated the 26th May 1914, under review:

FLETCHER, J.—The only point that calls for our decision in this appeal is whether an application for an order absolute for sale of a decree *nisi*, dated the 28th of September 1898, is barred by limitation.

The actual date of the application of the order absolute for sale does not appear from the paper-book, but it is admitted that the application was made after the Code of Civil Procedure, 1908, came into operation.

The Code of Civil Procedure, 1908, repealed sections 85 to 90 of the Transfer of Property Act, 1882, and in lieu thereof enacted the provisions contained in Order XXXIV in the first Schedule to the Code with reference to suits relating to mortgages on immoveable property.

Prior to the Code of 1908 it had been established by the decisions of this Court that there was no period of limitation within which a plaintiff was bound to apply for the order absolute for sale in a suit brought for sale of the mortgaged property. Thus in the case of *Tiluck Singh* v. *Parsotein Proshad* (1) Prinsep and Ghose, JJ., decided that an application under section 89 of the Transfer of Property Act, 1882, to have a mortgage decree for sale made absolute was not governed by Article 178 of the Indian Limitation Act, 1877, and that the Article was limited to applications under the Code of Civil Procedure. The learned Judges towards the close of their judgment made the following remarks: "We may further observe that no final order for sale having been passed, the suit may properly be regarded as being still pending." Article 181 of the Limitation Act of 1908 is in identically the same terms as Article 178 of the Act of 1877.

The question for our decision depends on whether the provisions of Order XXXIV of the first Schedule to the Code of Civil Procedure, 1908, apply so as to take away a vested, right which the plaintiff had, of applying to have the decree for sale made absolute.

The Allahabad High Court has laid down in the case of *Konsilla* v. *Ishri Singh* (2) that the effect of the Code of Civil Procedure, 1908, did not take away the vested right that a party had to apply to have his decree for sale made absolute.

A contrary view was taken by the Bombay High Court in the case of *Datto Atmaram Hasabins* v *Shankar Dattatraya* (3).

But with all respect to the learned Judges who decided that case, it seems to me that they founded their judgment on a misreading of the judgment of Jenkins, C. J., in the case of *Amolak Chand Parak* v. *Sharat Chundra Mukerjee* (4).

Moreover, we have the recent decision of a special Bench of this Court in the case of *Gopeshwar Pal* v. *Jiban Chandra* (5), which laid down that a right of suit is a vested right and that it is an established axiom of construction that though procedure may be regulated by the Act for the time being in force still the intention to take away a vested right without compensation or any saving is not to be imputed to the Legislature unless it be expressed in unequivocal terms.

Applying those principles to the case before us I think the learned Judge in the lower Appellate Court came to a correct decision.

The present appeal, therefore, fails and ought to be dismissed with costs.

RICHARDSON, J.—I agree.

Babu *Jyotish Chandra Hazra*, for the Applicant.

(1) 22 C. 924.

(2) 6 Ind. Cas. 188; 7 A. L. J. 420; 32 A. 499.

(3) 21 Ind. Cas. 318; 38 B. 32; 15 Bom. L. R. 841.

(4) 11 Ind. Cas. 943; 38 C. 913; 16 C. W. N. 49.

(5) 24 Ind. Cas. 37; 18 C. W. N. 804; 19 C. L. J. 549; 41 C. 1125.

SHASHI BHUSAN HAZRAH *v.* ESABAR ALI.

Babu *Brojo Lal Chakravarti*, for the Opposite Party.

JUDGMENT.

FLETCHER, J.—This is a Rule obtained by the defendant-appellant calling on the plaintiff-respondent to show cause why a review of judgment should not be granted. The only question involved in the appeal was, whether an application for an order absolute for sale of a decree in a mortgage suit, dated the 28th of September 1898, was barred by limitation. Following the decisions of this Court on appeals from Courts subordinate thereto we held, as we were bound to hold, that no period of limitation applied to such an application and that the Code of Civil Procedure, 1908, had not taken any vested right that the plaintiff had. On the original side of the Court a different view has been taken, namely, that an application for an order absolute for sale in a mortgage suit is a proceeding in execution and must be made within the time prescribed by the Indian Limitation Act: *Amolak Chand Parak* v. *Sharat Chunder Mukerjee* (4). After our decision in the present case the learned Vakil for the defendant appeared and called our attention to two decisions of the Privy Council published since the date of our judgment. These two decisions are *Batuk Nath* v. *Munni Dei* (6) and *Abdul Majid* v. *Jawahir Lal* (7). In both of these cases the Privy Council had expressed an opinion contrary to the view we expressed in our judgment. We, therefore, issued the present Rule.

I think the present Rule must be made absolute. The present case is covered by the two decisions of the Privy Council that I have cited above. Moreover the case of *Munna Lal Parrack* v. *Sarat Chander Mukerji* (8) has been on appeal to the Privy Council and the decision of this Court has been affirmed. See *Raja Narendra Lal Khan* v. *Jogi Hari* (9). That being so, the preset Rule must be made absolute. The appeal of the defendant must be allowed and the judgment of the Subordinate Judge set aside and that of the Munsif restored. The plaintiff must pay to the defendant his costs in this Court and the Courts below including the costs of this Rule, the hearing fee in the Rule being one gold *mohur*.

RICHARDSON, J.—I agree.

Rule made absolute.

(6) 3 Ind. Cas. 644; 36 A. 284; 18 C. W. N. 740; 12 A. L. J. 596; 19 C. L. J. 574; 16 Bom. L. R. 360; 27 M. L. J. 1; 16 M. L. T. 1; 1 L. W. 729.

(7) 23 Ind. Cas. 649; 36 A. 350; 12 A. L. J. 624; 16 Bom. L. R. 395; 18 C. W. N. 963; 19 C. L. J. 626; 27 M. L. J. 17 (1914, M. W. N. 485; 16 M. L. T. 44; 1 L. W. 483.

(8) 27 Ind. Cas 683; 17 M. L. T. 120; 21 C. L. J. 118; 2 L. W. 282; 19 C. W. N. 561; 17 Bom. L. R. 408.

(9) 2 C. L. J. 107; 32 C. 1107.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 2310, 2651 TO 2657 OF 1911 AND APPEAL FROM ORDER NO. 646 OF 1911.

March 11, 1915.

Present:—Mr. Justice Fletcher and Mr. Justice Teunon.

SHASHI BHUSAN HAZRAH—DEFENDANT—APPELLANT (IN ALL CASES)

versus

IN NO. 2310 OF 1911

Sheikh ESABAR (ESRAR) ALI NAZIR AND OTHERS—PLAINTIFFS—RESPONDENTS

IN NO. 2651 OF 1911

PURNA CHANDRA PAL—PLAINTIFF—RESPONDENT

IN NO. 2652 OF 1911

KALIDAS SAMANTA AND OTHERS—PLAINTIFFS—RESPONDENTS

IN NO. 2653 of 1911

JOGENDRA NATH SAMANTA AND ANOTHER—PLAINTIFFS—RESPONDENTS

IN NO. 2654 OF 1911

Sheikh ARIETULLAH AND OTHERS—PLAINTIFFS—RESPONDENTS

IN NO. 2655 OF 1911

AKHIL CHANDRA ADHICARY AND OTHERS—PLAINTIFFS—RESPONDENTS

IN NO. 2656 OF 1911

KALIDAS SAMANTA AND OTHERS—PLAINTIFFS—RESPONDENTS

IN NO. 2657 OF 1911

ABDUL GAFFUR NAZIR AND OTHERS—PLAINTIFFS—RESPONDENTS

IN NO. 646 OF 1911

Sheikh ARIETULLA AND OTHERS—PLAINTIFFS—RESPONDENTS

Bengal Tenancy Act (VIII of 1885), ss. 109, 106, scope of—Revenue Court's duty as to fair rent—Suits in Civil Court, bar of—Revenue and Civil Courts, jurisdiction of—No forfeiture for mistake in selecting one Court for another.

Under the provisions of section 109 of the Bengal Tenancy Act, the decision of a Settlement Officer or rather a Revenue Court, with reference to what is the fair and equitable rent, is binding and conclusive and the tenants are not entitled to question that decision in any Civil Court, provided that the question in the Civil Court is concerning any matter which is or has clearly been the subject of an

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application made under sections 105 to 108 of the Bengal Tenancy Act [p. 123, col. 1.]

The duty of a Revenue Court is limited to the inquiry as to what is the fair rent, having regard to the entry that appears on the Record of Rights and, therefore, section 109 of the Bengal Tenancy Act is no bar to a suit by a tenant for a declaration that the lands are either *lakheraj* or are held at fixed rates. Section 106 of the Bengal Tenancy Act does not exclude the right of a Civil Court. It is an extremely dangerous proposition to say that whenever a Statute gives a person a right to go, if he thinks fit, to a special Tribunal, that necessarily excludes the jurisdiction of the ordinary Courts of the country. [p. 124, col. 1.]

A person, because he went to a Civil Court instead of going to a Revenue Court, is not liable to be deprived of his rights to the property which he may have purchased or inherited from his ancestors. [p. 124, col. 2.]

IN No. 2310, 2651 TO 2657 OF 1911.

Appeals against the decrees of the Sub-Judge, first Court, Hooghly, dated 7th July 1911, affirming the decrees of the Munsif, second Court, Uluberiah, dated 31st August 1910.

IN No. 646 OF 1911.

Appeals against the orders of the Subordinate Judge, first Court of Hooghly, dated the 7th of July 1911, reversing that of the Munsif, second Court, at Uluberiah, dated the 31st of August 1910, and remanding the case to his Court for trial on its merits.

Dr. *Rash Behari Ghose*, Babus *Sarat Chandra Roy Chowdhury*, *Jyotish Chandra Hazra* and *Satya Charan Sinha*, for the Appellant.

Babus *Mohendra Nath Roy*, *Nagendra Nath Ghosh* and *Haradhan Chatterjee*, for the Respondents in Nos. 2310, 2652, 2654, 2657 and 646.

JUDGMENT.

FLETCHER, J.—These appeals are preferred by the defendant, who is the *darpatnidar* of a certain *mouzah*, called Nagarpore, of which his father obtained a *darpatni* settlement on the 13th April 1899. The plaintiffs in these cases are the various tenants in the *mouzah*. The rights that the plaintiffs allege they have in the lands are either that their lands are *lakheraj*, or, in two cases, I think, that they are held at fixed rents. The only objection that has been raised before us is as to whether the Civil Court had jurisdiction to hear and determine these suits. Proceedings were commenced on the 27th July 1901 by the father of the defendant to have a Record of Rights prepared and that being done, the record was finally published on the 9th July 1903, and the lands of the plaintiffs in those suits were all recorded as *mal* lands. The defendant's father then applied under section 105 of the Bengal Tenancy Act for assessment of fair and equitable rents of the lands. Objections were raised by the tenants, namely, that certain of the lands were *lakheraj* and the rest of the lands were held at fixed rents. The Settlement Officer held that certain of the lands were *lakheraj*, but that the other lands were not held at fixed rents, but were liable to have fair rents assessed. The cases were then taken before the Special Judge and the learned Special Judge agreed with the decision of the Settlement Officer. Then second appeals were preferred to this Court, and this Court was of opinion that the decision of the Settlement Officer was *ultra vires* in holding that the lands were *lakheraj* and that the duty of the Settlement Officer was to settle rents having regard to the entries that appeared in the Records of Rights. This Court upheld the decision in so far as it held that the other lands were not held at fixed rents. Then the cases went back to the Settlement Officer and he settled, in accordance with the decision of this Court, fair rents under the provisions of the Bengal Tenancy Act. The tenants then went to the Civil Court and they brought, amongst other suits, the suits that are now under appeal in which they asked for a declaration either that the lands were *lakheraj* or that they were held at fixed rents. It is now argued that the decisions of the Courts below are wrong, on the ground that the decision of the Settlement Officer or rather the Revenue Court with reference to what is the fair and equitable rent is binding and conclusive and that the tenants are not entitled to question that decision in any Civil Court. Of course, that is so under the provisions of section 109 of the Bengal Tenancy Act, provided that the question in the Civil Court is concerning any matter which is or has clearly been the subject of an application made under sections 105 to 108 of the Bengal Tenancy Act. But it is obvious from the decision of this Court in the second appeals, to which I have referred, that this Court held that the Revenue Officer was not competent to go behind the Record of Rights and enquire what was the real

nature of the interest of the tenants. This Court said that the duty of the Revenue Court was limited to the inquiry as to what was the fair rent having regard to the entry that appeared on the Record-of-Rights. It is quite obvious that, in that view, section 109 of the Bengal Tenancy Act would not be a bar to the present suits.

Then an argument that seems to me to have no substance at all has been advanced and that is that, having regard to the terms of section 106 of the Bengal Tenancy Act, as the tenants have taken no proceedings as contemplated by that section, therefore, they are deprived of the right of suit in the Civil Court. But the wording of the section clearly does not bear any such construction. The words are that "a suit may be instituted." The word "may" cannot be construed as meaning that the jurisdiction of the Civil Court is excluded. Before the jurisdiction of the ordinary Courts of the country can be excluded by a special Court, namely, the Revenue Court, there must be the clear words in the Statute excluding such jurisdiction. It is quite true that Dr. Ghose has referred to us an unreported decision of this Court* in which the view is taken that section 106 does exclude the jurisdiction of the ordinary Civil Court. But that decision stands alone or rather if it has got any support at all, it is supported by the decision in *Jogendra Nath* v. *Krishna Pramada* (1), that has received judicial consideration on more than one occasion and cannot be considered as lending a strong support. It is sufficient to say that my learned brother who is sitting with me has, in a well-considered judgment,† already dissented from this decision which Dr. Ghose relies upon. I do not see how, on the plain words of the section (106), it can be said that the section excludes the right of the Civil Courts. It is an extremely dangerous proposition to say that whenever a Statute gives a person a right to go, if he thinks fit, to a special tribunal, that necessarily excludes the jurisdiction of the ordinary Court of the country. I think that it does not so exclude and that the words of section 106 are merely permissive, and in my opinion the decisions in the two cases* that have been cited to us by the learned Vakil for the respondents are more in accordance with not only principle, but the plain words of section 106, than that which Dr. Ghose has relied upon. That being so, it is manifest that there is nothing in the proceedings that have taken place before the Revenue Court or the omission of the plaintiffs in these suits to resort to the Revenue Court that would take away the rights that the plaintiffs allege they have in the lands as against the *darpatnidar*. It seems to me to be an alarming proposition to put forward that a person, because he went to the Civil Court instead of going to the Revenue Court, is liable to be deprived of his rights to the property which he may have purchased or inherited from his ancestors. I agree with the decision of my learned brother in the case that has been handed over to us by the learned Vakil for the respondents and I think that the judgment arrived at by the learned Judge of the lower Appellate Court is correct. The appeals, therefore, fail and must be dismissed with costs.

TEUNON, J.—I agree.

Appeal dismissed.

(1) 35 C. 1013; 12 C. W. N. 1032; 8 C. L. J. 322.

*Reported in Indian Cases. See *Sashi Bhusan Hazra* v. *Aswini Comar Samanta*, 28 Ind. Cas. 981; 19 C. W. N. 637*n*.—*Ed.*

†Reference appears to be to *Shashi Bhushan Hazra* v. *Denamoyee Dasi*, 23 Ind. Cas. 615; 19 C. W. N. 638*n*—*Ed.*

*Reference apparently is to *Pandab Dowari Das* v. *Ananda Kishun Chakravarti*, 7 Ind. Cas. 102; 12 C. L. J. 195; 14 C. W. N. 897 and *Shashi Bhushan Hazra* v. *Denamoyee Dasi*, 23 Ind. Cas. 615; 19 C. W. N. 638*n*.—*Ed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1093 OF 1913.

January 12, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Napier.

ARUNAGIRI MUDALIAR—PLAINTIFF—APPELLANT

versus

KUPPUSAMI PILLAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (*IV of* 1882), *ss.* 82, 101—*Usufructuary and simple mortgage in favour of same person—Mortgagee purchasing some of mortgaged property—Suit on simple mortgage—Liability of property purchased to rateable contribution.*

The defendant No. 1 and another mortgaged certain properties to the plaintiff with possession. Later on

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defendants Nos. 1 and 2 executed a simple mortgage in respect of the same lands as well as a house and a house site in favour of the plaintiff. The plaintiff then purchased the lands, the sale-deed expressly stating that the debt secured by the simple mortgage should stand. In a suit to enforce the mortgage security under the second mortgage:

Held, (1) that the plaintiff took the lands subject to all the incidental liabilities which attached to them by reason of their having been previously mortgaged under the simple mortgage and which were, therefore, liable to contribute to the debt secured by it; [p. 126, col. 2.]

(2) that the plaintiff's liability to contribute out of the value of the lands purchased by him arose not by reason of his position of usufructuary mortgagee but by his purchase of the mortgagors' equity of redemption. [p. 126, col. 2.]

Held, (per *Napier, J.*, dissenting), that the plaintiff mortgagee was entitled to enforce his claim for the whole amount of his mortgage against the property. [p. 128, col. 1.]

Sesha Aiyangar v. *Krishna Aiyangar*, 24 M. 96; 12 M. L. J. 383; *Mir Esuff Ali Haji* v. *Panchanan. Chetterjee*, 6 Ind. Cas. 842; 15 C. W. N. 800; 11 C. L. J. 639, followed.

Second appeal against the decree of the District Court of North Arcot, in Appeal Suit No. 496 of 1912, preferred against the decree of the Court of the District Munsif of Tiruvannamalai in Original Suit No. 103 of 1912.

FACTS of the case appear from the following judgement of the District Judge:—

"Plaintiff appeals. Defendants Nos. 1 and 2 are brothers. On 1st October 1895, 1st defendant and another mortgaged certain lands measuring 7 acres 98 cents to plaintiff with possession under Exhibit E for Rs. 500.

On the 3rd February 1900, defendants Nos. 1 and 2 executed a simple mortgage, Exhibit A, for Rs. 100 in respect of the same lands as well as a house and vacant sites in favour of plaintiff. In order to discharge the mortgage-debt of Exhibit E and other debts, (documents Nos. 1 and 2) the two persons sold the lands for Rs. 950 to plaintiff on 9th May 1901, under a sale-deed Exhibit F.

On 22nd December 1908, 5th defendant purchased the house and vacant sites from 1st defendant for Rs. 500, under Exhibit 1. Plaintiff now sues to enforce the mortgage security, Exhibit A, and to recover Rs. 460 from the defendants by the sale of the mortgaged property.

Defendant No. 5's contention was that all the properties comprised in the mortgage, Exhibit A, were liable for the satisfaction of the plaint debt and that not more than a rateable part of the mortgage-debt should be thrown upon the property in his hands, *viz.*, the house and vacant sites. The District Munsif accepted the contention that plaintiff was only entitled to recover Rs. 306-10-8, in the proportion which the value of the house and sites (Rs. 600) bore to the value of the lands (Rs. 400) free of the mortgage of 1900. Exhibit F is styled * * * * * * * to be an outright deed of sale. It, however, contains the following recital: * * * * * * * *

which is translated correctly by the Munsif, as "while the mortgage of 3rd February 1900 (*i. e.* Exhibit A) created by Kuppusami Pillai and Narayanasami Pillai (defendants Nos. 1 and 2) is still subsisting, we sell these lands to you."

I agree with the District Munsif that what was sold was the equity of redemption and that the document cannot be construed as a sale of the vendor's entire interest free of the mortgage charge.

Section 82 of the Transfer of Property Act provides that between several properties mortgaged to secure one debt rateable contribution to that debt is to prevail in the absence of a contract to the contrary. The circumstance that the mortgagee plaintiff subsequently purchased a portion of the mortgaged property does not, I think, affect the doctrine of contribution. The rateable burden which the properties are to bear has to be calculated according to their valuation at the time of the mortgage.

I think the District Munsif was right in holding that plaintiff was bound to abate a portion of his debt in the proportion which the value of the properties purchased by him bore to the whole mortgaged property.

The only other question argued in this appeal is whether the decision in a former suit, Original Suit No. 236 of 1907, in the Tirukavilur District Munsif's Court operates as *res judicata*. It appears that 5th defendant sued defendants Nos. 1 and 2 to enforce a mortgage of 1904. The present plaintiff, who

was 5th defendant in the suit, pleaded that the house which was item No. 1 in the suit should be sold subject to his prior mortgage of 1900. Fifth defendant admitted plaintiff's priority and a decree was passed accordingly. Plaintiff did not allege in his written statement that he had a mortgage on the house and lands also. There was no decision in the former suit on the question in issue in this suit, and it is difficult to see how 5th defendant can be estopped from raising his present plea that the property sold to him is only liable to contribute rateably to the plaint mortgage debt.

The matter is clearly not *res judicata* by reason of the decision in the former suit.

The appeal fails and is dismissed with costs."

Mr. *C. Padmanabha Aiyangar*, for the Appellant.

Mr. *K. R. Rangaswami Aiyangar*, for the Respondents.

JUDGMENT.

SPENCER, J.—It is clear in my opinion that when the plaintiff purchased the cultivable lands by his sale-deed, Exhibit F, on 9th May 1901, he took them subject to all the incidental liabilities which attached to them by reason of their having been previously mortgaged under the simple mortgage (Exhibit A) of 3rd February 1900 along with the house and house site of defendants No. 1 and 2. In fact the sale-deed expressly stated that the debt secured by the simple mortgage was to stand, thus bringing the case within the first exception to section 101 of the Transfer of Property Act. I am unable to read into these words an implied meaning that they referred to the simple mortgage standing not on the lands described in the sale deed, but on other property not therein specified. If the parties intended to convey a different meaning by the words used by them, then I can only say that they did not express their meaning properly. There are no words in the document stating expressly or by implication that the sale was free of encumbrances. In other words, the plaintiff took whatever rights over the cultivable lands the mortgagors had to sell, *viz.*, the equity of redemption, while the mortgagors retained all the rights they hitherto possessed in the house and house site. Again, when on 22nd December 1908, the 5th defendant purchased from defendants Nos. 1 and 2 the house and house site, he succeeded to all the rights and benefits which the mortgagors then possessed in that property. Among such rights was the right conferred by section 82 of the Transfer of Property Act of making the lands mortgaged along with the house and site contribute rateably to the debt secured by the simple mortgage of 3rd February 1900.

It is argued, *first*, that by providing in the sale-deed (Exhibit F) for the discharge of the principal of his own usufructuary mortgage of 1st October 1896, the plaintiff impliedly cast all the burden to which the property was then subject on the house and site: and *secondly*, that the 5th defendant's undertaking to discharge plaintiff's simple mortgage when he took a private conveyance of the house and site was equivalent to a renunciation of his right to make the other lands bear any portion of the debt.

But the usufructuary mortgage does not really affect the question, as it had been cleared off before the 5th defendant purchased the house and site and thus plaintiff's liability to contribute out of the value of the lands purchased by him to the discharge of his own simple mortgage arose, not by reason of his position as usufructuary mortgagee of the lands but by his purchase of the mortgagors' equity of redemption.

Again, the 5th defendant's agreement (Exhibit G) was an agreement with one of the mortgagors (1st defendant) and could not be taken as the foundation of any rights in favour of any other owners of property burdened by the plaintiff's simple mortgage, such for instance as the plaintiff.

Lastly, as regards the plea of *res judicata*, the admission of 5th defendant, who was plaintiff in Original Suit No. 236 of 1907, was an admission of priority, not an admission that he surrendered his right to claim contribution at any future date, nor was the right to contribution directly and substantially in issue in that suit. I hold that the view taken by the lower Courts was correct and that this second appeal must be dismissed with costs.

NAPIER, J.—This is an appeal from a judgment of the District Judge of North Arcot in Appeal Suit No. 496 of 1912, from

ARUNAGIRI MUDALIAR *v.* KUPPUSAMI PILLAI.

Original Suit No. 103 of 1912 on the file of the District Munsif of Tiruvannamalai. The suit asked for a mortgage decree in respect of an amount of Rs. 460, alleged to be due from the defendants on a simple mortgage deed, Exhibit A, executed by defendants Nos. 1 and 2 on 3rd February 1900. The properties covered by this mortgage were certain lands which had already been mortgaged by the 1st defendant and another to the plaintiff by Exhibit E on the 1st October 1896, together with a house and house site charged for the first time by Exhibit A. The plaintiff, by Exhibit F of the 9th May 1901, purchased the lands covered by Exhibit E, and the present suit is to recover the whole amount due on the mortgage Exhibit A by the sale of the house and house site charged therein. The District Munsif held that the plaintiff must abate a portion of his claim in the proportion which the value of the properties purchased by him bears to the whole properties mortgaged, and gave a decree with respect to two-thirds of the claim only.

The District Judge, on appeal, holds that under the purchase-deed, Exhibit F, the mortgagors sold to the mortgagee the equity of redemption and that the document could not be construed as a sale of the mortgagors' entire interest free of the mortgage charge. He, therefore, held that, just as a stranger would be bound to contribute under section 82, so the mortgagee in his capacity of owner of the equity of redemption of one of the properties must contribute also, and, that on making allowance for what he was bound to contribute, the District Munsif was right in only allowing the sale for two-thirds of the value of the mortgaged property.

The point argued before us on appeal is that Exhibit F is not a sale of the equity of redemption keeping the mortgage alive, but a sale of the whole property free of the mortgage charge. Reliance is placed by the appellant on the case of *Mir Esuff Ali Haji* v. *Panchanan Chatterjee* (1), where the distinction between these two classes of transactions is pointed out, and the test laid down by Mr. Justice Mookerjee is "whether the mortgagee purchaser applied the purchase-money towards the satisfaction of the mortgage debt," and he then expressed the view that it was not fair, if he had done that, to make him give credit, when proceeding against the other property, for a further sum representing the difference between the mortgage value and the settled price. The appellant appears to have sought in the first Court to adduce oral evidence as to the intention of the parties at the time of Exhibit F, obviously for the purpose of explaining the apportionment of the purchase-money. But the District Munsif refused to admit it, holding that the language of Exhibt F was clear that the mortgage was kept alive. In his appeal memorandum to the lower Appellate Court he pressed that this evidence should not have been shut out, and renews this plea here and desires to show how the purchase-money of Rs. 950 was applied. Exhibit F purports to be a deed of absolute sale of the property with full right to alienate by sale, gift, etc. Then come the words on which the difficulty arises: "The amount due under the hypothecation deed executed on 3rd February 1900 is excluded." This translation, as well as the translation by the lower Courts, is challenged by the appellants; and an alternative reading is given to us by the Bench clerk, "while the balance due under the hypothecation deed executed on 3rd February 1900 stands." The appellant argues that this means that the amount remains as a charge on the other property, *i.e.*, the house and house site, and that it was put in to make that clear. The respondent supports the view taken by the lower Court that it was intended to keep alive the liability on this property also.

In these circumstances I think it best to see what the nature of the original mortgage was. Exhibit A was a simple mortgage, that is to say, a promise by the mortgagor to pay the mortgage-money with a right to proceed against the hypothecated properties for the purpose of recovering the amount. Exhibit E, the prior mortgage, was a usufructuary mortgage. When the property was sold by Exhibit F the title to the property passed to the mortgagee who already had the right to possession. What, then, became of

(1) 6 Ind. Cas. 842; 11 C. L. J. 639; 15 C. W. N. 800.

the mortgagee's rights under Exhibit A with reference to this property? I am unable to see how Exhibit F can have failed to operate as a merger. His right under Exhibit A was to bring the property to sale. When the property had passed into his hands as absolute owner, this right must, apart from any statutory possession, necessarily disappear. It is quite true that under section 101 of the Transfer of Property Act it is in the power of the mortgagee to keep the charge alive, but I am unable to see any express words or necessary implication in the language quoted above by which the mortgagee declares that it shall continue to subsist. The alternative requirement is that the continuance would be for his benefit. It is most obvious that if there is another property liable for the mortgage amount which is sufficient to discharge it, it cannot be for the benefit of the mortgagee to keep alive the charge on the property purchased so as to render him liable to make a rateable reduction. I am inclined to think that the appellant's reading of the clause is the correct one. Anyhow, I am clear that it has not been made out that the view taken by the lower Court is correct.

I would refer to the view that I have expressed in *Thuvoor Venkatasubba Reddy* v. *Bagiammal* (2) that a mortgagee is entitled, subject to the provisions of sections 56, 60 and 81, to proceed, for the whole amount of his mortgage debt, against any portion of the mortgaged property, and I decline to introduce limitations to this right save as are to be found in the language of the Act, or as arise by fraud of the mortgagee or in circumstances coming within the purview of section 90 of the Trust Act, which must be alleged and made out as an answer to the plaintiff mortgagee's claim.

In my view it does not rest on the plaintiff to show that he paid the full value of the unincumbered property to the defendants No. 1 and 2, but on the defendants to establish the contrary. The property was, as above stated, subject to a usufructuary mortgage in favour of the plaintiff on which Rs. 500 was due and the purchase-money was Rs. 950. Defendants Nos. 1 and 2 did not set up any case of fraud or allege that the sum of Rs. 950 was not the full value for the property. The 5th defendant is the real contesting defendant. He purchased the equity of redemption in the house property covered by Exhibit A long after the sale under Exhibit F, his purchase being in 1908, while Exhibit F is in 1901. In his written statement he claims the rateable reduction, but alleges no grounds in support of the claim. In my opinion this case is covered by the principles laid down in *Sesha Aiyangar* v. *Krishna Aiyangar* (3) and *Mir Esuf Ali Haji* v. *Pachanan Chatterjee* (1), and the plaintiff mortgagee is entitled to enforce his claim for the whole amount of his mortgage against the property covered by Exhibit A, and I would give a preliminary decree for sale for the whole amount found due on the mortgage; but as my learned brother takes a different view, the appeal will be dismissed with costs.

Appeal dismissed.

(2) 29 Ind. Cas. 113; 2 L. W. 469; (1915) M. W. N. 339; 17 M. L. T. 411.

(3) 24 M. 96; 12 M. L. J. 283.

CALCUTTA HIGH COURT.

APPEAL FROM ORDERS NOS. 181 AND 189 OF 1913

June 4, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

IN No. 181 OF 1913

NRIPENDRO NATH SHAHOO—APPELLANT

IN No. 189 OF 1913

GOPINATH MANDAL—APPELLANT

versus

ASHUTOSH GHOSH AND OTHERS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 37 (1), scope of—Transfer of property or any interest therein—Preference, fraudulent—Burden of proof—Dominant view—Proper test—Disposition, voluntary—Debtor's state of mind—Good faith no protection to creditor.

Before a transfer by a debtor of any interest in his property is avoided under section 37 (1) of the Provincial Insolvency Act, four conditions must be fulfilled, namely *first*, the debtor must, at the date of the transaction, be unable to pay from his own money his debts as they fall due; *secondly*, the transaction must be in favour of a creditor or of some person in trust for a creditor: *thirdly*, the debtor must have acted with the view of giving such creditor a preference over his other creditors; and *fourthly*, the debtor must be adjudged an insolvent on an insolvency petition presented within three months after the date of the transaction sought to be impeached. [p. 130, col. 1.]

NRIPENDRO NATH *v.* ASHUTOSH GHOSH.

Where an act is impeached as a fraudulent preference, the onus of proof lies on the Receiver, even if the debtor was insolvent at the time of the payment and knew himself to be so. [p. 130, col. 1.]

In re Laurie, Ex parte Green, (1898) 5 Manson 148; 67 L. J. Q. B. 431; 46 W. R. 491, *In re Eaton and Co., Ex parte Viney,* (1897) 2 Q. B. 16; 66 L. J. Q. B. 491; 4 Manson 111 and *In re Lake, Ex parte Dyer,* (1901) 1 K. B. 710; 70 L. J. K. B. 390; 84 L. T. 430; 49 W. R. 291; 8 Manson, 145, referred to.

In the determination of the question whether a person is able or unable to pay his debts, as they become due, from his own money, the fact that he has money locked up which, at a later period, may be available for the payment of his debts, is immaterial. [p. 130, col. 2.]

Washington Diamond Co. In re, (1893) 3 Ch. 95; 62 L. J. Ch. 895; 69 L. T. 27; 41 W. R. 681, referred to.

A particular transaction in favour of a creditor may be set aside as a fraudulent preference only if it is proved that it was carried out with the substantial or dominant view of giving the creditor a preference over the other creditors. [p. 130, col. 2; p. 131, col. 1.]

Ex parte Griffith, Wilcoxon, In re, (1883) 23 Ch. D. 69; 52 L. J. Ch. 717; 48 L.T. 450; 31 W.R. 878 and *Ex parte Hill, Bird, In re,* (1883) 52 L. J. Ch. 903; 49 L. T. 278; 32 W. R. 177; 23 Ch. D. 695 at p. 704, referred to.

The proper test to ascertain the dominant view is the question, "was the act done voluntarily"? [p. 131, col. 1.]

A voluntary disposition is an act moving from the debtor spontaneously. [p. 131, col. 1.]

The use of the word "preference" implies an act of free will, so that there can be no preference where the act is the result of pressure. [p. 131, col. 2.]

In every case the state of mind of the debtor is the paramount consideration. [p. 132, col. 1.]

Under section 37 of the Provincial Insolvency Act (which is substantially identical with section 48 of 46 & 47 Vict. c. 52), good faith on the part of the creditor affords him no protection where the intention of the debtor to give him a preference is established, although sub-section (2) of section 37 protects a person who, in good faith and for valuable consideration, has acquired a title through or under a creditor of the insolvent. [p. 132, col. 1.]

Davison v. *Robinson,* (1857) 3 Jur. (N.S.) 791; *Butcher* v. *Stead,* (1875) 44 L. J. Bk. 129; 33 L. T. 548; (1857) 24 W. R. 463; 7 H. L. 839; and *Sharp* v. *Jackson,* A. C. 419; 68 L. J. Q. B. 866; 80 L. T. 841; 6 Manson, 264; 15 T. L. R. 418, referred to.

Appeals against the orders of the Additional District Judge, 24-Perganas, dated the 30th January 1913.

IN APPEAL NO. 181 OF 1913.

Mr. *B. Chakravarti,* Counsel, and Babus *Ram Chandra Majumdar* and *Jnanendro Nath Sircar,* for the Appellant.

IN APPEAL NO. 189 OF 1913.

Babus *Mohendra Nath Roy* and *Panchanan Gohse* for Babu *Khetter Mohan Sen,* for the Appellant.

IN APPEALS NOS. 181 AND 189 OF 1913.

Babus *Bepin Behari Ghose* and *Satish Chandra Mukerjee,* for the Respondents.

JUDGMENT.

MUKERJEE, J.—These appeals are directed against an order under section 37 of the Provincial Insolvency Act. On the 4th December 1911, Nilratan Mandal and his four brothers executed a mortgage for Rs. 9,000 in favour of one of their unsecured creditors, Nripendra Nath Sabu. On the 27th December 1911 and 14th February 1912, they executed two other mortgages, one for Rs. 6,000 and another for Rs. 10,000, in favour of their unsecured creditor Gopinath Mandal. On the 19th February 1912, a third creditor, Kissen Chand Kessari Chand, applied to the District Judge under section 5 of the Provincial Insolvency Act so that the mortgagors might be adjudicated insolvents. The application was granted and a local Pleader, Babu Ashutosh Ghose, was appointed Receiver. In due course on the 26th September 1912, the Receiver applied to the Court to take action under section 37 and to annul the three mortgages mentioned. This application was granted on the 30th January 1913, and the present appeals, which have been preferred by the two mortgagees separately, are directed against that order. The District Judge has found that when Nilratan Mandal executed and registered the deeds, he knew that he was not in a position to pay his debts, and that, consequently, the mortgages must be declared fraudulent and void as against the Receiver. This decision of the District Judge has been assailed before us, on the ground that all the elements necessary to justify an order for avoidance of the mortgages under section 37 have not been established, and that the requirements of that section have not been fully appreciated. In our opinion, this contention is well-founded and the case must be re-tried.

Sub-section (1) of section 37 of the Provincial Insolvency Act—we quote so much only of the sub-section as applies to the present case—provides as follows: "Every transfer of property or of any interest therein.....by any person unable to pay his debts, as they become due, from his own

money, in favour of any creditor with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the Receiver and shall be annulled by the Court." It is plain that before a transfer by a debtor of any interest in his property is avoided under this section, four conditions must be fulfilled, namely, *first*, the debtor must, at the date of the transaction, be unable to pay from his own money his debts as they fall due; *secondly*, the transaction must be in favour of a creditor or of some person in trust for a creditor; *thirdly*, the debtor must have acted with the view of giving such creditor a preference over his other creditors; and *fourthly*, the debtor must be adjudged an insolvent on an insolvency petition presented within three months after the date of the transaction sought to be impeached. There is no dispute that the second and fourth elements are present in the case before us. The mortgagees were creditors of the mortgagors on the dates when the mortgage instruments were executed; the promissory notes on which they had previously advanced moneys to the Mandals were unpaid on those dates: these have been produced and proved to represent genuine transactions. There is also no question that the insolvency petition was presented by the creditor on the 19th February 1912, that is, within three months after the earliest of the three mortgages impeached. The controversay has thus centered round the first and third conditions. Before we discuss the requirements of these two conditions, we may point out, however, that where an act is impeached as a fraudulent preference, the onus of proof lies on the Receiver [*Ex parte Lancaster, In re Marsden* (1)], and it has been said [*In re Laurie, Ex parte Green* (2)] that the burden of proof lies on the Receiver, even if the debtor was insolvent at the time of the payment and knew himself to be so, though the view has been indicated that in such a case the onus might shift: *In re Eaton and Company, Ex parte Viney* (3), *In re Lake, Ex parte, Dyer* (4).

The *first* point for consideration is, whether the mortgagors were, on the dates of the mortgage transactions, able to pay from their own money their debts as they fell due. The evidence on the record does not enable us to pronounce an opinion upon this matter. There were, it must be remembered, three mortgages of the 4th December 1911, 27th November 1911 and 14th February 1912. Each of these transactions has to be tested from the point of view of the condition mentioned, and it is quite conceivable that the mortgagors, though not able to pay from their own money their debts as they fell due on the 14th February 1912, might have been in a very different position more than two months earlier, on the date of the first of the three mortgages. Two factors must plainly be taken into account on the date of each transaction, namely, what were the debts payable by the mortgagors on that date, and, what was the money then available to them to pay such debts? In this connection, it may be pointed out that in the determination of the question whether a person is able or unable to pay his debts as they become due from his own money, the fact that he has money locked up which, at a later period, may be available for the payment of his debts is immaterial: *Washington Diamond Co., In re* (5). The question, therefore, whether the debtors were, at the date of each of the three mortgages impeached, unable to pay, from their own money, their debts as they fell due, must be investigated.

The *second* point for consideration is whether the debtors acted with the view of giving the mortgagees a preference over their other creditors. Here again, the case of each mortgagee and of each transaction with him has to be separately considered in the light of the surrounding circumstances on the several dates. A particular transaction may be set aside as a fraudulent preference, only if it is proved that it was carried out with the substantial or dominant

(1) (1883)25 Ch. D. 311 at p. 319; 53 L. J. Ch. 1123; 50 L. T. 223; 35 W. R. 483.

(2) (1898) 5 Manson, 48; 67 L. J. Q. B. 431; 46 W. R. 491.

(3) (1897) 2 Q. B. 16; 66 L. J. Q. B. 491; 4 Manson, 111.

(4) (1901) 1 K. B. 710; 70 L. J. K. B. 390; 84 L. T. 430; 49 W. R. 291; 8 Manson, 145; 17 T. L. R. 296.

(5) (1893) 3 Ch. 95; 62 L. J. Ch. 895; 69 L. T. 27; 41 W. R. 681.

view of giving the creditor a preference over the other creditors: *Ex parte Griffith, Wilcoxon, In re* (6), *Ex parte Hill, Bird, In re* (7). This need not be the primary result aimed at; it is sufficient that it should be the object aimed at in bringing about the primary result: *Ex parte Taylor, Goldsmid, In re* (8), *New's Trustee* v. *Hunting* (9). If the transaction can properly be referred to some other motive than that of giving the particular creditor a preference over the other creditors, the payment is not fraudulent, because the invalidity of the transaction arises from the intention on the part of the debtor to act in fraud of the Bankruptcy Law, that is, to prevent the distribution of his property rateably among all his creditors [*Bills* v. *Smith* (10)]. To ascertain whether the giving of a preference to the particular creditor, that is, putting that creditor in a better position relatively to the other creditors than that in which he would be placed by the Bankruptcy Law [*Bourne* v. *Graham* (11)] was the dominant view in the debtor's minds, "the proper test to be applied is, was the act done voluntarily, a question the solution of which depends primarily on the inquiry, from which party did the proposition originate: *In re Eaton & Co., Ex parte Viney* (3), *In re Vaulin; Saffery, Ex parte* (12). A voluntary disposition is an act moving from the debtor; the question, consequently, in most cases, if not always, is—did the thing move from the debtor or from the creditor? *Ex parte Dectastet* (13), *Strachan* v. *Barton* (14). If it moves entirely from the debtor, in the sense that it was his spontaneous act uninfluenced by any circumstances which tend to rebut the presumption that the bankrupt made a distinction among his creditors, then the transaction will be condemned as a fraudulent preference: *Ex parte Tempest, Craven, In re* (15), *Bills* v. *Smith* (10). If on the other hand, the proposal for the payment or the disposition of the property comes entirely from the creditor and is not collusive, the transaction will stand: *Crosby* v. *Crouch* (16), *Ex parte Hall, Cooper, In re* (17). To take one illustration if it is established that the transaction was the result of real pressure brought to bear on the debtor by a creditor, it cannot be deemed his spontaneous act: *Tomkins* v. *Saffery* (18), *Butcher* v. *Stead* (19), *Sharp* v. *Jackson* (20), *Joakim* v. *Secretary of State* (21) for, as Lord Cairns said in *Butcher* v. *Stead* (19), the use of the word "preference" implies an act of free will, so that there can be no preference where the act is the result of pressure. The pressure, as we have said, must have been real, that is, it must have operated on the mind of the debtor as the dominant influence affecting him: *Boyd, Ex parte, Boyd, In re* (22), *Official Receiver, Ex parte, Bell, In re* (23), and it must not have been fraudulent, *Ex parte Reader, Wrighley, In re* (24), *Miller* v. *Sheo Prasad* (25), *Phulchand* v. *Miller* (26). In the case of *Official Receiver, Ex parte, Bell, In re* (23) it was observed that the preference is fraudulent, if it is established that, notwithstanding that the payment or disposition might never have been made but for the importunity of the creditor, it is also a fact that the payment never would have been made but for the desire to prefer—*Brown* v. *Kempson* (27) *Graham* v. *Candy* (28), *Ex parte Hall, In re Cooper* (17). To take another illustration, the

(6) (1883) 23 Ch. D. 69; 52 L. J. Ch. 717; 48 L. T. 450; 31 W. R. 878.
(7) (1883) 23 Ch. D. 695 at p. 704; 52 L. J. Ch. 903; 49 L. T. 278; 32 W. R. 177.
(8) (1886) 18 Q. B. D. 295; 56 L. J. Q. B. 195; 35 W. R. 148.
(9) (1897) 2 Q. B. 19; 66 L. J. Q. B. 554; 45 W. R. 577; 76 L. T. 742; 4 Manson 03
(10) (1865) 6 B. & S. 314; 34 L. J. Q. B. 68; 11 Jur. (N. S.) 154; 12 L. T. 22; 13 W. R. 497; 122 E. R. 1211; 141 R. R. 421.
(11) (1856) 2 Jur. (N. S.) 1225.
(12) (1900) 2 Q. B. 325; 69 L. J. Q. B. 703; 82 L. T. 722; 48 W. R. 652; 7 Manson, 291.
(13) (1810) 17 Ves. 247; 34 E. R. 95; 11 R. R. 70.
(14) (1856) 11 Exch. 647; 25 L. J. Ex. 182; 4 W. R. 292.
(15) (1870) 6 Ch. App. 70; 40 L. J. Bk. 22; 23 L. T. 650; 19 W. R. 137.
(16) (1809) 11 East 256; 2 Camp. 166; 103 E. R. 1003.
(17) (1882) 19 Ch. D. 580; 51 L. J. Ch. 556; 46 L. T. 549.
(18) (1870) 3 A. C. 213; 47 L. J. Bk. 11; 37 L. T. 758; 26 W. R. 62.
(19) (1875) 7 H. L. 839; 44 L. J. Bk. 120; 33 L. T. 541; 24 W. R. 463.
(20) (1899) App. Cas. 419; 68 L. J. Q. B. 866; 80 L. T. 841; 6 Manson, 264; 15 T. L. R. 418.
(21) 3 A. 530.
(22) 6 Morrell, 209.
(23) (1892) 10 Morrell 15.
(24) (1875) 20 Eq. 763; 44 L. J. Bk. 139; 33 L. T. 36.
(25) 10 I. A. 98; 6 A. 84; 13 C.L.R. 335; 4 Saraswati's P. C. J. 430.
(26) 7 A. 340; A. W. N. (1885) 33.
(27) (1850) 19 L. J. C. P. 169.
(28) (1862) 3 F. & F. 206.

presumption of fraudulent intention may be repelled, if it be apparent that the debtor acted in fulfilment of a prior agreement: *Halliday* v. *Holgate* (29), *Ex parte Kevan, In re Crawford* (30), *Ex parte Mackenzie, Bent, In re* (31), *Ex parte Hodgkin, In re Softley* (32). But it will not suffice to prove that the debtor was moved by a mere sense of honour or a sense of duty or of moral obligation, or that he acted from motives of kindness or of gratitude. *Suffolk, Ex parte, Fletcher, In re* (33), *Vingoe, In re, Viney, Ex parte* (34), *Bluckburn & Co., In re* (35), *In re Jukes, Ex parte Official Receiver* (36). In every case, as was said in *Sharp* v. *Jackson* (20), the state of mind of the debtor is the paramount consideration; the intention or view to prefer the creditor as the *causa causans* of the debtor's conduct is the cardinal point round which the whole question turns: *In re Ramsay, Ex parte Deacon* (37). The case before us has not been considered from this point of view, and the facts must be fully investigated before an order of annulment can be made.

We may add that, on behalf of the appellants, a strenuous effort was made to sustain the view that if the creditor has acted in good faith and in ignorance of the intention of the debtor, he is protected from the operation of section 37. In our opinion this contention is not well founded, as under section 37 of the Provincial Insolvency Act, which is substantialy identical with section 48 of 46 & 47 Vict. c 52, good faith on the part of the creditor affords him no protection, where the intention of the debtor to give him a preference is established, although sub-section 2 of section 37 protects a person who, in good faith and for valuable consideration, has acquired a title through or under a creditor of the insolvent: see *Davison* v. *Robinson* (38), *Butcher* v. *Stead* (19) and *Sharp* v. *Jackson* (20), which show how the law on this point in England has undergone a material change in recent years. (Williams on Bankruptcy Practice, eighth Edition, page 258.)

(29) (1867) 17 L. T. 18.
(30) (1874) 9 Ch. Ap. 752.
(31) (1873) 28 L. T. 486, 42 L. J. Bk. 25.
(32) (1875) 20 Eq. 746; 44 L. J. Bk. 107; 33 L. T. 62; 24 W. R 68.
(33) (1891) 9 Morrell 8.
(34) 1 Manson, 416.
(35) (1899) 2 Ch. 725; 68 L. J. Ch. 764; 81 L. T. 520; 48 W. R. 186; 7 Manson, 47.
(36) (1902) 2 K. B. 58; 71 L. J. K. B. 710; 86 L. T. 456; 50 W. R. 560; 9 Manson, 249.
(37) (1913) 2 K. B. 80 at p. 84; 82 L. J. K. B. 526 108 L. T. 495; 20 Manson, 15; 29 T. L. R. 225.
(38) (1857) 3 Jur. (N. S.) 791.

The result is that these appeals are allowed, the order of the District Judge set aside and the case remanded to him for re-trial on additional evidence. The costs of these appeals will abide the result. We assess the hearing fee in each case at two gold *mohurs*.

Let the record be sent down as soon as possible.

BEACHCROFT, J.—I agree.

Appeals allowed; Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 397 OF 1913.

March 8, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Trotter.

RAMANADHAN CHETTIAR—PLAINTIFF—APPELLANT

versus

ANNAMALAI CHETTY AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 42—Fraudulent decree, suit to set aside, when maintainable—Consequential relief, necessity of—Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of plaint, when not permitted.

A suit to declare that a decree is fraudulent and void will not lie unless followed up by a prayer for consequential relief, such as an injunction restraining the decree-holder from executing the decree. [p. 132, col. 2; p. 133, col. 1.]

A Court should not exercise its wide powers of amendment under Order VI, rule 17, of the Civil Procedure Code when the plaintiff has not availed himself of the other remedies open to him. [p. 133, col. 1].

Arunachalam Chetty v. *Rangasamy Pillai*, 28 Ind. Cas. 79; (1915) M. W. N. 118; 17 M. L. T. 154; 28 M. L. J. 118; *Kunhamed* v. *Kutti*, 14 M. 167; 1 M. L. J. 338, followed.

Second appeal against the decree of the District Court of Ramnad at Madura, in Appeal Suit No. 568 of 1912, preferred against that of the Court of the Temporary Subordinate Judge of Sivanganga, in Original Suit No. 90 of 1912.

Mr. *T. Rangaramanujachari*, for the Appellant.

Mr. *A. Krishnaswami Aiyar*, for the Respondents.

JUDGMENT.—We are of opinion that the plaintiff in this suit could not have been given a decree declaring that the decree in

PARMA *v.* NEK RAM.

Original Suit No. 42 of 1909 was fraudulent and invalid without a prayer in his plaint for consequential relief. Vide *Arunachalam Chetty* v. *Rangasamy Pillai* (1). The consequential relief necessary was an injunction restraining the 1st defendant (plaintiff in Original Suit No. 42) from executing his decree, vide *Kunhamed* v. *Kutti* (2). Whether the District Judge was right or wrong in thinking that he had no power to allow the plaintiff to amend his plaint in spite of the very wide language in which Order VI, rule 17, Civil Procedure Code, is worded, we are clearly of opinion that the circumstances of the present case were not such as to warrant an indulgence.

They are, *firstly*, that having applied without success to have the *ex parte* decree against him set aside, he did not appeal against the rejection of his application when that course was open to him; *secondly*, that it appears from the temporary Subordinate Judge's judgment that he was unwilling at the time of the trial of his suit to amend the plaint.

We must, therefore, dismiss this appeal with costs.

Appeal dismissed.

(1) 28 Ind. Cas. 79; (1915) M. W. N. 118; 17 M. L. T 154; 28 M. L. J. 118.
(2) 14 M. 167; 1 M. L. J. 338.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER NO. 164 OF 1914.

March 27, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Piggott.

PARMA—APPLICANT—APPELLANT

versus

NEK RAM—OPPOSITE PARTY—RESPONDENT.

Probate and Administration Act (*V of* 1881), *s.* 50—*Civil Procedure Code* (*Act V of* 1908), *ss.* 114, 151—*Inherent power of Court to set aside order made under Probate and Administration Act—Procedure—Notice—Person interested in estate of deceased*—Zemindar, *right of.*

An order granting Letters of Administration to a particular person should not be cancelled without giving him notice. [p. 133, col. 2.]

It is open to a District Judge to re-consider an order granting Letters of Administration, whether under the provisions of section 114 or under the inherent powers of the Court recognized by section 151 of the Code of Civil Procedure, apart altogether from the provisions of section 50 of the Probate and Administration Act itself. [p. 134, col. 2.]

A Court ought never to grant Letters of Administration to the estate of a deceased person without having good *prima facie* evidence that the applicant has such an interest in the estate of the deceased as would entitle him to a grant of Letters of Administration. A person who satisfies the Court that he is the heir or one of the heirs of the deceased, has such an interest. A creditor also has an interest. [p. 134, col. 1.]

First appeal from an order of the District Judge of Agra, dated the 18th of September 1914.

Mr. *Nihal Chand*, for the Appellant.

Mr. *S. K. Dar*, for the Respondent.

JUDGMENT.

RICHARDS, C. J.—The facts connected with this appeal are as follows. It is alleged that one Sanwalia died intestate. The property left by him is said to be only a house in a village. One Parma applied for Letters of Administration to the estate of deceased and obtained an order on 18th of September 1914. The order was in the following terms: "Read application from the above-named petitioner, dated 18th August 1914, requesting that Letters of Administration to the estate of Sanwalia deceased, may be granted to him under Act V of 1881. Valued at Rs. 400. Order. This case has been uncontested. I grant Letters of Administration to Parma applicant for the estate of his deceased nephew Sanwalia; provided that if the valuation of the house made by the Collector exceeds the amount stated in the application the deficiency in fees shall be recovered." It appears that later on the same day one Nek Ram came into Court, with the result that the learned Judge passed the following order: "After passing the above *ex parte* order a petition has this day been filed. I cancel the above order and frame the following issue:—Is Parma the uncle and heir of the deceased Sanwalia"? Parma has come in appeal to this Court, contending that the order granting him Letters of Administration should not have been cancelled by the learned Judge without giving him notice. Nek Ram's contention admittedly is that Sanwalia died intestate and without heirs and that according to custom, the house reverts to him as *zemindar*. It seems to me that Parma having obtained an order granting him Letters of Administration, that order ought not to have been cancelled without giving him notice. This in itself

sufficient to dispose of the present appeal. I think, however, that it is right to point out a few matters to the learned Judge. It does not appear upon what evidence, if any, the order in favour of Parma was made. In my opinion a Court ought never to grant Letters of Administration to the estate of a deceased person without having good *prima facie* evidence that the applicant has such an interest in the estate of the deceased as would entitle him to a grant of Letters of Administration. A person who satisfies the Court that he is the heir, or one of the heirs, of the deceased has such an interest. A creditor also has an interest. In an insolvent's estate the creditor's interest is even greater than that of the heirs. I think even assuming that Parma had satisfied the Court that he had an interest as one of the heirs of the deceased, it ought to have ordered him to give security for the due administration of the estate of the deceased. I think also that it is a wise precaution for the Court to have clear evidence as to who are the other persons interested in the estate and as a general rule, to direct that such persons should get notice either that the application has been made or at least that the application for Letters of Administration has been allowed. The question whether or not the *zemindar* Nek Ram has such an "interest" as will entitle him to oppose the grant of Letters of Administration, will probably arise. It seems to me that Nek Ram has no "interest" in the estate of the deceased. His contention is that the moment Sanwalia died without heirs the house reverted to him. It is contended on behalf of Nek Ram that if Letters of Administration are once granted to Parma, the result would be that under the provisions of section 14 and section 59 the *zemindar* will never afterwards be allowed to say that Sanwalia died without heirs. If this is really the result of the provisions of the sections I have mentioned, it certainly would seem only just to allow Nek Ram an opportunity of contesting that Parma is the heir of the deceased. I, however, do not think that we are called upon to decide this question in the present appeal. I would set aside the order of the learned District Judge cancelling the order granting Letters of Administration and send the case back him, directing him to send notice of the objection of Nek Ram to Parma and then to proceed to consider the matter according to law.

PIGGOTT, J.—I entirely concur in what the learned Chief Justice has said and in the order proposed by him. It is only in regard to one matter that I wish to add a few words. In the arguments addressed to us in support of this appeal, it seemed to me that in the background of the appellant's case there lay the contention that he was in the position of a person holding Letters of Administration which could not be revoked at all, except under the provisions of section 50 of the Probate and Administration Act, V of 1881. Now no doubt the Court which has granted Leters of Administration has jurisdiction to take action under that section. But in the circumstances of the present case it is clear that other points would have to be considered before the case could be tied down to the provisions of that particular section. In the matter of an application for Probate or Letters of Administration, it is often impossible to apply strictly those rules of the Code of Civil Procedure which govern *ex parte* proceedings in cases where there is a defendant named at the very outset, on whom notice is required to be served. Neverthless the Court possesses, as is recognised by section 151 of the Code of Civil Procedure, inherent powers to make such orders as may be necessary for the ends of justice, or to prevent the abuse of the process of the Court. When Nek Ram laid his petition before the Court, what he desired to contend was that he was entitled to be heard *before* any Letters of Administration were granted to Parma at all. He still desires to raise this point in spite of the fact that an *ex parte* order allowing Parma's application had been passed before he was able to lay his petition before the Court. I only wish to say that it will be open to the learned District Judge when the matter comes back to him, to consider whether under the provisions of section 114, or under the inherent powers of the Court recognised by section 151 of the Code of Civil Procedure, he can or ought to re consider his *ex parte* order in favour of Parma, apart

altogether from the provisions of section 50 of the Probate and Administration Act itself.

RICHARDS, C. J.—I agree with what my learned colleague has said.

BY THE COURT.—The order is that we allow the appeal, set aside the order of the Court below and remand the case to that Court for trial according to law. Costs will be costs in the cause.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL SUIT NO. 199 OF 1914.

March 2, 1915.

Present:—Mr. Justice Kumaraswami Sastri.

LODD GOVINDOSS KRISHNADOSS AND OTHERS—PLAINTIFFS

versus

RUKMANI BHAI—DEFENDANT.

Professional ethics—Counsel appearing in a cause—Propriety of his giving evidence.

Though it is no doubt desirable that Counsel ought not to appear in a case where it is probable that his evidence would be material, there is no inflexible rule that his evidence ought not to be taken, if at any stage of the suit, it becomes necessary to do so. To lay down such a hard and fast rule would often defeat the ends of justice. [p. 136, col. 2; p. 137, col. 1.]

Messrs. *V. C. Seshachariar* and *V. V. Srinivasa Aiyangar*, for the Plaintiffs.

Messrs. *Venkatasubba Row* and *Radhakrishnayya*, for the Defendant.

JUDGMENT.—The plaintiffs pray for the reduction of the maintenance decreed to the defendant in Civil Suit No. 187 of 1906 from Rs. 400 to Rs. 100 a month, on the ground that the maintenance decreed in that suit was in respect of the defendant and her daughter and that, owing to her daughter having been married, her maintenance was no longer obligatory on the defendant. The plaintiffs also pray that the decree in Civil Suit No. 187 of 1906 may be rectified by declaring that the amount decreed in that suit was really for the maintenance of the defendant and her daughter and that the amount be reduced to Rs. 100 or such other sum as the Court may think proper.

The case for the plaintiffs is t] : ' defendant, who is the step-mother of the 1st plaintiff, filed Civil Suit No. 56 of 1906 in the High Court claiming *inter alia* maintenance for herself and her daughter, that the said suit was permitted to be withdrawn with liberty to file a fresh suit, as it was found that the suit was bad for misjoinder of parties and causes of action that she brought Civil Suits Nos. 187 of 1906 and 188 of 1906 claiming maintenance for herself and her daughter respectively, that the suits were heard together and compromised, the terms being that the plaintiff and her daughter should get Rs. 400 a month for their maintenance, that a decree was passed in Civil Suit No. 187 of 1906 awarding Rs. 400 for maintenance but that, by reason of some mistake, the decree, instead of stating that the maintenance was to be for the defendant and her daughter, simply states that the maintenance was to be for the defendant, that defendant's daughter was married in October 1913 and has attained puberty and gone to live with her husband and that, by reason of this fact, he has no longer to pay Rs. 400 a month but only Rs. 100.

The defendant filed a written statement, denying that the sum of Rs. 400 was the maintenance payable to her and her daughter and stating that the terms of the compromise are correctly set out in the decrees passed in Civil Suits Nos. 187 and 188 of 1906. She states that, although she claimed a much larger sum, Rs. 400 was, by consent of the parties, fixed for her maintenance, that her daughter was then of marriageable age, and that her maintenance was not taken into consideration when the settlement was arrived at. She also states that an application to amend the decree was made before Sir Arnold White but that it was refused, the Chief Justice holding that he had no power to vary his decree and that, even if he had, he would not do so on the merits. The defendant denies that the plaintiffs have any cause of action and states that the matter is *res judicata* and that the plaintiffs are not entitled to any relief. A preliminary issue was settled as to whether the plaintiffs are entitled to vary the terms of the *razinama* decree in Civil Suit No. 187 of 1906. For the reasons given in my judgment dated 8th December 1914, I held that the plaint disclosed a cause of action and that, on the allegations con-

tained in the plaint, the plaintiffs were entitled to sue. I also held that the suit was not barred by *res judicata*. The following additional issues were then settled:—

(*a*) Was it agreed that the maintenance of Rs. 400 should be paid to the defendant and her daughter as alleged in paragraph 6 of the plaint?

(*b*) If the 1st issue is found in plaintiffs' favour, are they entitled to any reduction in the maintenance allowed by the decree, and, if so, by what amount?

(*c*) Is the claim of the plaintiff for the rectification of the decree barred by limitation?

* * * *

The two Suits Nos. 187 and 188 of 1906 came on for hearing before Sir Arnold White and, after they were part-heard, a compromise was suggested and the terms of the compromise were admittedly settled in his Lordship's Chambers.

* * * *

The only evidence adduced before me to show that there was any mistake when the compromise decrees in Civil Suits Nos. 187 and 188 of 1906 were entered into, is the evidence of the plaintiff and of Mr. Narasimhachari, the junior Vakil who was present in the Chambers of Sir Arnold White. I may dismiss the evidence of the plaintiff as that of a person who is interested and whose attitude towards his step-mother has been throughout bitterly hostile. He set up the false plea that he was not personally liable and that the decree was wrong in that respect also, and the proceedings after the decree in Civil Suits Nos. 187 and 188 of 1906 show that he left no stone unturned to prevent the plaintiffs therein from realizing the fruits of their decrees. Mr. Narasimhachari, who was present when the compromise was entered into, admits in cross-examination that nobody expressly stated that the maintenance was to be for both the plaintiff and her daughter and that he does not remember if the daughter's name was mentioned. In answer to a question put by me, he stated that he understood that the arrangement was that Govindoss (1st plaintiff herein) should pay Rs. 400 to the defendant and that she should maintain her daughter, there being no arrangement as to how much should be paid for the daughter's maintenance. He winds up by saying that he cannot say what was understood by all the parties as regards the question of maintenance. All that this witness can state is that he was under the impression that the maintenance of Rs. 400 was to be for the plaintiff and her daughter, but how he came to be under that impression the evidence does not show. As against the evidence of the plaintiff and Mr. Narasimhachari, there is the evidence of Mr. Venkatasubba Row, who appeared for the plaintiff in Civil Suit No. 187 of 1906. He gave his evidence in a straightforward manner and I have no hesitation in accepting his evidence as to what took place in the Chambers of the late Chief Justice.

Objection was taken to Mr. Venkatasubba Row giving evidence, as he was one of the Vakils who appeared for the defendant. I cannot help remarking that the objection comes with very bad grace from the plaintiffs. At the settlement of issues, the plaintiffs were ordered to file a written statement before 16th December 1914 giving full particulars as to the date of the agreement mentioned in the first issue, the parties that were present at the time of the agreement and the parties between whom the agreement was come to. The plaintiffs did not file the particulars and their only excuse was that their Vakil forgot to do so. Though the plaintiffs would have only themselves to thank if the first issue was decided against them and the suit dismissed, I did not want to dismiss the suit, nor did Mr. Venkatasubba Row press for it as the non-filing of the particulars was due to an oversight of the plaintiff's Vakil. When the evidence was gone into, it was alleged that the compromise was in the Chambers of the late Chief Justice and names of the parties present were given. As soon as the plaintiff's evidence was over, Mr. Venkatasubba Row withdrew from the case and it was conducted by Mr. Radhakrishnayya. Under these circumstances I do not see what objection there could be to Mr. Venkatasubba Row giving evidence in this suit. Though it is no doubt desirable that Counsel ought not to appear in a case where it is probable that his evidence would be material, I do

not think that there is any inflexible rule that his evidence ought not to be taken, if, at any stage of the suit, it becomes necessary to do so. To lay down such a hard and fast rule would often defeat the ends of justice. I have no hesitation in holding that the evidence of the 1st plaintiff and Mr. Narasimhachari is utterly insufficient to show that there was any mistake in the terms as embodied in the decree in Civil Suits Nos. 187 and 188 of 1906.

I find on this issue that there was no mistake in the matter and that the real agreement at the time of the compromise was that Rs. 400 should be paid to the defendant, and not to the defendant and her daughter.

In the result the suit fails and is dismissed with costs.

Suit dismissed.

PUNJAB CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 353 OF 1913.

February 6, 1915.

Present:—Sir Alfred Kensington, KT., Chief Judge, and Mr. Justice Rattigan.

Musammat UMAT-UL-MUGHNI BEGUM—DEFENDANT No. 4—APPELLANT

versus

SALIG RAM AND OTHERS—PLAINTIFFS AND OTHERS—DEFENDANTS—RESPONDENTS.

Ex parte *decree—Costs—Procedure to be adopted, when date of hearing holiday*—Ex parte *decree, setting aside of—Costs, of adjournment—Appellate Court's power to cancel order of costs allowed by first Court.*

Where the date fixed for hearing a case happens to be a holiday, the Court is in no way justified in taking up the case on the following day and in passing any order to the prejudice of any of the absent parties without duly serving upon him a fresh notice of the hearing. [p. 138, cols. 1 & 2.]

Passing an *ex parte* decree without duly serving the summons upon the defendant is wholly unjustifiable and liable to be set aside unconditionally. [p. 138, col. 1.]

A party having good and sufficient reason for non-compliance with an order of a Court cannot be burdened with the costs of an adjournment. [p. 138, col. 1.]

Miscellaneous appeal from the order of the Additional District Judge, Delhi, dated the 28th August 1912, dismissing plaintiffs' application for setting aside the *ex parte* decree passed on 16th July 1912.

Mr. *Sundar Das*, for the Appellant.

Mr. *Raushan Lal*, for the Respondent.

JUDGMENT.—This is an appeal under Order XLIII, rule 1, clause (*d*), Civil Procedure Code, from the order of the Additional District Judge, Delhi, dated the 28th of August 1912, rejecting an application to set aside an *ex parte* decree passed against the appellant on the 16th of July 1912. It appears that on the 9th of March 1911, plaintiffs, Salig Ram and Mahesh Das, instituted a suit for recovery of Rs. 6,645 due on a mortgage-deed executed by defendants Nos. 1 to 3, and impleaded defendant No. 4, the present appellant, *Musammat* Umat-ul-Mughni as she claimed to be interested in the mortgaged property to the extent of 1/7th share. On the 5th July 1911, a decree was passed against defendants Nos. 1 to 3 on a confession of judgment and *ex parte* against defendant No. 4. On the 23rd of August 1911, appellant applied to have the *ex parte* decree set aside on the ground that she had not been duly served with notice of the date of hearing. The application was granted and the decree unconditionally set aside on the 5th of January 1912, the 7th of January being fixed as the date on which defendant No. 4 was to file her pleas. This order was duly complied with and on the 23rd of January issues were fixed, and the case was put down for evidence for the 20th of February. At the hearing on the 20th February, plaintiffs produced certain witnesses who were duly examined, and then stated that they relied upon certain documents in the possession of defendant No. 4. The latter's *mukhtar* pointed out that his client was at Hyderabad, and that she did not intend to call any evidence in support of her pleas. He was directed to produce the documents referred to by the plaintiffs and the 14th of March was fixed for the next hearing. On that date the defendant's *mukhtar* stated that his client was "out in camp in Hyderabad with her husband," and that the documents called for had not reached him. Thereupon the Court adjourned the case to the 29th of March, and directed defendant No. 4 to pay Rs. 30 as costs of the adjournment. On the 29th of March neither defendant No. 4 nor her *mukhtar* was present and the costs directed to be paid by the Court's order of the 14th of March had not been paid. The Court accord-

ngly passed an *ex parte* decree against defendant No. 4. On the 29th of April, defendant No. 4 filed an application praying that the *ex parte* decree might be set aside, on the ground that she herself was at Hyderabad, that her *mukhtar* was ill on the date fixed for the last hearing, and that her Counsel on that date was absent from the station. On the 13th of June the Court, passed an order directing that if defendant No. 4 paid the sum of Rs. 30 as costs in addition to the sum of Rs. 30 previously ordered to be paid by her into Court. the *ex parte* decree would be set aside. The case was fixed for hearing on the 15th of July. The day last mentioned happened to be a holiday and the Court was shut, but the case was taken up on the 16th of July; and as defendant No. 4 was not present and the costs had not been paid, her application of the 29th April was rejected. On the 12th of August she applied for restoration of her application on the ground that the Court was closed on the 15th of July, the date fixed for the hearing, but her application was summarily rejected on the 28th of August. It is from this last order that the present appeal has been filed.

We have no hesitation in holding that the procedure adopted by the Court has been wholly unjustifiable from the very outset. In the first place, the original *ex parte* decree was passed in spite of the fact that defendant No. 4 had not received notice of the date of hearing. Then, on the 14th of March she was directed to pay Rs. 30 as costs for adjournment, though it must have been obvious to the Judge that there was good and sufficient reason for her non-compliance with the order of the 20th of February inasmuch as she happened to be out in camp with her husband, an official of the Hyderabad State, and presumably, therefore, not in a position to get hold of the papers required by the plaintiffs. Again, on the 13th of June the Court was apparently satisfied that she had shown good cause for setting aside the *ex parte* decree passed on the 29th of March, but nevertheless directed her to pay a further sum of Rs. 30 as a condition precedent to setting aside the *ex parte* decree. Finally, the Court was in no way justified in taking up the case on the 16th of July without giving notice to the appellant. The date of hearing had been fixed for the 15th of July, and as the Court was shut on that date, no order to the prejudice of the appellant should have been passed in her absence on the following day. We accordingly accept this appeal and set aside all the orders of the Court below passed subsequently to the 20th of February 1912; the result being that defendant No. 4 should now be called upon to produce by a date, to be specified by the Court, the documents called for by the plaintiffs, and thereafter the case to proceed in accordance with law. We wish it to be distinctly understood that the orders of the 4th of March and the 13th of June 1912, directing payment of costs by defendant No. 4, are expressly set aside. As it is the Court rather than the parties that has been in fault upto date, we leave the latter to bear their own costs in this Court.

Petition allowed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 92 OF 1913.

February 24, 1915.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

M. SUBRAMANIAM PILLAI—PLAINTIFF—APPELLANT

versus

Sri GOPALARAMA SUBRAMANIA AIYAR, MINOR, BY HIS MOTHER AND GUARDIAN ANANDAMMAL—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 66—Purchase in Court auction as benamidar—Agreement by purchaser to execute sale-deed in favour of plaintiff—Suit, whether maintainable.

A suit for execution of a sale-deed and for recovery of possession on the ground that the defendant's father purchased the suit properties as *benamidar* for the plaintiff, falls within the scope of section 66 of the Civil Procedure Code and is barred. [p. 139, cols. 1 & 2.]

Appeal against the decree of the Court of the Subordinate Judge of Tinnevelly in Original Suit No. 40 of 1911.

Messrs. *S. Srinivasa Aiyangar* and *S. Ramaswamy Aiyar*, for the Appellant.

Messrs. *T. R. Ramachandra Aiyar* and *M. Krishnamachari*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff against a decree of the Subordinate Judge, Tinnevelly. The plaintiff alleged

in his plaint that it was agreed between the plaintiff and Chidambara Iyer, father of the defendant, that the latter should purchase the properties now in suit on behalf of the plaintiff at a sale in execution of a decree with the money which the plaintiff agreed to pay to him, and that the properties should be taken possession of through Court; that Chidambara Iyer should enjoy for four years the income from the said properties in satisfaction of all debts incurred on those properties; that after four years the properties should be put into plaintiff's possession free of all incumbrances and that Chidambara Iyer should execute a sale-deed to plaintiff in respect of them. In accordance with these arrangements, the plaintiff states that the properties were purchased by Chidambara Iyer as plaintiff's agent with plaintiff's money and that he remained in possession. The plaintiff now sues for the execution of a sale-deed and for recovery of possession. The suit was dismissed by the Subordinate Judge as he was of opinion that it is barred by section 66 of the Civil Procedure Code.

The plaintiff appeals. The section enacts that "no suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims." When the plaintiff was examined as a witness in the case, he admitted that the defendant's father Chidambara Iyer purchased the suit properties in Court auction as *benamidar* for him. And he again repeated the statement that "the agrement between myself and defendant's father was that he should purchase the properties for me as *benamidar* and that he should enjoy the properties for four years," in accordance with the arrangement referred to. This statement that the purchase by the defendant's father was *benami* for the plaintiff was repeated in the plaint and also in his deposition as his witness.

It was argued before us that as there was an agreement to execute a conveyance in favour of the plaintiff, section 66 does not bar the suit. But the conveyance was to be executed by the defendant's father on the ground that he was a *benamidar*. It was not intended thereby that he should convevy any title which was vested in him to the plaintiff. The allegations in the plaint do not show that any title was vested in the defendant, that he purchased the property on his own behalf as the owner of the property. It appears to us that the case falls clearly within the scope of section 66, Civil Procedure Code.

We accordingly confirm the decree of the lower Court and dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 10 OF 1912.

February 24, 1915.

Present:—Mr. Justice Fletcher and Mr. Justice Teunon.

CHANDRA MOHAN BANERJEE—DEFENDANT No. 1—APPELLANT

versus

SATYA KRIPAL BANERJEE—PLAINTIFF AND OTHERS—*Pro forma* DEFENDANTS—RESPONDENTS.

Mortgage—Mortgagor, payment by, to one mortgagee—Endorsement on mortgage-deed, value of—Payment, whether amounts to discharge—Mortgagor, duty of—Probate and Administration Act (V of 1881), ss. 4, 92—Endorsement as to receipt of mortgage-money by one executor mortgagee, value of.

Two of the sons of a deceased testator were made executors of his Will. The two sons invested the moneys they had in their hands in mortgages. One of the brothers alone sued to enforce the mortgage security making the other brother defendant. The mortgagor pleaded payment of certain amounts to the other brother, as evidenced by endorsement on the mortgage bond, and claimed to be credited for the amounts:

Held, that notwithstanding that the money in fact formed a portion of the estate of the deceased, it did not vest in the executors as such under section 4 of the Probate and Administration Act, but vested in them by virtue of the bonds which were given to them by the mortgagor and that, therefore, the endorsement did not amount to a discharge under section 92 of the Act. [p. 140, col. 2.]

Held, further, that the money was lent on a joint account and it was the duty of the defendant mortgagor in making re-payment to see that he made the payment to, and obtained a receipt from, a person entitled to give him a discharge. [p. 140, col. 2.]

Appeal against the decree of the Additional Subordinate Judge, Hoogly, dated the 16th of September 1911.

Babus *Mohendra Nath Roy* and *Hiralal Sanyal*, for the Appellant.

CHANDRA MOHAN BANERJEE *v.* SATYA KRIPAL.

Babus *Dwarka Nath Chakravarti*, *Jogendra Nath Mukherji*, Dr. *Dwarka Nath Mitter* and Babu *Bijoy Coomar Bhattacharyya*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal from a decision of the learned Additional Subordinate Judge of Hoogly dated the 16th September 1911. The suit out of which the present appeal arises is a suit brought to enforce certain mortgage securities. It appears that one Satya Dayal Banerji, who died as long ago as the 30th May 1897, left a Will, dated the 11th January 1897, under the terms of which the plaintiff and the defendant No. 2 in this case, who are his sons, were executors. The defendant No. 3 is the only other son of the deceased Satya Dayal Banerji. In accordance with their duties as executors the plaintiff and respondent No. 2 had in their hands certain moneys and these moneys they invested in these mortgage securities, the mortgagor in each case being the defendant No. 1. These mortgages were dated respectively the 6th November 1898, the 10th February 1899 and the 20th April 1899, and the respective principal sums were Rs. 14,000, Rs. 10,000 and Rs. 9,550-8-0. The plaintiff, apparently later on, had disputes with his brother, the defendant No. 2, and the present suit was brought by him to enforce these mortgage securities. He appears as the sole plaintiff in this case and his brothers have been joined as defendants.

The only question that is in dispute in this case is as to certain items that appear endorsed in the mortgage bonds as having been paid, it is said, to the defendant No. 2 by the defendant No. 1. It is said that this endorsement is a good receipt and that these sums ought to be given credit to the defendant No. 1. In the first place I disagree in the proposition of law that has been put forward by the learned Vakil for the appellant. This is not a case governed by section 92 of the Probate and Administration Act at all. Section 92 applies to property which the English lawyers say rests in the executor *virtute officii*. That appears from section 4 of the Probate and Administration Act. It is the property that lies vested in him, that is, the executor as such, that section 92 applies to. The illustrations to section 92 make it clear. In a system of law such as exists in England where there is a distinction between real and personal estates, it is a matter of some importance. But here where there is only one class of property, the matter is not of such great importance. Where the executor derives his title to a lease-hold by virtue of his office, it is frequently in English law a matter of great importance. When one looks at illustration (*b*) of section 92, it will appear that one executor has power to surrender a lease, that is because the lease vests in him as such, as mentioned in section 4 of the Act. The right under these bonds, notwithstanding that the money did, in fact, form a portion of the estate of the deceased, did not vest in the executors as such under section 4 of the Act, but vested in them under and by virtue of the bonds which were given to them by the defendant No. 1. That being so the money was lent on a joint account and it was the duty of the defendant No. 1 on making re-payment to see that he made the payment to, and obtained a receipt from, a person entitled to give him a discharge. So even if I come to the conclusion that the learned Judge of the Court below was wrong in the findings of fact, I should agree in the result that he has arrived at. The learned Judge, it seems to me in a case like this, was in a far better position than any Appellate Court is in, where the question is purely as to the weight and value to be attached to the evidence of certain witnesses that the Judge had before him and where he was able to appreciate the evidence that was given in his presence. We are not in an equal position and we are not entitled, unless we come to the conclusion that the learned Judge was clearly wrong in the conclusion that he arrived at, to distrub the findings of fact made by him. The learned Judge having these witnesses before him has come to the clear finding that the defendant No. 1 and defendant No. 2 acted in collusion to cheat the estate of the deceased Satya Dayal Banerji. If that be so, no weight can be attached to any statement of either of these witnesses unless it is supported by good and independent evidence. A great deal has been made of the admission by the defendant No. 2 that

he was deceived of these sums that are alleged to have been paid by the defendant No. 1, a sum of Rs 4,939-10-6 payable on the second bond and another sum of Rs. 400 payable on the third bond. But the learned Subordinate Judge has disbelieved the whole of this story. How can we, in appeal, not having seen the witnesses, say that these people were telling the truth, that we should hold that their evidence ought to be believed and that the statements made by these witnesses proving the payments ought to be given a greater weight than the learned Subordinate Judge has given them, and that we ought now to come to the finding that these payments were in fact made? Then, it is said that the learned Subordinate Judge was biassed as against the defendant No. 1, because he was the co-defendant in a divorce case and got off what the learned Judge calls scot-free. But I am satisfied on the judgment that it was not that only that made the learned Judge take an unfavourable view of the evidence given by the two defendants. The real fact is that he had before him the whole of their evidence, he disbelieved that evidence and disbelieved the genuineness of the endorsements that are on the bonds. I see no reason why we should differ from the findings of fact made by the learned Judge, and I think we ought not to disturb those findings on the evidence as it now stands before us. Far from thinking that the learned Judge has come to a wrong conclusion, so far as I have been able to form an independent estimate of the evidence, I think that if I had been in the position of the learned Judge of the Court below, I would have arrived at a similar conclusion.

The only other point that was raised in this appeal is as to the form of the decree. The learned Subordinate Judge had before him all the parties interested in the estate of the deceased Satya Dayal Banerji, namely the plaintiff, the defendant No. 2 and the defendant No. 3, and thought it proper to give one-third of the mortgage-money to each of them, that being the share which each of them is entitled to, apparently under the terms of the Will, although, as a matter of fact, the Will has not been given in evidence. The only point raised is that the defendant No. 2 admitted that he had received Rs. 4,939-10-6 and Rs. 400 out of the mortgage-money and had endorsed these payments on the back of the second and third mortgage bonds, and it is said that at any rate thedefendant No. 1 should have received credit as against the defendant No. 2 for these two sums so endorsed, which have been admitted by the defendant No. 2 to have been received by him. The learned Judge did not assent to that view and apparently on this ground, namely, that he was not bound by the admission and he disbelieved the admission; and, therefore, he thought that he ought to make a decree for the whole amount of the mortgage-money. What has happened as a matter of fact is, that the greater portion of the mortgage-money has been paid into Court by the defendant No. 1 and by an order of the Court it has been drawn out by the plaintiff, the defendant No. 2 and the defendant No. 3 in equal shares. So now it would not be convenient for the Court to alter that portion of the decree declaring that the defendant No. 2 should get one-third of the amount realized under the terms of the mortgage-deeds. The defendant No. 1 paid the money into Court, I suppose, on terms as to the stay of execution of the decree that then stood, and he must have known when he did that, that the Court might order that that money should be paid out on the terms of the decree then existing. Any right that he has got against the defendant No. 2 in respect of these sums which the defendant No. 2 says he has received, he will be able to enforce in an independant suit. I think it would not be convenient now to disturb the decree so far as the defendant No. 2 gets $\frac{1}{3}$rd share of the mortgage-money, when in fact he has already received a greater portion of his $\frac{1}{3}$rd share. On the whole I come to the same conclusion as the learned Subordinate Judge has come to and in my opinion the present appeal fails and must dismissed with costs to the plaintiff only.

TEUNON, J.—I agree.

Appeal dismissed.

LAKSHMI ACHI *v.* SUBBARAMA AIYAR.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 151 OF 1914.

March 10, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

LAKSHMI ACHI—PETITIONER—APPELLANT

versus

SUBBARAMA AIYAR AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XX, r. 12, O. XXII, rr. 2, 3, 4, 10; O. XXXIV, rr. 2, 3; O. XLIII, r. 1 (l)—Preliminary decree, suit if continued till final decree after passing of—Suit by executors on mortgage in favour of estate of deceased testator—Death of executors—Right of widows to be brought on record as legal representatives of deceased testator—Application under O. XXII, r. 3—Order, whether appealable—Transfer of Property Act (IV of 1882), ss. 88, 89.

Under the Civil Procedure Code of 1908, after the passing of a preliminary decree, the suit is continued until the stage of final decree is reached. [p. 143, col. 2.]

Malikarjunadu Setti v. *Lingamurti Pantulu*, 25 M. 244; 12 M. L. J. 279; *Abdul Majid* v. *Jawahir Lal*, 23 Ind. Cas. 649; 12 A. L. J. 624; 16 Bom. L. R. 395; 18 C. W. N. 963; 19 C. L. J. 626; 36 A. 350; 27 M. L. J. 17; (1914) M. W. N. 485; 16 M. L. T. 44; 1 L. W. 483; *Ashfaq Husain* v. *Gauri Sahai*, 9 Ind. Cas. 975; 33 A. 264; 15 C. W. N. 370 (P. C.); 8 A. L. J. 332; 9 M. L. T. 380; 13 C. L. J. 351; 13 Bom. L. R. 367; 4 Bur. L. T. 121; 21 M. L. J. 1140; *Munna Lal Parruck* v. *Sarat Chandra Mukerjee*, 27 Ind. Cas. 683; 21 C. L. J. 118; 17 M. L. T. 120; 2 L. W. 282; 19 C. W. N. 561; 17 Bom. L. R. 408, distinguished.

A widow of a deceased testator cannot apply to be brought on record as the "legal representative" on the death of the executors who instituted the suit. The term "devolution" in Order XXII, rule 10, means the devolution of the interest of the person who instituted the suit. [p. 144, col. 1.]

Ferral v. *Curran*, (1899) 2 Ir. R. 470; 33 Ir. L. T. R. 90; 4 Irish Law Reports 850; *Rikhai Rai* v. *Sheopujan Singh*, 7 Ind. Cas. 97; 7 A. L. J. 960; 33 A. 15; *Gandi Ramaswami* v. *Puramsetti Pedamunayya*, 27 Ind. Cas. 1001; 17 M. L. T. 186, followed.

An application to be brought on record by such a widow could be made only under Order XXII, rule 3, and as orders on such applications are not made appealable under Order XLIII, rule 1, no appeal lies from an order rejecting such an application. [p. 144, cols. 1 & 2.]

Appeal against an order of the Court of the Subordinate Judge of Mayavaram, in Insolvency Appeal No. 6 of 1914 in Original Suit No. 40 of 1911.

FACTS.—One Arunachalam Chetty died issueless, leaving two widows him surviving. By his last Will and testament he appointed two executors and he also disinherited the senior widow. In respect of a mortgage outstanding in the name of the deceased the executors instituted a suit, but one of them having died before the preliminary decree and the other after, the junior widow was brought on record. The senior widow then applied to be brought on record as the legal representative of the deceased jointly with her co-widow, and this application was dismissed by the Subordinate Judge of Mayavaram. Against this order the senior widow preferred this civil miscellaneous appeal.

Mr. *S. Srinivasa Aiyangar* (with him Mr. *G. S. Ramachandra Iyer*), for the Respondents, raised a preliminary objection that no appeal lay either under Order XLIII, rule 1, or under section 47, as the proceedings from the stage of a preliminary decree and up to the final decree are proceedings in the suit itself and are not by way of execution and as until the final decree is passed, there is no executable decree in the suit. Reference was made to the deliberate change in the language of Order XXXIV, rules 2 and 3, which substituted the word 'decree' for the word 'order' in the corresponding section 19 of the Transfer of Property Act.

Messrs. *T. Rangachariar* and *C. V. Anantakrishna Iyer*, for the Appellant:—After the preliminary decree the procedure to be followed in obtaining a final decree is by way of execution only. It is, therefore, competent to the appellant to come in and pray for being made a party and hence to appeal against any adverse order. *Vide* Explanation to section 2 (2), read with section 47, Civil Procedure Code. *Vide* also *Malikarjunadu Setti* v. *Lingamurti Pantulu* (1), *Ashfaq Husain* v. *Gauri Sahai* (2) and *Munna Lal Parruck* v. *Sarat Chandra Mukerjee* (3), where it has been held that a preliminary decree is executable. Again by way of analogy under Order XX, rule 12, a preliminary decree relating to possession is executable independent of a provision for the passing of a final decree regarding mesne profits. Then again the estate having devolved on the appellant upon the death of the executors, she was entitled to come in under Order XXII, rule 10, Civil Procedure Code.

Mr. *S. Srinivasa Aiyangar*, in reply:—The cases quoted, *viz.*, *Malikarjunadu Setti* v. *Lingamurti Pantulu* (1), *Ashfaq Husain* v. *Gauri Sahai* (2) and *Munna Lal Parruck* v. *Sarat Chandra*

(1) 25 M. 244; 12 M. L. J. 279.

(2) 9 Ind. Cas. 975; 33 A. 264; 15 C. W. N. 370 (P. C.); 8 A. L. J. 332; 9 M. L. T. 380; 13 C. L. J. 351; 13 Bom. L. R. 367; 4 Bur. L. T. 121; 21 M. L. J. 1140.

Mukerjee (3) do not apply. They are decisions under the Transfer of Property Act. In fact in the case of *Ashfaq Husain* v. *Gauri Sahai* (2), Counsel expressly admitted that the present contention was not tenable under the new Code. A decree for mesne profits is not a necessary sequel to a decree for possession. Order XXII, rule 10 is not applicable. The devolution therein referred to must be that of the interest of the plaintiff who instituted the suit. The use of the words 'assignment' and 'creation' are very suggestive. See *Ferral* v. *Curran* (4), where a remainder-man was not allowed to continue a suit instituted by a tenant-for-life. This decision was under Order XVII, rule 2, Judicature Act, corresponding to Order XXII, rule 10. The Legislature has provided for cases of interest other than those of the person suing. Vide Order XXII, rules 3 and 4, read with section 2 (11) and *Rikhai Rai* v. *Sheopujan Singh* (5) and *Gandi Ramaswami* v. *Puramsetti Pedamunayya* (6). Further, the application to the lower Court was under Order XXII, rule 3, and no appeal lies against an order passed under that rule.

JUDGMENT.—One Arunachalam Chetty died leaving two widows. Prior to his death, he executed a Will on the 25th July 1904. Two persons were appointed executors under it. They brought Original Suit No. 49 of 1911 on the deed of mortgage executed to the deceased testator. One of the executors died before the preliminary decree in the suit was passed, and the other after it. An application was presented by the appellant, the senior widow of the deceased, to continue the suit. It was opposed by the respondent, the junior widow. The Subordinate Judge dismissed the application. This appeal is against that order.

Mr. S. Srinivasa Aiyangar raised the preliminary objection that no appeal lies against the order of the lower Court. The question has been argued very fully before us by the learned Vakils for the appellant and respondent. We have to come to the conclusion that the preliminary objection must be upheld.

Mr. T. Rangachariar's first contention is that after the passing of the preliminary decree in a mortgage suit, the procedure leading up to the final decree is only by way of execution and that consequently his client, the appellant, is entitled to initiate proceedings in that behalf. We are of opinion that this argument is not open to the appellant after the amendment of the Code of Civil Procedure, which by Order XXXIV now regulates the procedure relating to the execution of mortgage decrees. It was held in *Malikarjunadu Setti* v. *Lingamurti Pantulu* (1) that the preliminary decree passed in a mortgage suit is the only executable decree and that proceedings for obtaining the final decree could be taken only by way of execution. This view was based mainly on the language of section 89 of the Transfer of Property Act, which says: "the plaintiff or the defendant, as the case may be, may apply to the Court for an *order* absolute for sale of the mortgage property." The recent decision of the Judicial Committee in *Abdul Majid* v. *Jawahir Lal* (7) is in favour of the view taken in the Madras Full Bench case. The use of the word *order* in section 89, in contradistinction to the word *decree* in section 88, was responsible for numerous decisions which were not easily reconcilable. The Legislature intervened, and in Order XXXIV speaks of both the adjudications as decrees (See rules 2 and 3). Therefore, after the passing of the preliminary decree, the *suit* is continued until the stage of final decree is reached. It is not by the process of execution that the final decree is obtained. Mr. Rangachariar refers to the explanation to the definition of decree, and argues that when read with section 47, the proceeding referred to in the Explanation really relates to execution. Had it not been for the deliberate change in the language of Order XXXIV, this contention would have force. The decisions of the Judicial Committee of the Privy Council in *Ashfaq Husain* v. *Gauri Sahai* (2) and *Munna Lal Parruck* v. *Sarat Chundra Mukerjee* (3) relate to the language of sections 88 and 89 of the Transfer of Property Act, and not to the amended provision of the Code of Civil Procedure. In the former case, Counsel expressly stated that under the

(3) 27 Ind. Cas. 683; 21 C. L. J. 118; 17 M. L. T. 120; 2 L. W. 284; 19 C. W. N. 561; 17 Bom. L. R. 408.

(4) (1899) 2 Ir. R. 470; 33 Ir. L. T. R. 90; 4 Irish Law Reports 850.

(5) 7 Ind. Cas. 97; 7 A. L. J. 960; 33 A. 15.

(6) 27 Ind. Cas. 1001; 17 M. L. T. 186.

(7) 23 Ind. Cas. 649; 12 A. L. J. 624; 16 Bom. L. R. 395; 18 C. W. N. 963; 19 C. L. J. 626; 36 A. 350; 27 M. L. J. 17; (1914) M. W. N. 485; 16 M. L. T. 44; 1 L. W. 483.

Code it would not be possible to argue that the preliminary decree is executable. It was further argued by the learned Vakil that as the preliminary decree relating to possession (under Order XX, rule 12) is executable independently of the final decree as to mesne profits, it follows that a preliminary mortgage decree is executable. A decree for mesne profits is not, strictly speaking the final stage of the decree for possession. They relate to two different rights: and the fact that an exception is made in such cases is not an argument for holding that all preliminary decrees are executable.

Mr. Rangachariar's next contention is that his client is a person on whom the estate has devolved upon the death of the executors and that her application must be treated as one falling under Order XXII, rule 10, of the Code of Civil Procedure. We were at first inclined to think that the devolution referred to in this rule was of the same character as is referred to in the definition of '*Legal representative*' in the Code (section 2, clause 11). Mr. S. Srinivasa Aiyangar has satisfied us that rule 10 is not open to that interpretation. The term legal representative is used in rules 3 and 4 of the Order and does not find a place in rule 10. The plain language of the rule suggests that the devolution of the interest must be that of the plaintiff who has instituted the suit. The words 'assignment' and 'creation' indicate that it is the person suing that assigns and creates the interest which enables the assignee to continue the suit. We think that "devolution" which is by operation of law must also relate to the interest of the party to the suit. Under the corresponding rule in the Judicature Act (Order XVII, rule 2), it was held that where a tenant-for-life who brought the suit died, the remainder-man was not entitled to continue the suit [*Ferrall* v. *Curran* (4)]. The same construction must be adopted with reference to rule 10. The Legislature has provided for cases in which the interest devolving is not that of the deceased plaintiff, but is that of the person whose right of action the deceased plaintiff sought to enforce as representing his estate. Rules 3 and 4 of Order XXII, read with section 2, clause 11, cover such cases. It is on this principle it has been held that a reversioner can continue the suit instituted by a widow. See *Rikhai Rai* v. *Sheopujan Singh* (5), and *Gandi Ramaswami* v. *Puramsetti Pedamunayya* (6). It has to be noted that the application of the appellant in the lower Court was under rule 3, Order XXII. The Legislature has chosen not to give a right of appeal against orders passed under that rule, whereas under Order XLIII, rule 1 (*l*), orders with reference to rule 10 are appealable. We must, therefore, hold that this appeal is incompetent.

The appellant will pay the costs of the respondent.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 641 OF 1914.

April 26, 1915.

Present:—Justice Sir P. C. Banerji, KT.

BHAGIRATHI NONIYA—DEFENDANT—APPELLANT

versus

SUKHDEO NONIYA—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 152—Clerical error in judgment—Correction—Jurisdiction.

A Munsif, by a clerical error, recorded in his final order an order dismissing the suit instead of decreeing it. The decree was prepared in accordance with the final order:

Held, that the Munsif had jurisdiction under section 152 of the Civil Procedure Code to subsequently correct the error.

Second appeal from a decision of the District Judge of Benares at Jaunpur, dated the 17th February 1914.

Mr. *Iqbal Ahmad*, for the Appellant.

Dr. *Suleman*, for the Respondent.

JUDGMENT.—The only question raised in this appeal is whether the learned Munsif was justified in correcting his judgment and decree. What happened was that the plaintiff brought a suit for possession of property left by one Sheoraj, claiming the whole of it on the ground that he was the only son of Sheoraj. The defendant Bhagirathi claimed to be another son of Sheoraj by another wife. This was denied on behalf of the plaintiff, and the Court of first instance found that the defendant was not the son of Sheoraj and that the plaintiff alone was entitled to the property. By a clerical error, instead of recording a decree in favour of the plaintiff, the final order of the Munsif was one of dismissal of the suit, a decree was drawn up in accordance with this judgment. It having been brought to the notice of the

learned Munsif that an error had crept into the judgment, he corrected the judgment and the decree and substituted for the word "dismissed" the word "decreed". It is urged that the Munsif had no power to make this correction and that his original decree dismissing the suit should hold good. I do not agree with this contention. Section 152 of the Code of Civil Procedure was enacted clearly with the object of enabling the Court to correct clerical mistakes made by it in the judgment or decree or in any order. The Munsif's judgment shows that the findings were all in favour of the plaintiff and that he intended to decree the claim. It was only by an oversight that he wrote out an order of dismissal. After the correction of the judgment and the decree the defendant appealed to the District Judge and on the merits the learned Judge found against the defendent. So that neither on the point of law nor on the merits the defendant-appellant had any case. I dismiss the appeal with costs, including fees on the higher scale.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 397 OF 1914.

February 9, 1915.

Mr. Justice Ayling and Mr. Justice Tyabji.

MUSALIUM VEETIL THEYATHIL MAHAMMADUNNI—DEFENDANT No. 1—APPELLANT

versus

KUDUMPALATH PADINHARA PARAMBIL BAVA AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 3 TO 7 AND 2—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 83, 84—Deposit of mortgage amount, when valid—Interest, when ceases to run.

It is only the actual payment of the full mortgage amount into Court that makes interest on the mortgage amount cease to run under section 84 of the Transfer of Property Act, and not a mere presentation of a petition for that purpose under section 83 of the Act. [p. 145, col. 2.]

Second appeal against the decree of the District Court of South Malabar, in Appeal Suit No. 206 of 1913, preferred against that of the Court of the District Munsif of Ponnani in Original Suit No. 626 of 1911.

FACTS.—A petition under section 83, Transfer of Property Act, for depositing the sum of money due on a certain mortgage was filed on 3rd August 1910 but the deposit was actually made on 10th August 1910. The sum so deposited represented only the amount due on 3rd August 1910. The mortgagee refused to receive the money. The plaintiff then filed the present suit for redemption claiming that the mortgagee was not entitled to interest, as the deposit disentitled him to the same. The lower Appellate Court found that the deposit was valid and decreed the suit. The mortgagee appealed.

Mr. *C. V. Anantakrishna Iyer*, for the Appellant:—The deposit is not valid, as what was deposited was the amount due on 3rd August 1910 and not on 10th August 1910, the date on which the deposit was actually made. The appellant is, therefore, entitled to interest disallowed. To disentitle the appellant to interest the deposit must be that of the full amount due on the date of deposit.

Mr. *K. P. M. Menon*, for the Respondents:—The petition was filed on 3rd August 1910 and the deposit could only be of the amount due on that date. It is the date of petition and not that of the deposit that is material. The appellant is, therefore, not entitled to interest under section 83 of the Transfer of Property Act.

JUDGMENT.—The parties have been litigating for a very small amount, unless (as seems probable from the District Munsif's judgment) the real question at issue between them was not that which is argued before us, but whether the one side or the other was entitled to the documents referred to in the third issue.

Before us the only argument has had reference to the question whether the respondent had validly deposited under section 83 of the Transfer of Property Act the amount of the mortgage due to the appellant. The learned District Judge has held that there was a valid deposit. We find, however, that the respondent put in a petition for deposit on the third of August 1910, and yet the sum was not deposited till the 10th of August and on that day he brought into Court only the sum due as on the 3rd of August. This was clearly not the proper amount, and his deposit was consequently not valid and technically the deposit cannot prevail so as to stop interest running under section 84 of the Transfer of Property Act. We must, therefore, vary the decree under appeal by allowing

interest till redemption, for which we extend the time to three months from this date.

Both sides have been in the wrong as to their attitude in the lower Courts, and neither has made any effort at meeting and minimising the question at issue between them. We think the proper order as to costs will, therefore, be that the lower Appellate Court's order for costs stand and to make them bear their own costs in this Court. We order accordingly.

The memorandum of objections is dismissed without costs.

Appeal partly allowed; Decree modified.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 559 OF 1914.

January 12, 1915.

Present:—Mr. Justice Rossignol.

IMAM-UD-DIN—DEFENDANT—APPELLANT

versus

KHUDA BAKHSH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Limitation—Pre-emption—Starting point of prescribed period—Land in possession of vendee at date of sale—Mutation of names.

The vendor in 1906 sold three fields by three sale-deeds, by transferring each one-third share out of each of the three fields to vendees who were father and son. Two of the fields were at the date of sale in the possession of the father vendee under a mortgage and the third he cultivated as a *tenant* before 1906 and in 1907-08 and in subsequent years. In 1906 the mutation was refused on the ground that the vendor had not transferred possession to the vendees. Subsequently mutation having been sanctioned in 1912 the plaintiffs brought the present suit for pre-emption:

Held, that since the vendees did not take possession of any portion of the land *under the sale* the period of limitation for the suit commenced from the date of mutation.

The taking of possession under a sale is an overt act fixed as the terminus *a quo* for limitation because it constitutes a publication of the transfer.

First appeal from an order of the Additional Divisional Judge, Ferozepur Division at Ludhiana, dated the 27th May 1913, reversing that of the Munsif, 2nd Class, Zira, dated the 2nd May 1913, decreeing plaintiffs' claim.

Mr. *Asquith*, for the Appellant.

Lala *Dharam Das Suri*, for the Respondents.

JUDGMENT.—The only question in this case is that of limitation. The vendor purported to sell to vendees, Imam-ud-Din and Ismail, father and son, in December 1906, the area in dispute, consisting of three fields.

The sale-deeds are three in number and each one purports to sell a ⅓rd share out of each

of the three fields. Imam-ud-Din was already in possession of two of the fields under an earlier mortgage from vendor. The taking of possession under the sale is an overt act fixed as the terminus *a quo* for limitation, because it constitutes a publication of the transfer.

In respect of these two fields, no possession was taken by vendee under the sale, for he was already in possession of the whole. As for the remaining field 5743, it is clear that Imam-ud-Din had cultivated that also as a tenant for many years. In 1906-07, Nur Muhammad, co-sharer, tilled it with his own hand and the mutation of the sales was rejected because Imam-ud-Din was not in possession. In 1907-08, Imam-ud-Din again cultivated as a tenant under Nur Muhammad. There is the same entry in 1908-9, but in 1909-10 there is a note of the sale to Imam-ud-Din only, but this is unjustified by any mutation. In 1910-11, Imam-ud-Din alone cultivates as a tenant. It was only in 1912 that mutation was sanctioned. It is clear from this analysis that the vendees did not take possession of any portion of land *under the sale* and limitation runs from mutation. The appeal is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 225 OF 1912.

March 16, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Piggott.

THE SECRETARY OF STATE FOR INDIA—DEFENDANT—APPELLANT

versus

JWAHIR LAL—PLAINTIFF—RESPONDENT.

Pensions Act (XXIII of 1871), ss. 4, 6—Assignment of Government revenue—Declaration—Power of Civil Court—Jurisdiction.

A Civil Court is precluded from making any declaration that would in any way directly or indirectly affect the liability of Government to pay a grant of Government revenue to any person. [p. 148, col. 2.]

First appeal from the decision of the Subordinate Judge of Shahjahanpur, dated the 4th April 1912.

Mr. *Ryves*, for the Appellant.

Mr. *B. E. O'Conor* (with him Messrs. *Benode Bihari* and *S. K. Dar*), for the Respondent.

JUDGMENT.—This appeal arises out of

a suit in which the plaintiff claimed a declaration that he has "proprietary rights in ten *biswas* of revenue-free grant in each of the three *mahals* Nur Muhammad, Farhat Fatima and Intizamuddin in *Mouza* Lakhimpur," and that the name of the Government may be expunged. The claim does not appear to be accurately expressed. What the plaintiff really claims is that in the events which have happened, he is now entitled to be considered as the assignee of the Government revenue payable in respect of the 10 *biswas*. His real claim is that the last assignee of this Government revenue was one Dalpat Rai, who died leaving a daughter *Musammat* Ram Piare. He claims that now he is entitled, as the heir of Dalpat Rai under Hindu Law, to have the same rights as Dalpat Rai enjoyed.

The Court below granted the plaintiff a decree declaring that he is entitled, by right of succession to Dalpat Rai as the *muafidar* or assignee of the Government revenue, to the revenue of the 10 *biswas* share in *mahals*.

The Secretary of State has appealed, and it is contended, *first*, that the Court below ought not to have entertained the suit because the plaintiff had not obtained the certificate referred to in sections 5 and 6 of Act XXIII of 1871; *secondly*, that the decree of the Court below is in contravention of the provisions of section 6 of the same Act; and *thirdly*, that the title which Dalpat Rai had, to be deemed the assignee of the Government revenue, came to an end with his lineal descendants.

The plaintiff submits that the provisions of sections 5 and 6 do not apply; *secondly*, that if it was necessary to obtain a certificate, he did in fact obtain one; and *thirdly*, that the decree of the Court below does not in any way contravene the provisions of section 6.

It appears that sometime after the year 1902 the plaintiff brought a suit in respect of a certain *zemindari* which belonged to Dalpat Rai. He succeeded then in establishing his title to the property he sued for. He did not in that suit include the Government revenue which he now claims. As a matter of fact he had already assigned it to third parties. A vendee from the plaintiffs also brought a suit in respect of some other *zemindari* which had at one time belonged to Dalpat Rai. In that case the Court dismissed the suit, on the ground that the then plaintiff had failed to prove that the present plaintiff was the reversioner to Dalpat Rai.

Section 4 of Act XXIII of 1871 is as follows:—"Except as hereinafter provided, no Civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government, whatever may have been the consideration for any such pension or grant, and whatever may have been the nature of the payment, claim, or right for which such pension or grant may have been substituted." Section 5, "Any person having a claim relating to any such pension or grant may prefer such claim...to the Collector of the District, or Deputy Commissioner, or other officer shall dispose of such claim in accordance with such rules as the Chief Revenue Authority may, subject to the general control of the Local Government, from time to time prescribe in this behalf." Section 6, "A Civil Court, otherwise competent to try the same, shall take cognizance of any such claim upon receiving a certificate from such Collector, Deputy Commissioner, or other officer authorised in that behalf that the case may be so tried, but shall not make any order or decree in any suit whatever by which the liability of Government to pay any such pension or grant as aforesaid is affected directly or indirectly."

The plaintiff seems to have procured a certificate, dated the 5th of November 1902, probably in connection with the previous suit to which we have already referred. This certificate will be found at page 7 of the respondent's book. The plaintiff contends that if the provisions of Act XXIII of 1871 applied to the present case, then the production of that certificate is a sufficient compliance with the provisions of section 6. The argument of the plaintiff that the provisions of section 6 of Act XXIII of 1871 do not apply to his case, is based on the decision of their Lordships of the Privy Council in the case of *Secretary of State for India* v. *J. Moment* (1). In that case it was held that certain provi-

(1) 18 Ind. Cas. 22; 40 C. 391; 13 M. L. T. 53; 17 C W. N. 169; (1913) M. W. N. 45; 15 Bom. L. R. 27; 11 A. L. J. 49; 17 C. L. J. 194; 6 Bur. L. T. 1; 24 M. L. J 459; 7 L. B. R. 10; 40 I. A. 48.

sions in the Burma Act (IV of 1898) were *ultra vires* in so far as it enacted that no Civil Court should have jurisdiction to determine any claim to any right over land as against the Government. Their Lordships referred to the Act of 1858 and to the Indian Councils Act of 1861. By section 65 of the Act of 1858 it was provided that, "The Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate; and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council for India as they could have done against the said Company." Their Lordships proceed as follows: "Their Lordships are of opinion that the effect of section 65 of the Act of 1858 was to debar the Government of India from passing any Act which could prevent a subject from suing the Secretary of State in Council in a Civil Court in any case in which he could have similarly sued the East India Company." On referring to Act XXIII of 1871 it will be found that until the passing of that Act there had been a Regulation in force, namely, XXIV of 1793, section 17 of which barred the jurisdiction of Civil Courts in a suit like the present. This section was repealed by Act XXIII of 1871. It would, therefore, seem that the East India Company could not have been sued at the time of the transfer of its powers and liabilities to the Crown. The case cited, therefore, does not apply to the present case. If the provisions of section 6 do apply, it was necessary that the plaintiff should produce the certificate specified in this section. It seems to us that the certificate which in fact was produced is not a compliance with the section. In the *first* place it is dated 1902, long before the present claim was contemplated. It was a certificate that the claim of Jwahir for *resumption of a muafi grant* might be tried by a Civil Court. At that time, there were rival claimants to the property of Dalpat Rai. The present suit is not a suit to establish the right of one of two rival claimants but is a suit against the Secretary of State in Council. *Furthermore*, it seems to us that we could not possibly make a decree declaring that the plaintiff was the assignee of the Government revenue without "making an order or a decree which would directly or indirectly affect the liability of Government to pay a grant of the Government revenue." The original *sanad* is not on the record. Such evidence as there is shows that it was a grant "*naslan bad naslan*", that is to say, "from generation to generation." It is not usual to make a grant of Government revenue by way of absolute grant, and if the grant was only made to the original grantee and his lineal descendants then the plaintiff has no claim. Admittedly he is not a lineal descendant. If on the other hand, it was a grant of the absolute interest, then the owner for the time being could do what he liked with the subject-matter of the grant. If the grant was of this nature, then the plaintiff by his own admission has alienated the revenue to third parties in which case he has no title. The plaintiff asks that in any event we should give him a declaration that he is the nearest reversioner to Dalpat Rai. The Court below has found that he is the nearest reversioner. As already pointed out, in one previous suit he satisfied the Court that he was the nearest reversioner. On the other hand, a vendee from him failed to prove in another Court that the plaintiff was the nearest reversioner of Dalpat Rai. The plaintiff says that a declaration of this kind may help him to come to a settlement with the Government. We do not feel called upon to decide the question, but at the same time we do not express any disagreement with the finding of the Court below. In our opinion we are precluded from making any declaration that would in any way directly or indirectly affect the liability of Government to pay this revenue to the plaintiff. We, therefore, think upon all these grounds that the plaintiff's suit was misconceived and ought to have been dismissed.

We accordingly allow the appeal, set aside the decree of the Court below and dismiss the plaintiff's claim with costs in all Courts. Costs in this Court will include fees on the higher scale.

Appeal allowed.

BROJENDRA LAL DASS *v.* LAKSHMI NARAIN KHANNA.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 241 OF 1913.

March 9, 1915.

Present:—Mr. Justice Fletcher and Mr. Justice Teunon.

BROJENDRA LALL DASS—DECREE-HOLDER—APPELLANT

versus

LAKSHMI NARAIN KHANNA AND ANOTHER—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 145, scope of—Surety, when liable.

Section 145 of the Code of Civil Procedure applies only where the surety has rendered himself personally liable for the decretal amount, and such liability can only be enforced against him to the extent to which he has become personally liable. [p. 149, col. 2.]

Appeal against the order of the District Judge, Burdwan, dated the 31st of March 1913.

Babus *Ram Chandra Mazumdar* and *Chandra Sekhar Banerjee*, for the Appellant.

Babu *Baidya Nath Dutt* and *Tarkeshwar Pal Chowdhury*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal from a udgment of the learned District Judge of Burdwan, dated the 31st March 1913, rejecting an application. The application that was before the learned Judge was an application under section 145, Code of Civil Procedure, for the execution of a decree against an alleged surety, Lakshmi Narain Khanna, by the sale of two Government promissory notes which, it is said, he had deposited as security for the decretal amount. The judgment-debtor is the son-in-law of the said Lakshmi Narain Khanna and a warrant for his arrest having been issued, Lakshmi Narain Khanna appeared before the first Munsif of Burdwan and threw on the table before him, according to the evidence, two Government promissory notes for Rs. 1,000 each, which he wished the Court to take as security for the decretal amount which had been found due against his son-in-law and to stay further proceedings in execution pending an application to set aside the *ex parte* decree. The learned Munsif refused to take the two Government promissory notes which had been so thrown upon the table of his Court, on the ground that no formal application had been made. Then what happened seems to be somewhat in dispute. It is said that Babu Sailendra Nath Mukerjee, who was the Pleader engaged by the decree-holder, took the Government promissory notes and put them into his pocket. The story told by Babu Sailendra Nath Mukerjee is that there was an arrangement between him and Lakshmi Narain Khanna that he should hold the two Government promissory notes as security for the due fulfilment of the decree. The decretal amount not having been paid, the present application was lodged. The litigation seems to have occupied a considerable time. The point, however, may be dealt with very shortly. Section 145, Code of Civil Procedure, applies only where the surety has rendered himself personally liable for the decretal amount. That is obvious because the section states so. *Secondly*, it would not be convenient to sell property in a suit that was not brought for that purpose. It is quite clear, therefore, that section 145 only applies where the surety has rendered himself personally liable for the decretal amount and such liability can only be enforced against him to the extent to which he has become personally liable. Accepting the story told by Babu Sailendra Nath Mukerjee, how does the case come under section 145, Code of Civil Procedure? According to the story told by Babu Sailendra Nath the agreement was that "we," that is the decree-holders, would execute the decree and realize the decretal amount by sale of the promissory note. 'Note' is obviously a mistake for 'notes.' Therefore, first of all it is to be seen whether Lakshmi Narain Khanna was a surety for the purpose of this decree. Clearly he did not acknowledge his personal liability. There was no contract of guarantee within the meaning of section 126 of the Indian Contract Act. All that he had done was that he deposited by way of security, or collateral security; if we accept Sailendra Babu's evidence, those two promissory notes were to remain as security for the amount due under the decree. That does not come within section 145. If the story is true, then Lakshmi Narain has only created an equitable charge upon the two Government promissory notes in favour of the decree-holder by depositing them in that manner to secure the amount due under the decree and, if that is the true arrangement,

as Sailendra Babu says it is, then that liability can only be enforced in a regular suit for the purpose of enforcing the charge that has been created by the deposit of the two Government promissory notes. The present proceedings have altogether been misconceived and I think the learned Judge of the Court below was quite right when he came to the conclusion that no contract, as provided by section 145 of the Code of Civil Procedure, had been established and that no personal liability having been undertaken by Lakshmi Narain Khanna his liability as mortgagor of these two Government promissory notes could not be enforced in an application under section 145, Code of Civil Procedure. I think the conclusion arrived at by the learned Judge of the Court below is right and the present appeal fails and must be dismissed with costs, two gold *mohurs*.

TEUNON, J.—I agree.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 526 OF 1914.

January 26, 1915.

Present:—Mr. Justice Shah Din.

FATEH CHAND AND OTHERS—DEFENDANTS —APPELLANTS

versus

GANDA MAL—PLAINTIFF, AND ANOTHER— DEFENDANT—RESPONDENTS.

Punjab Pre-emption Act (II of 1905), s. 22 (2), proviso, applicability of.

The proviso to sub-section (2) of section 22 of Act II of 1905 is not applicable to a case, in which the price does not consist mainly of a debt greatly exceeding in amount the market-value of the property. [p. 150, col. 2.]

Second appeal from the decree of the Divisional Judge, Gujranwala Division at Lahore, dated the 30th October 1913, varying that of the Additional Judge, Gujranwala, datedthe 6th March 1912, decreeing the claim.

Mehta *Bahadur Chand*, for the Appellants.

Mr. *Bhagat Ram Puri*, for the Respondents.

JUDGMENT.—The facts are very fully stated in the judgment of the learned Divisional Judge. The plaintiff-respondent brought a suit against the defendants-appellants for possession by pre-emption of 126 *kanals* 18 *marlas* of land situate in *Mauza* Arup which had been sold by defendant No. 1, Fateh Singh, to defendants Nos. 2 and 3, Fateh Chand and Gurlal Singh, for Rs. 2,100. The Additional District Judge, in whose Court the suit was instituted, decreed the possession of the land in favour of the plaintiff conditional on payment of the whole consideration money, Rs. 2,100, but on appeal the learned Divisional Judge held that the proviso to sub-section (2), section 22 of the Punjab Pre-emption Act, II of 1905, was applicable to the case, and he found the market-value of the land Rs. 1,609 as the price of it for the purposes of the suit. He accordingly varied the decree of the Additional District Judge by reducing the amount payable by the plaintiff to the defendant-vendee from Rs. 2,100 to Rs. 1,609.

The questions for decision before me in this appeal are—(1) whether the proviso to sub-section (2) of section 22 of Act II of 1905 applies to this case and (2) whether, if the said proviso is not applicable, the price entered in the sale-deed was not fixed and paid in good faith, so that the plaintiff should have a right to take possession of the land on payment of the market-value.

Upon the *first* question the learned Counsel for the respondent has conceded that the proviso to section 22 of the Pre-emption Act is not applicable to the case, inasmuch as the price, Rs. 2,100, at which the sale purports to have taken place does not represent entirely or mainly a debt greatly exceeding in amount the market-value of the land sold. The debt which was due by the vendor to Mokand Lal, who made an assignment of it to the present vendees, amounted, as found by the Divisional Judge, to Rs. 1,491 and the market-value of the land has been held to be Rs. 1,609. It is, therefore, clear that the price entered in the sale deed did not consist mainly of a debt greatly exceeding in amount the market-value of the property, and the Divisional Judge was in error in applying to the case sub-section (2) of section 22 aforesaid.

Upon the *second* question, the plaintiff-respondent's Counsel has urged that since the vendees had purchased the debt, due by the vendor to Mukand Lal and which amounted

to Rs. 1,491 for Rs. 1,052, (the Divisional Judge is wrong in saying that the amount of the purchase-money was only Rs. 1,000), the price entered in the sale-deed was not fixed and paid in good faith, and that, therefore, his client is entitled to possession of the land on payment of its market-value.

This argument is clearly fallacious. At the date of the sale the vendor owed Mokand Lal a debt amounting to Rs. 1,491 and although the vendees had a few days previously purchased that debt from Mokand Lal for Rs. 1,052, yet the amount due to them by the vendor was Rs. 1,491 and they could recover that amount from him by execution of the decree on the basis of which the said amount was due to Mokand Lal. Therefore as between the vendor and the vendees the amount of the debt due by the former to the latter was not Rs. 1,052 but the full amount of Rs. 1,491, and since it has been held by the Divisional Judge that the rest of the consideration money entered in the sale-deed was actually paid, the conclusion is irresistible that the price at which the sale purports to have taken place was fixed and paid in good faith. In fact, as the Divisional Judge has applied the proviso to sub-section (2) of section 22 aforesaid to this case, he has, by necessary implication, found that the price was paid and fixed in good faith as between the vendor and the vendees, for it is only upon that finding that the proviso in question would come into operation.

For the foregoing reasons, I hold that the decision of the Additional District Judge was correct and I accordingly accept this appeal, and reversing the decree of the Divisional Judge, restore that of the Additional District Judge. The plaintiff-respondent will pay the costs of the defendants-appellants both in this Court and in the Divisional Court. The plaintiff must pay into Court the amount required to make up the full price, Rs. 2,100, on or before the 26th March 1915, failing which his suit shall stand dismissed with costs throughout.

Appeal accepted.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 31 OF 1914.

March 8, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

T. R. GOPALASAMI PILLAI—PETITIONER —APPELLANT

versus

SI. RU. PE. KA. CHIDAMBARAM —RESPONDENT.

Contract Act (IX of 1872), s. 56—Sub-contract—Principal contract, cancellation of—Effect on sub-contract.

Where a sub-contract postulates the existence of a principal contract for its operation and continuance, the cancellation of the latter terminates the former also. [p. 152, col. 1].

Inder Pershad Singh v. *Campbell*, 7 C. 474; 8 C. L. R. 501; *Goculdas Madhavji* v. *Narsu Venkuji*, 13 B. 630, followed.

Appeal, under clause 15 of the Letters Patent, against the judgment, dated the 19th December 1913, of the Hon'ble Mr. Justice Spencer, in Civil Revision Petition No. 375 of 1912, preferred against the decree of the Court of the Subordinate Judge of Madura, in Small Cause Suit No. 3036 of 1911.

FACTS.—One Solai Kudumban obtained a contract from Government to build a hospital at Dindigul. He appointed the defendant his agent to execute the said work with full powers of enforcing the contract with the Executive Engineer, Public Works Department. The defendant appointed the plaintiff his representative and agent to be in charge of and to supervise and conduct the further construction and completion of the said building and agreed to pay him Rs. 300 for the services to be rendered. After some work was done, the Government refused to recognise the agency of the defendant and cancelled the contract. The work had to be stopped in consequence. The plaintiff having been paid Rs. 122-10-0 out of the Rs. 300 promised, he instituted the present suit to recover the balance from the defendant. The Subordinate Judge of Madura dismissed the suit and the dismissal was upheld by Spencer, J., in Civil Revision Petition No. 374 of 1912. Against this latter order, the plaintiff preferred this appeal under the Letters Patent.

Mr. *S. Muthia Mudaliar*, for the Appellant:—The plaintiff having done all that he was bound to do under the contract

and the performance having been prevented by no act of his, the defendant was bound to pay the stipulated sum, *Rustomji* v. *Sheth Purshotamdas* (1) and *Fani Bhusan Roy Chowdhry* v. *Bama Sundari Debi* (2).

Mr. *V. Purushottama Iyer*, for the Respondent:—The liability to pay was dependent upon the continuance of the original contract and that having been put an end to by the Government, the subordinate contract of agency also came to an end. *Goculdas Madhavji* v. *Narsu Yenkuji* (3) and *Inder Pershad Singh* v. *Campbell* (4).

JUDGMENT.—The learned Judge is right. *Inder Pershad Singh* v. *Campbell* (4) and *Goculdas Madhavji* v. *Narsu Yenkuji* (3) show that where a sub-lease is entered into in the belief that the original contract will be subsisting during the period during which the sub-contract is to be worked, the cancellation of the contract terminates the sub-contract as well: we think that proposition is unobjectionable. The plaintiff has recovered on the principle of *quantum meruit* for what he has done. The suit was rightly dismissed.

The appeal is dismissed with costs.

Appeal dismissed.

(1) 25 B. 606; 3 Bom. L. R. 227.
(2) 4 C. W. N. 343.
(3) 13 B. 630.
(4) 7 C. 474; 8 C. L. R. 501.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1374 OF 1914.

January 26, 1915.

Present:—Mr. Justice Shah Din.

BAHADUR KHAN—JUDGMENT-DEBTOR—APPELLANT

versus

VIROO MAL—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 37 (1)—Execution of decree—Arrest of judgment-debtor, when may be ordered.

A decree-holder is not justified in applying for the arrest of the judgment-debtor in the first instance, without trying to obtain execution of the decree by other means available to him, *i. e.*, by the attachment and sale of his property other than land.

First appeal from an order of the District Judge, Multan, dated the 22nd of May 1914, ordering arrest of the judgment-debtor in execution of decree.

Bakhshi *Tek Chand*, for the Appellant.

Mehta *Bahadur Chand*, for the Respondent.

JUDGMENT.—This is an appeal from an order passed in the course of execution proceedings and is connected with Civil Appeal No. 602 of 1914. The respondent, decree-holder, had applied in the Court of the District Judge for execution of his decree by the arrest of the appellant, judgment-debtor, and the District Judge allowed the appellant fifteen days' time to arrange for the farm of his land in favour of the respondent, failing which a warrant for the arrest of the appellant was to issue. I think that the respondent was not justified in applying for the arrest of the appellant in the first instance, without trying to obtain execution of the decree by other means available to him, *i. e.*, by the attachment and sale of the appellant's property other than land. The District Judge too was wrong in ordering the arrest of the appellant if he did not settle with the respondent about the lease of his land to him within fifteen days. The time allowed was so short that it was impracticable for the appellant to make satisfactory arrangements for the farm of his land to the respondent.

I accept this appeal and set aside the order of the District Judge for the arrest of the appellant. The respondent, can, if so advised, make a fresh application for execution. The appellant's costs will be borne by the respondent. Counsel's fee Rs. 16.

Appeal accepted.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1515 OF 1913.

March 27, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Piggott.

KUNNU MAL—DEFENDANT—APPELLANT

versus

TARA CHAND AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Mortgage of family property—Liability of sons and grandsons—Legal necessity.

The sons and grandsons of a Hindu mortgagor mortgaging the family property are not bound under the mortgage in respect of that part of the consideration, which was paid in cash at the registration office but not required for legal necessity. [p. 153, col. 2.]

KUNNU MAL *v.* TARA CHAND.

Second appeal from the decision of the Additional Judge, Aligarh, dated the 21st of July 1913.

Mr. *Durga Charan Banerji*, for the Appellant.

Mr. *Lakshmi Narain*, for the Respondents.

JUDGMENT.—These are two connected appeals in which substantially similar questions were litigated. The suits were brought in one case by the sons and grandsons, and in another case by the sons only, of one Chhittar Mal. In the suit out of which this appeal, No. 1515 of 1913, arises, the plaintiffs were the sons and grandsons. The relief sought was a declaration that certain alienations of joint family property were not binding on the plaintiffs. There was a considerable array of defendants, of whom only one, Kannu Mal has contested the matter in second appeal before this Court. We are concerned, therefore, with the findings arrived at in the Courts below regarding two mortgage-deeds in favour of Kannu Mal, one dated the 30th March 1904 and one dated the 9th of January 1906. The consideration for these bonds has been analysed by the learned Subordinate Judge who tried the suit in the first instance. He has come to the conclusion that part of the consideration for each of these bonds was due on account of antecedent debt and is binding on the sons and grandsons. In the case of each of these bonds part of the consideration was paid in cash at registration. The finding of the first Court, which has been affirmed by the lower Appellate Court, is to the effect that it has not been shown that this money was borrowed for any such legal necessity as to make the alienation binding on the sons. On these findings the plaintiffs have been given a decree that each of these bonds is binding on them only to the extent of the antecedent debt. Coming to this Court in second appeal Kannu Mal has raised various points. One of these is as to a finding of fact with regard to the question, whether a certain award and a decree passed in accordance with the same had been actually acted upon. If the decision of the Courts below on this point were wrong, it is possible that a question of limitation might arise; but we see no reason for holding that the finding to the effect that this award has been shown to have been acted upon, should be interfered with by us. Two other pleas of a technical nature have been raised, one as to the effect of the provisions of section 41 of the Transfer of Property Act, IV of 1882, on the position of the parties, and the other is as to whether the filing of these two suits does not contravene the provisions of Order II, rule, 2, of the Code of Civil Procedure. We are content to say that we find no force in these pleas. The latter has been more particularly dealt with by the lower Appellate Court and we agree with the view taken by the learned District Judge on the point. The substantial plea taken is that the Courts below have not considered the question, whether the money advanced at registration in respect of each of the two bonds in favour of Kannu Mal might not constitute a debt binding upon the sons, in view of their pious duty to satisfy their father's debts not tainted with immorality. We cannot find that there was any plea to this effect taken in the Courts below, and naturally no such plea having been taken there has been no inquiry as to whether the debt in question could or could not be said to be tainted with immorality. We think, however, that the point does not really arise in a suit like the present and that it was rightly passed over in the Courts below. It might arise in the event of Kannu Mal's obtaining a simple money decree on his bonds and seeking to enforce the same against the ancestral property. What the sons and grandsons are now contesting is the alienation; that is to say, the question raised is whether the mortgage of the family property as such is binding upon these plaintiffs in respect of those sums which were advanced cash down as consideration for the two mortgages. In the present state of authority in this Court, we think this question must be answered in the negative. The appeal, therefore, fails and we dismiss it with costs, including fees on the higher scale.

The questions raised in the connected Second Appeal No. 1516 of 1913 are substantially identical, and that appeal must also fail.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1520 OF 1913.

February 4, 19, 5.

Present:—Mr. Justice Scott-Smith.

LAJJA RAM—PLAINTIFF—APPELLANT

versus

FAQIRA—DEFENDANT—RESPONDENT.

Easement—Custom—Privacy—Windows interfering with privacy—Injunction.

A plaintiff is entitled to have a decree closing doors and windows opened by his neighbour, by obtaining an injunction from the Court on the ground that his privacy has been interfered with and by custom he is entitled to restrain the defendant from interfering with his privacy by opening new windows and ventilators.

Second appeal from the decree of the Divisional Judge, Ambala, dated the 19th April 1913, reversing that of the Munsif, first Class, Karnal, dated the 15th June 1912, decreeing the claim.

Mr. *Nand Lal*, for the Appellant.

Bakhshi *Gokal Chand*, for the Respondent.

JUDGMENT.—In the suit out of which the present appeal arises the plaintiff asked for a perpetual injunction against the defendant, to the effect that he should close certain windows which he had made in his house and should not open any windows or ventilators towards the plaintiff's house on the ground that the opening of such interfered with the plaintiff's privacy. The defendant raised a plea as to plaintiff's ownership of the house occupied by him, but both the Courts have decided this point in plaintiff's favour. The first Court, after recording evidence and viewing the spot, held that plaintiff's privacy had been interfered with and granted him the injunction asked for. The Divisional Judge set aside the order of the first Court, apparently on the ground that plaintiff had not proved any custom entitling him to such an injunction and that the most reasonable course to adopt was to leave the plaintiff to protect by building a wall up against the offending windows and within his own property. In support of its view the lower Appellate Court cited a ruling reported as *Chabildas Lallubhai* v. *Municipal Commissioner, Bombay* (1). In that case where a window opened by the defendant commanded a view, not of the plaintiff's private apartments, but of an open courtyard outside his house, it was held that there had been no invasion of the plaintiff's privacy which would entitle him to have the window closed, according to the custom legally recognized in Gujrat. That case was decided according to custom prevalent in a distant part of the country and it does not appear to me to be an authority in point in the present case. The lower Appellate Court appears to have set up a defence which was never pleaded by the defendant in the first Court. Neither in his written statement, nor when examined orally, did the defendant say anything about the claim being contrary to custom.

Under the circumstances, I think the case should not have been decided upon the ground put forward by the lower Appellate Court. The plaintiff's witnesses state that his privacy has been interfered with by the windows in question, but there is no serious contention that it has not been interfered with and the Judge of the first Court who went to the spot says that it has been interfered with. In my opinion the plaintiff is clearly entitled to the relief asked for. I accept the appeal, and setting aside the order of the lower Appellate Court restore the decree of the first Court with costs throughout.

Appeal accepted.

(1) 8 B. H. C. R. 85.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 332 OF 1914.

February 16, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

KALAYI NARAYANA JOGITHAYA—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF SOUTH CANARA—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), s. 35—Survey records, entry of measurement of survey fields in, admissibility of, to prove encroachment—Title, proof of.

Entries of the extents of the survey fields made in survey registers are admissible under section 35 of the Evidence Act to prove an encroachment, though insufficient to prove title to the extent encroached upon. [p. 155, col. 2.]

KALAYI NARAYANA JOGITHAYA *v.* SECRETARY OF STATE.

Sankaran Numbudripad v. *Manavikraman*, 10 Ind. Cas. 653; 9 M. L. T. 415; (1911) 1 M. W. N. 213; *Krishna Aiyar* v. *Secretary of State for India in Council*, 5 Ind. Cas. 121; 33 M. 173 at p. 175; 6 M. L. T. 306; 20 M. L. J. 71, *Venkatarama Aiyar* v *Secretary of State for India in Council*, 5 Ind. Cas. 118; 33 M. 362 at p. 364; 7 M. L. T. 139; 20 M. L. J. 74, distinguished.

Second appeal against the decrees of the District Court of South Canara, in Appeal Suits Nos. 507 and 517 of 1911, preferred against those of the District Munsif of Puttur, in Original Suit No. 403 of 1910.

FACTS.—The only point involved in the second appeal was whether the District Judge was right in relying upon entries in survey records in deciding whether the disputed plot was encroached upon or not.

Mr. *B. Sitarama Rao*, for the Appellant:—The entries in survey records are quite insufficient to prove the character of the land, whether *poramboke* or not: *Krishna Aiyar* v. *Secretary of State for India in Council* (1) and *Venkatarama Aiyar* v. *Secretary of State for India in Council* (2).

The *Government Pleader*, for the Respondent:—The cases cited have no application. Entires in survey records have been admitted as valuable evidence. *Sankaran Numbudripad* v. *Manavikraman* (3). The two cases in 33 Madras do not go the length of deciding that the entries are inadmissible even to prove the extent of *poramboke*, and it is for that purpose alone that the District Judge has admitted the evidence.

JUDGMENT.—The District Judge has found, as a fact, that the plaint plots are encroachments on *poramboke*. The appellant's Vakil seeks to attack this finding on the ground that it is based on evidence which is legally insufficient, *i. e.*, on the entries and measurements in the survey records. It is not denied that this is relevant evidence under section 35 of the Indian Evidence Act and it has in many cases been relied onas valuable [Vide *Sankaran Numbudripad* v. *Manavikraman* (3)]. The appellant relies on the dicta in *Krishna Aiyar* v. *Secretary of State for India in Council* (1) and *Venkatarama Aiyar* v. *Secretary of State for India in Council* (2). "This (classification of the items as *nattam poramboke*) at the utmost was an assertion of title, and is not by itself sufficient to prove the title of the defendant:" *Krishna Aiyar* v. *Secretary of State for India in Council* (1). "Such entry (of a disputed tank in *pymash* and settlement registers as Government *poramboke*) is, of course, insufficient to prove that the tank is, in fact, the property of Government:" *Venkatarama Aiyar* v. *Secretary of State for India in Council* (2). We doubt whether the learned Judges in either case meant to lay down a rule of law as to the quantum of evidence requisite to prove a question of fact. But apart from this the cases are quite distinguishable.

In each reported case the learned Judges were considering to what extent the description of a particular piece of land or a tank in a Government register as *poramboke* should be accepted as proof that the land or tank was really *poramboke*. Here the question is different. It is not disputed that a "*todu*" has been in existence from time immemorial and is Government *poramboke*. The question is how far it extends: and in determining this the District Judge has relied on the records of and measurements taken by the Survey Department in the course of their ordinary official duties as evidence of the extent of the *poramboke* at the time of the survey. This he is entitled to do: and it is not within our province, sitting as Judges in second appeal, to determine whether it should be accepted as sufficient, or what weight on the other side should be given to the appearance of the ground at the time of suit or the existence of trees relied on by the appellant.

The second appeal must be dismissed with costs.

Appeal dismissed.

(1) 5 Ind. Cas. 121; 33 M. 173 at p. 175; 6 M. L. T. 306; 20 M. L. J. 71.

(2) 5 Ind. Cas. 118; 33 M. 362 at p. 364; 7 M. L. T. 139; 20 M. L. J. 74.

(3) 10 Ind. Cas. 653; (1911) 1 M. W. N. 213; 9 M. L. T. 415.

AMIRTA SUNDARI *v.* SHERAJUDDIN AHAMED.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL NO. 409 OF 1910.

July 31, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Walmsley.

Rani AMRITA SUNDARI DEBI CHOWDHURANI AND OTHERS—DEFENDANTS—APPELLANTS

versus

Munshi SHERAJUDDIN AHAMED CHOWDHURY AND OTHERS—PLAINTIFFS AND DEFENDANT—RESPONDENTS.

Chur *land formed in bed of river—Consent decree, nature of, how far binding—Consent decree and compromise, compared—Contract of parties, nature of—Head of family, decree against, how far binding—Map drawn for a different purpose, how far affects rights of property—Survey map and* thak *map distinguished—Submerged lands, possession of, presumption of—Limitation—Adverse possession—Constructive possession does not apply to a wrong-doer.*

A consent decree is just as binding on the parties thereto as a decree after a contentious trial. [p. 159, col. 2.]

In re South American and Mexican Co., (1895) 1 Ch. 37; 64 L. J. Ch. 189; 12 R. 1; 71 L. T. 594; 43 W. R. 131, *The Bellcairn*, (1885) 10 P. D. 161; 55 L. J. Adm. 3; 53 L. T. 686; 34 W. R. 55; 5 Asp. M. C. 503; *Nicholas v. Asphar*, 24 C. 216; *Raj Lakshmi Dassee* v. *Katyayani Dassee*, 12 Ind. Cas. 464; 38 C. 639 at p. 674, referred to.

A consent decree cannot have greater validity than the compromise itself. [p. 160, col. 1.]

Huddersfield Banking Co. v. *Lister*, (1895) 2 Ch. 273; 64 L. J. Ch. 523; 12 R. 331; 72 L. T. 703; 43 W. R. 567, referred to.

A consent order is only an order of the Court carrying out the agreement between the parties. [p. 160, col. 1.]

Rajlakshmi v. *Katyayani Dassee*, 12 Ind. Cas. 464; 38 C. 639 at p. 674; *Kshetra Moni Dasi* v. *Amodini Dasi*, 16 Ind. Cas. 611, referred to.

A contract of the parties is not the less a contract and subject to the incidents of a contract, because there is superadded the command of the Judge. [p. 160, col. 1.]

Wentworth v. *Bullen*, 9 L. J. (o. s.) K. B. 33, 9 B. & C. 840; 33 R. R. 353; 109 E. R. 313; *Keshab Panda* v. *Bhobani Panda*, 21 Ind. Cas. 538; 18 C. L. J. 187, referred to.

A decree obtained against the head of a family in a suit to which the other members are not parties may be operative against the latter under certain circumstances; but this principle clearly does not apply unless it is shown that the matter was one in which the member sued was entitled to represent the whole family. [p. 162, col. 2.]

Jogendra Deb v. *Funindro Deb*, 14 M. I. A. 367 at p. 376; 11 B. L. R. 244; 17 W. R. 104; 2 Suth. P. C. J. 517; 3 Sar. P. C. J. 32; 20 E. R. 824; *Narayanaswamy Naidu Garu* v. *Tirumalasetti*, 16 Ind. Cas. 698; (1913) M. W. N. 96; 24 M. L. J. 79 at p. 83; *Jaddo Kuar* v. *Sheo Shankar*, 7 Ind. Cas. 902; 7 A. L. J. 945; 33 A. 71, affirmed by the Judicial Committee in *Sheo Shankar Ram* v. *Jaddo Kunwar*, 24 Ind. Cas. 504; 16 M. L. T. 175; (1914) M. W. N. 593; 1 L. W. 695; 20 C. L. J. 282; 36 A. 383; 12 A. L. J. 1173; 16 Bom. L. R. 810; 18 C. W. N. 968, *Kishen Parshad* v. *Har Narain Singh*, 9 Ind. Cas. 739; 15 C. W. N. 321; 8 A. L. J. 256; 9 M. L. T. 343; 13 C. L. J. 345; 21 M. L. J. 378; 13 Bom. L. R. 359; 38 I. A. 45; 33 A. 272; (1911) 2 M. W. N. 395 and *Kunj Behari* v. *Kandh Prashad*, 6 C. L. J. 362 at p. 368, referred to.

The rights of property as between two parties cannot be affected by a map drawn for a different purpose, a purpose not relevant to the subject of the dispute between them. [p. 163, col. 2.]

Kerr v. *Nuzzar Mahomed*, 2 W. R. (P. C.) 28 and *Moni Roy* v. *Rajbanshi Kooer*, 25 W. R. 393, referred to.

Although the survey officers have at their disposal means of more accurate measurement than the *thak* officers have, yet no hard and fast rule can be laid down that a survey map is more reliable than a *thak* map. The true principle is that the map which more clearly agrees with the local land-marks, is the one that should be followed. [p. 164, col. 2.]

Abid Hossein Mandul v. *Dowcurry Pal*, 6 C. W. N. 629 and *Nawab Bahadur of Murshidabad* v. *Gopinath*, 6 Ind. Cas. 392; 13 C. L. J. 625 at p. 632, referred to.

The rightful owners must be deemed in law to have been in possession of the submerged lands during the period of diluvion, the only point for investigation in such cases is the period of time when the lands re-appeared and became fit for occupation. [p. 165, col. 1.]

Secretary of State v. *Krishnamoni Gupta*, 6 C. W. N. 617; 29 C. 518 (P.C.); 4 Bom. L. R. 537; 29 I. A. 518, referred to and followed.

Where it is found that the possession of the defendants, after re-formation of the disputed lands, has not extended over the statutory period, the claim of the plaintiffs is not barred by limitation in respect of lands which lie within the *thak* boundaries of the *churs*. [p. 165, col. 2.]

The theory of constructive possession is applied only in favour of a rightful owner and is not extended in favour of a wrong-doer whose possession is treated as confined to land of which he is actually in possession. [p. 165, col. 2.]

Mohini Mohan v. *Promada Nath*, 24 C. 256; 1 C. W. N. 304 and *Jogendra Nath Roy* v. *Baladeo Das Marwari*, 35 C. 961; 6 C. L. J. 735; 12 C. W. N. 127, referred to.

Appeal against the decree of the Additional Subordinate Judge, Faridpur, dated the 25th April 1910.

Dr. *Rash Behary Ghose*, Babus *Dwarka Nath Chakravarti*, *Biraj Mohan Majumdar*, *Satish Chandra Bhattacharya* and *Jatindra Narain Chowdhury*, for the Defendants-Appellants.

Mr. *S. P. Sinha*, Babus *Tara Kishore Chowdhury*, *Troylokya Nath Ghose* and *Surendra Nath Das Gupta*, for the Plaintiffs-Respondents.

Babu *Joges Chandra Roy* for the Defendant-Respondent.

AMRITA SUNDARI *v.* SHERAJUDDIN AHAMED.

JUDGMENT.—The subject-matter of the litigation, which has resulted in this appeal, consists of a large tract of land, included in a *chur* formed in the bed of the river Ganges, called also Kirti Nasha, in the District of Faridpur. The land is described in the plaint as comprised within three sets of boundaries which constitute three distinct parcels *ka*, *kha*, *ga*. The areas of the parcels were stated approximately in the plaint as 10 *kanis* (=90 *bighas*), 3 *drones* (=432 *bighas*), and 15½ *drones* (=2232 *bighas*) respectively. On measurement, however, the aggregate area of the first two parcels has turned out to be 347 *bighas*, and the area of the third plot 4221 *bighas*. The case for the plaintiffs is that the disputed lands are included in estate No. 5603 of the Faridpur Collectorate, held in *patni* by them under the proprietors. They allege that the lands are partly re-formation on the site of, and partly accretion to three *mouzas* Bhaga Chur, Chur Datali, and Chur Lasti also called Chur Bhaga. The *churs* were measured in the course of *thak* proceedings in the year 1859 and were subsequently measured by way of survey during the following year. The plaintiffs further assert that in 1879, as a consequence of a dispute about the possession of some of the lands of these *churs*, a suit was instituted by their predecessors-in-interest against persons now represented by the defendants. In the course of this litigation, it is said, the lands were measured, and a decree made by consent of parties. The plaintiffs found their title to the disputed lands on the *thak* map of 1859, the survey map of 1860 and the consent decree in the suit of 1879. The immediate occasion for the institution of this suit is stated to be a dispute as to the possession of the land which culminated in a proceeding under section 145 of the Criminal Procedure Code. The dispute related to plots *ka* and *kha* and an intervening strip of land. The Magistrate held, on the 8th March 1905, with regard to plots *ka* and *kha* that neither of the disputants was in possession, and accordingly made an order for attachment under section 146 of the Criminal Procedure Code. As regards plot *ga*, the plaintiffs allege that the defendants wrongfully took possession of it on its re-appearance in 1889 after diluvion. The plaintiffs on these allegations pray for declaration of their title to the disputed lands by way of re-formation on the original site of, and contiguous accretion to, the three *mouzas* Bhaga Chur, Chur Datali and Chur Lastias comprised within the *thak* and survey boundary lines, and within the lines of the decree in the suit of 1879; the plaintiffs also claim title by adverse possession for the statutory period. They seek to recover possession by ejectment of the defendants as trespassers and claim mesne profits as also the sum in the custody of the Collector as the surplus profits of the land attached by the Magistrate. The defendants resist the claim, on the ground that the plaintiffs have no title in the disputed lands, and that, if they had any title, it has been extinguished by operation of the law of limitation. The defendants may be grouped into two classes: one set claims part of the lands as included in *mauza* Nemua, also called Sakhipura, which appertains to estates No. 9964-67; the other set claims a portion of the lands as included within *mouza* Tarabunia comprised in estate No. 9670. The proprietors of Sakhipura also repudiate the consent decree in the litigation of 1879 as not conclusive upon the question now in controversy. The Subordinate Judge has, upon an examination of the voluminous evidence on record, both oral and documentary, decreed the claim in part. He has found in substance that the *thak* line has not been correctly delineated by the *amin* and cannot consequently be made the foundation for a decree; he has also found that the survey line has been correctly delineated by the *amin* and was inaccurately relaid on the map prepared in the suit of 1879; but he has held that the parties are bound by the delineation of the boundary on that map to the extent it goes. The Subordinate Judge has accordingly, taken as the boundary of the *mouzas* claimed by the plaintiffs, a composite line consisting partly of the survey boundary, partly of the boundary line on the map in the suit of 1879 and—these two lines are not conterminous partly also of an imaginary line drawn from east to west to connect their ends. In this view the Subordinate Judge has dismissed the claim for plot *ka*, has decreed to the plaintiffs 213 *bighas*, 15 *cottahs* out of plot *kha* and 1905 *bighas*, 12½ *cottahs* out of plot *ga*. It may be added that the suit has failed in respect of all lands claimed by the pro-

prietors of Tarabunia as included within their estate. The defendants, proprietors of Sakhipura and claimants under them, have appealed to this Court. On their behalf, the decree of the Subordinate Judge has been attacked, on the ground that the plaintiffs are entitled at least to all lands included within the lines of the *thak* survey of Bhaga Chur, Chur Datali and Chur Lasti or Chur Bhaga. It has further been argued that the claim is barred by limitation in respect of all lands situated beyond the *thak* boundaries of these villages, even if the plaintiffs are able to establish a title thereto. The plaintiffs-respondents, the proprietors of Bhaga Chur, have preferred a cross-appeal which is directed both against the appellants, the proprietors of Sakhipura, and the respondents, the proprietors of Tarabunia. The objections in support of the cross-appeal against these two sets of persons are based on distinct grounds; against the proprietors of Sakhipura, it has been urged that the plaintiffs are entitled to more lands than what have been decreed to them as included within Bhaga Chur; as against the proprietors of Tarabunia it has been argued that the plaintiffs have acquired a good title by adverse possession. On these arguments, two questions emerge for consideration, *viz.*, those of title and possession. As regards the question of title, the points which require examination may be formulated as follows:—*viz.*, *first*, does the map prepared in the litigation of 1879 conclude the controversy in this suit either entirely or partially; *secondly*, is this question be answered in the negative, should a decree be made on the basis of the *thak* map as delineated on the case map in the present suit; and *thirdly*, if the point last mentioned be not answered in the affirmative, should a decree be made on the basis of the lines of the survey map as reproduced on the case map? It is plain that the substantial question in controversy relates to the scope of the suit of 1879, and the effect of the decision therein upon the points now in dispute, and we shall first examine the elaborate arguments which have been addressed to us on this part of the case; but for the correct appreciation of the points raised, it is essential to give a brief outline of the antecedent dispute between the parties regarding the subject-matter of this litigation.

In 1859, the officers in charge of the *thak* proceedings measured the lands comprised in Chur Bhaga, Chur Datali, Chur Lasti, Chur Sakhipura and Chur Tarabunia. In the following year, the lands were remeasured and fresh maps prepared by the survey authorities. The parties were then in controversy as to a large tract, 16 *d odes* or 2,300 *bighas* in area, which was shown by the *thak* authorities as situated within Sakhipura. Two suits were thereupon instituted in respect of this land, one on the 1st August 1863 by a lessee under the proprietors of Chur Bhaga, the other on the 13th January 1864 by the proprietors of Chur Sakhipura. The plaintiff in the former case prayed for a declaration that the lands had been erroneously held by the Board of Revenue on the 3rd August 1860 to be included within Sakhipura, and that they were really included in Chur Bhaga; he asked accordingly that his possession therein might be confirmed. In the second suit the plaintiffs prayed for a declaration that in a possessory suit under Act IV of 1840, decided on the 31st January 1861 by the primary Court and on the 21st March 1861 by the Court of Appeal, the then defendants had been erroneously held to be in possession of those lands and that consequently they might be ejected therefrom. An endeavour has been made, in the present litigation, to locate the lands then in dispute, but the attempt has proved fruitless. This much can be affirmed with some approach to certainty that the lands were situated towards the southern part of what is known as Chur Bhaga, but the northern boundary of the disputed plot cannot be located. The reason for this is obvious: the tract has been more than once swept away completely by the action of the river, and it is not practicable to identify the places mentioned in the boundaries as given in the schedules to the two plaints. The northern boundary as given in the plaint of the suit instituted on the 1st August 1863 by Kali Kishore Chatterjee, then lessee from the proprietors of Chur Bhaga under whom the plaintiffs claim, is obviously too vague to admit of identi-

fication. The northern boundary as given in the plaint of the suit instituted on the 13th January 1864 by the proprietors of Sakhipura, the predecessors of the defendants, is more precise, but is of no greater use for purposes of identification. There is no reliable evidence as to the northern boundary of Shajanpur mentioned therein. We know nothing about the size and situation of Shajanpur in 1863. We are not unmindful that a Shajanpur is mentioned in Exhibit 67 prepared in 1878 when the lands had re-formed after deluvion; but it cannot safely be assumed that what is called Shajanpur in the map of 1878 is identical in size and situation with the village of that name mentioned in the plaint of the 13th January 1864. Even if the identity were assumed, however, it would be of no assistance, for the obvious reason that the map does not show the boundaries of Shajanpur; we have nothing beyond the name on the map of 1878. We must hold accordingly that the northern boundary of the lands in dispute in the cross suits of 1863 and 1864 cannot now be definitely located. There is this additional difficulty that as the area of the disputed land covered only about one-seventh of Chur Bhaga, it cannot be located in the absence of information as to the precise position of the northern boundary of the disputed plot; so that we must proceed only on the basis that the lands were situated in the southern portion of Chur Bhaga. The suits were tried together in the Court of first instance, and on the 19th September 1864 the Principal Sadar Amin decided in favour of the lessee under the proprietors of Chur Bhaga. On appeal, this decision was reversed by the District Judge on the 10th June 865. He held in substance in favour of the proprietors of Sakhipura that the boundaries had been correctly determined by the *thak* authorities, and directed that they be restored to possession. There is no tangible evidence on the record to show the course of events after the termination of these litigations, in which the correctness of the boundary, as determined by the *thak* authorities, was directly challenged and ultimately upheld. The lands, it appears from the evidence, were washed away and were re-formed, and in 1879 another litigation commenced between the parties. The nature and scope of the dispute, if any, immediately antecedent to the institution of that suit do not transpire from the evidence on the record, though the plaint refers to a possessory order by the Criminal Court on the 31st May 1876 and also mentions other disputes. The suit was instituted by the present plaintiffs or their predecessors for recovery of possession of $8\frac{1}{2}$ *drones* or 1,224 *bighas* of *chur* land, alleged to be situated in Chur Bhaga, as also of a share of Chur Sakhipura (Exhibit 17). The claim was made against defendants, who along with other persons are defendants in the present litigation. The suit was commenced on the 5th March 1879 and a decree was made, apparently by consent of parties, on the 4th June 1880. As a result of this compromise, the then plaintiffs recovered 4 *kanis* of land, *i.e.*, 1/34th of the total quantity of lands claimed in the plaint. The compromise was based on a private map prepared by an *amin* other than the *amin* appointed by the Court to survey the locality. This map depicts a portion of the boundary between the villages Chur Bhaga and Chur Sakhipura; but the map gives no indication whatever as to the position either of the disputed lands ($8\frac{1}{2}$ *drones* in area) or of the lands decreed (4 *kanis* in area). The plaintiffs in this case have made a strenuous endeavour to support the conclusion that the boundary between Chur Bhaga and Chur Sakhipura, as demarcated in that suit, is conclusive between the parties, while the defendants have attacked the validity of the compromise and the decree based thereon on a variety of grounds. Before these grounds of attack are examined, two propositions may be treated as incontestable. In the *firsts* place, there is high authority for the proposition that a consent decree is just as binding on the parties thereto as a decree after a contentious trial: *In re South American and Mexican Co.* (1), *The Bellcairn* (2), *Nicholas* v. *Asphar* (3), *Rajlakshmi Dassee* v. *Katyayani Dassee* (4). In the *second* place, it

(1) (1895) 1 Ch. 37; 64 L. J. Ch 189; 12 R. 1; 71 L. T. 594; 43 W. R. 131.

(2) (1885) 10 P. D. 161; 55 L. J. Adm. 3; 53 L. T. 686; 34 W R. 15; 5 Asp. M. C. 503.

(3) 24 C. 216.

(4) 12 Ind. Cas. 464; 38 C. 639 at p. 674.

is equally well settled that a consent decree cannot have greater validity than the compromise itself. As was observed by the Court of Appeal in *Huddersfield Banking Co.* v. *Lister* (5), the real truth of the matter is that a consent order is a mere creature of the agreement, and that if greater sanctity were attributed to it than to the original agreement itself, it would be to give the branch an existence which is independent of the tree. To use the language of Kay, L. J., the consent order is only the order of the Court carrying out the agreement between the parties: *Rajlakshmi* v. *Katyayani* (4), *Kshetra Moni Dasi* v. *Amodini Dasi* (6), conversely, as was said in *Wentworth* v. *Bullen* (7), the contract of the parties is not the less a contract and subject to the incidents of a contract, because there is superadded the command of the Judge. *Keshab Panda* v. *Bhobani Panda* (8). The consent decree of the 4th June 1880 has consequently as much validity as and no greater validity than the agreement, if any, between the parties to which it purports to give effect. The appellants, the proprietors of Sakhipura, have denied that the decree in the suit of 1879 concludes the controversy in this litigation on five substantial grounds, namely, *first*, that the litigation was not *bona fide*; *secondly*, that the settlement was not made with the authority of the Sakhipura proprietors; *thirdly*, that all the parties to the present suit were not parties to the earlier suit and are not bound by the compromise; *fourthly*, that the compromise decree has not been recognised and acted upon; and *fifthly*, that no question of settlement of the boundary between Bhaga and Sakhipura fell within the scope of that suit and none was determined by the decree made therein.

In support of the first of these objections, reference has been made to the proceedings in the suit of 1879, and the execution of the decree made therein. The plaint was filed on the 14th March 1879, as appears from the order sheet in the suit (Exhibit 83). On what date the proprietors of Sakhipura, who were some of the defendants, entered appearance, cannot be determined from the materials on the records; but that some of the defendants must have entered appearance on or before the 15th April 1879, is shown by the fact that on that date the suit was adjourned for compromise on the application of both sides. This circumstance is a matter for legitimate comment. If there was a real dispute between the parties, which had culminated in the institution of the suit by the plaintiffs, it is hardly probable that the parties would forthwith negotiate for a settlement, specially when we find, as will presently appear, that the claim was grossly exaggerated and rested on no solid foundation. On the 16th May 1879, the case was again adjourned for compromise, though up to this stage no written statement had been filed by any of the defendants. On the 16th June 1879, the defendants filed their written statement (Exhibit 22) in which mention was made of the proposal for compromise, and the failure of the parties to effect a settlement as the lands were under the flood. The written statement then proceeded to controvert all the allegations of the plaintiffs. This written statement was verified by one Ram Kishore Sen, a *mukhtar* of the then defendants. From the orders recorded in the order sheet on the 16th June, 25th June and 21st July 1879, it appears that the summonses in the suit had not even then been served upon all the defendants; but the order of the 12th August possibly implies that the case was then ready for trial. The issues were fixed on the 22nd August; but no copy thereof is available as the major portion of the record has been destroyed. Steps were then taken for the appointment of an *amin* for local investigation; his fees were deposited by the plaintiffs in due course and a writ for local inquiry was issued on or about the 21st November 1879. Thereafter, the case was adjourned from time to time on several occasions, as the *amin* had not completed his inquiry and returned the papers. On the 25th May 1880, the case was directed to be put up on the 4th June following, as the *amin* had not even then sent the papers and also "in view of compromise." On the 2nd and

(5) (1895) 2 Ch. 273; 64 L. J. Ch. 523; 12 R. 331; 72 L. T. 793; 43 W. R 567.
(6) 16 Ind. Cas. 611.
(7) 9 B. & C. 840; 33 R. R. 353; 9 L. J. (o. s.) K. B. 33; 109 E. R. 313.
(8) 21 Ind. Cas. 538; 18 C. L. J. 187.

3rd June 1880, two petitions were presented, one on behalf of the plaintiffs, the other on behalf of the defendants, Exhibit 18 (1) and Exhibit 18 (2). These petitions were couched in much the same terms, were signed by the respective Pleaders and set out the terms of settlement. The recitals disclosed for the first time that the lands had been surveyed by a man named Ram Charan Bose, who had prepared a map on the 28th January 1880 and that the plaintiffs were entitled to 4 *kanis* out of the disputed lands as included within Bhaga, which lay on the left hand side of the line drawn from post 1 to post 44 on the map, while Sakhipura lay to the right hand side of that line. These petitions were laid before the Court on the 4th June 1880, when it was ordered that the suit be decreed in accordance with the terms of the compromise filed and the *amin* was directed to return the papers without taking up the work of local investigation (Exhibit 54). A decree was subsequently drawn up on the basis of this order (Exhibit 59). The manner in which the alleged settlement was notified to the Court has been criticised with some severity on behalf of the appellants. It has been argued with considerable force that if, as a matter of fact, Ram Charan Bose was, at the instance of both the parties, engaged openly in the work of local investigation and preparation of a map, it is difficult to understand why the information should be withheld from the Court and the erroneous impression deliberately created and steadily maintained for many months that the *amin* appointed by the Court, whose fees had been duly deposited, was engaged in investigation. No intelligible explanation has been offered why, after Ram Charan Bose had actually finished his map on the 28th January 1880, the Court should still be misled. It has consequently been suggested, not altogether without plausibility, that the entire proceedings in the suit are not free from suspicion. Stress has also been laid on the circumstances that Ram Kishore Sen, who verified the written statement of the Sakhipura proprietors, acted also as the *mukhtar* of their adversaries in various matters, and it has been suggested that in the present instance he betrayed his employers. In this connection, attention has been invited to the proceedings in execution of the compromise decree, which, it has been urged, are as much open to adverse comment as the proceedings in the suit itself. On the 18th August 1880, the decree-holders applied for execution of the decree of the 4th June 1880 (Exhibit 20 and Exhibit 60). In this application they prayed that they might be put in possession of the decreed lands, *i. e.*, the 4 *kanis* which they had obtained under the compromise. Several months were lost, either because the writ had not been put in or the fees of the *amin* not paid. Thereafter the writ was issued, and the 28th February 1881 was fixed for its return. On that date, as also on the 23rd March 1881, we find it recorded that the papers about delivery of possession had not been received back. On the 26th April 1881, we find it noted that the *amin* had put in the papers; but the order does not state whether the delivery of possession had been effected. We find, on the other hand, that the decree-holders were directed to take proper steps, and the case was adjourned to the 30th April. On that date, the case was struck off as the decree-holders had taken no steps. The appellants contend that this indicates that possession was never delivered, and they lay stress on the fact that as neither the map nor the decree gave any indication of the boundaries of the 4 *kanis* decreed to the plaintiffs, it was not possible for any *amin* to effect delivery of possession. The respondents, on the other hand, rely upon the oral evidence of their witness Ananda Chandra Bose; he alleges that possession was delivered by a Civil Court *amin*, Nanda Kumar Dutta, who fixed wooden posts on the ground as boundary marks, and adds that this took two days only. This witness is supported by Janaki Nath Dutta and Chandi Manjhi; but it is impossible to test their veracity as the lands were admittedly diluviated after 1881 and the alleged boundary marks could not be expected to survive the flood. But it is a matter for legitimate comment that if the delivery of possession was effected in the course of two days, the facts that the papers relating to delivery of possession were not returned for three months and even thereafter the decree-holders were called upon to take proper steps, require explanation;

none has been offered. It is consequently plain that although it may not be possible for the Court to hold affirmatively that the compromise decree in the suit of 1879 was obtained by fraud, the proceedings both in the suit and in the execution of the decree are full of unexplained difficulties and are calculated to excite grave suspicion as to their *bona fides*.

In support of the *second* objection it has been urged by the appellants that the settlement in the suit of 1879 is not shown to have been made with the authority or even with the knowledge of the Sakhipura proprietors. The written statement on their behalf was, as already stated, not verified by any of the parties themselves; it was verified by their agent, Ram Kishore Sen, who had in various matters acted as the *mukhtar* of their opponents. It is neither alleged nor proved that Ram Kishore Sen was authorised by his principals to bind them by a compromise. Nor has the position been taken up that the Pleaders engaged to conduct the defence were authorised, by the *vakalatnama* originally filed, to compromise the case. It has not also been argued that in the absence of authority expressly conferred on a Pleader he is competent to bind his client by a compromise. Consequently we need not determine, whether a Pleader can bind a client by a compromise of the suit unless he is specially authorised in that behalf—a question upon which judicial opinion has not been uniform: *Dighijoy Roy* v. *Ata Rahaman* (9). The plaintiffs, on the other hand, sought to prove that at the time when the settlement was effected, a fresh *vakalatnama* was filed in which the terms of the compromise were recited. The evidence of Ananda Chandra Bose on this point is not convincing; there is no satisfactory explanation of his presence on the occasion or why he should have read the *vakalatnamas* alleged to have been filed by both the parties; it is also a matter for comment that he should remember, after the lapse of thirty years, that the terms, if any, set out on the *vakalatnamas* were identical with these now found to have been inserted in the petition presented to the Court. No doubt, there is a presumption in favour of regularity of the proceedings in Court. But in the circumstances of this case, the plaintiffs cannot be deemed to have proved beyond all reasonable doubt that the compromise in the suit of 1879 was effected with the authority of the proprietors of Sakhipura.

In support of the *third* objection, it has been urged that some of the defendants were not parties to the suit of 1879, and they, at any rate, are not bound by the compromise made therein. It appears that Baikuntha Chandra Chakrabarty (defendant No. 4) was a party to the previous suit, but that defendants Nos. 3 and 5—9 were not parties. But it has been argued that as the property stood in the name of Baikuntha, he must be deemed to have acted on behalf of all members of the family. No foundation has been laid for this position. It may be conceded that a decree obtained against the head of a family in a suit to which the other members are not parties may be operative against the latter under certain circumstances, but this principle clearly does not apply unless it is shown that the matter was one in which the member sued was entitled to represent the whole family. [*Jogendra Deb* v. *Funindro Deb* (10), *Narayanaswamy Naidu Garu* v. *Tirumala Setti* (11), *Jaddo Kuar* v. *Sheo Shankar Ram* (12), affirmed by the Judicial Committee in *Sheo Shankar Ram* v. *Jaddo Kunwar* (13), *Kishen Parshad* v. *Har Narain Singh* (14) and *Kunj Behari Lal* v. *Kandh Parshad* (15)]. There is nothing to show in the case before us that Baikuntha had authority to bind the members of the family to which he belonged by a compromise with the plaintiffs; the mere fact that the property had been acquired by the family in his name would not necessarily justify the inference that he had such authority. It cannot consequently be held that the members of the Chakrabarty family, who

(9) 15 Ind. Cas. 156; 17 C. W. N. 156.

(10) 14 M. I. A. 367 at p. 376; 11 B. L. R. 244; 17 W. R. 104; 2 Suth. P. C. J. 517; 3 Sar. P. C. J. 32; 20 E. R. 824.

(11) 16 Ind. Cas. 698; 24 M.L. J. 79 at p. 83; (1913) M. W. N. 96.

(12) 7 Ind. Cas. 902; 33 A. 71; 7 A. L. J. 945.

(13) 24 Ind. Cas. 504; 18 C. W. N. 968; 20 C. L. J. 282; 36 A. 383; 12 A. L. J. 1173; 16 Bom. L. R. 810; 16 M. L. T. 175; (1914) M. W. N. 593; 1 L. W. 695.

(14) 9 Ind. Cas. 739; 38 I. A. 45; 33 A. 272; 15 C. W. N. 321; 8 A. L. J. 256; 9 M. L. T. 343; 13 C. L. J. 345; 21 M. L. J. 378; 13 Bom. L. R. 359; (1911) 2 M. W. N. 395.

(15) 6 C. L. J. 362 at p. 368.

were not parties to the suit of 1879, were bound by the settlement made therein. The decree has no greater effect than the argeement whereon it is based, and as there is no evidence that Baikuntha could have bound his co-sharers by an agreement made by himself alone without their authority in respect of the property jointly owned and possessed by them, they are not affected by the consent decree.

In support of the *fourth* objection, it has been argued that the consent decree has not been acted upon by the parties, but has, on the other hand, been repudiated by the proprietors of Sakhipura when sought to be used against them. It appears that in the course of proceedings under the Bengal Estates Partition Act, 1876, in respect of Sakhipura, the present plaintiffs intervened on the ground that lands which lay outside Sakhipura and within Chur Bhaga were attempted to be brought under partition. In support of their objection they relied upon the map in the suit of 1879; but the proprietors of Sakhipura promptly repudiated the map and the consent decree in a petition, dated the 17th June 1901 (Exhibit E); and they adhered to this position throughout the partition proceedings, Exhibit F, dated 27th April 1905, Exhibit LB, dated 7th June 1905, and Exhibit 2, dated 9th November 1905. There is thus no foundation for the suggestion that the proprietors of Sakhipura, though apprised of the proceedings in the suit of 1879, have acquiesced therein.

In support of the *fifth* objection, it has been urged that no question of settlement of the boundary between Bhaga and Sakhipura fell within the scope of the suit of 1879, that no such question was or could be determined by the decree made therein, and that the boundary then settled could not conclude the question now in controversy, as the title to other lands entirely distinct is in dispute. It is plain from an examination of the plaint in the litigation of 1879 that he suit was not brought for the purpose of demarcation of the boundary between Chur Bhaga and Chur Sakhipura. The claim was confined to specific lands; as to some of the lands, the plaintiffs claimed them as included in Chur Bhaga; as to others, they contended that they were entitled to a share as included in Sakhipura of which they were joint proprietors. The lands in the first schedule were comprised in three plots and the plaintiffs were awarded a decree by consent for four *kanis* out of the third plot. Assume that the *amin* re-laid a portion of the boundary between Chur Bhaga and Chur Sakhipura. It is plain that in so far as this was necessary for the decision of the controversy in the suit, and to such extent only, the parties would be bound. The petition presented to the Court which recited the terms of the settlement asked substantially for a decree for the four *kanis* allotted to the plaintiffs. The decree itself is undoubtedly capable of the interpretation that it gave the plaintiffs the four *kanis* mentioned. The decree does not explicitly declare that the boundary between Chur Bhaga and Chur Sakhipura was fixed as shown on the map of the *amin*; the decree could hardly do this when we find that the suit was not framed as one for demarcation of the entire boundary between the two *churs*. It is well settled, as was pointed out by the Judicial Committee in the case of *Kerr* v. *Nuzzar Mahomed* (16), that the rights of property as between two parties cannot be affected by a map drawn for a different purpose, a purpose not relevant to the subject of the dispute between them. To the same effect is the decision of Garth, C. J., in *Moni Roy* v. *Rajbunsee Koer* (17). There, in a suit for some land, a Judge had considered it necessary to find out the boundary between two villages, and had given a decision in favour of one of the parties, who, in a second suit of the same kind, but with reference to some other land, relied on the former decision to show that the land in dispute in the second suit must be his, if the finding as to the village boundary in the former suit was correct. This contention was overruled, and it was held that the finding as to the village boundary in the former suit was conclusive only as to the land in dispute in the former case, but did not make the former decision conclusive as to the entire boundary line itself. This view is based on obvious good sense and has been repeatedly adopted in this Court [*Kanto Prashad* v. *Jagat Chandra* (18), *Ranajit*

(16) 2 W. R. (P. C.) 28.
(17) 25 W. R. 393.
(18) 23 C. 335.

Sinha v. *Basanta Kumar* (19), *Priya Nath Mojumdar* v. *Mahendra Kumar Mitra* (20) and *Shib Charan Dey* v. *Nil Kantha Mahato* (21)]. The plaintiffs have consequently made an attempt to identify the lands in dispute in the suit of 1879, but the endeavour has been entirely unsuccessful. The map prepared in the suit of 1879 does not show the situation of the lands then in dispute; it does not even indicate the lands decreed to the plaintiffs. A fruitless attempt has been made to locate the lands from the boundaries of the three plots mentioned in the first schedule to the plaint in that suit, but in the absence of evidence to identify the localities mentioned in the boundaries, the attempt, as might have been anticipated, could not possibly succeed; the plaintiffs merely sought to express one unknown quantity in terms of others. There is this further difficulty that the eastern portion of the map, after station 44 and beyond the *done* (channel of water), has not been prepared to scale, as is obvious from a comparison with the corresponding locality on the case map. The explanation offered for this fact is that at that time there was no dispute in respect of that portion. If this be accepted as the true explanation why that portion of the map was not drawn to scale, it furnishes a good illustration of the danger of using a map prepared for one purpose for an entirely different purpose. We are consequently of opinion that the location of the boundary between station 1 and station 44 on the map (Exhibit 19A) prepared by Ram Chandra Bose in the suit of 1879 cannot be treated as conclusive as between the parties for the purpose of this litigation. That line, as depicted on the map, does not agree either with the *thak* line or the survey line; we do not know on what basis the line was drawn. It would obviously have not attained the ends of justice, if we had been constrained to adhere to a boundary line incorrectly drawn. This is well illustrated by the incongruous position which has resulted from the adoption of that line by the Subordinate Judge. The line between stations 1 and 44 does not constitute the complete boundary, and as it has been inaccurately drawn, it does not terminate either on the *thak* or on the survey line; the Subordinate Judge has, accordingly, been obliged to produce the line arbitrarily in a straight line towards the east, so as to make a complete boundary line. It is incontestible that this result, so eminently unsatisfactory, is avoided by the view we have adopted, *viz.*, that this line is not conclusive for the purposes of the present controversy which must be determined independently thereof.

The question next arises whether a decree should be made on the basis of the *thak* map as delineated on the case map. The Subordinate Judge has held that the *thak* line has not been correctly delineated. We are of opinion that this view is wellfounded. The plaintiffs pointed out to the *amin* on the 12th March 1909 an Aswatha tree as the point of commencement of the *thak* line; later, on the 6th January and 16th February 1910, they alleged that this was a mistake and prayed that the *thak* line might be re-laid. The Court refused the application as made at too late a stage of the case. In this Court, there has been considerable discussion at the Bar as to the correct tri-junction point from which the *thak* line should be re-laid; but although the parties are not agreed as to the situation of the true tri-junction point, it is plain that the line as delineated on the case map by the *amin* cannot be accepted as correct. The two possible alternatives are, either to have the *thak* line re-laid or to make a decree on the basis of the survey line which, it is admitted by both sides, has been correctly delineated on the case map by the *amin*. This is the third point raised in connection with the question of title. Now it may be conceded that the survey officers had, at their disposal, means of more accurate measurement than the *thak* officers had; but, as pointed out by this Court in *Abid Hossain Mandul* v. *Dowcurry Pal* (22) and *Nawab Bahadur of Murshidabad* v. *Gopinath* (23), no hard and fast rule can be laid down that a survey map is more reliable than a *thak* map. The true principle is that the map which more clearly agrees with the local land-marks is the one that should be

(19) 4 Ind. Cas. 81; 9 C. L. J. 597; 12 C. W. N. 759.
(20) 10 Ind. Cas. 376; 14 C. L. J. 578.
(21) 16 Ind. Cas. 747; 17 C. L. J. 642.
(22) 6 C. W. N. 629.
(23) 6 Ind. Cas. 392; 13 C. L. J. 625 at p. 632.

followed. This, however, is of no assistance in the case before us, because the lands in dispute were swept away by the action of the river more than once after the preparation of the *thak* map, and the identification of the local land-marks is attended with considerable risk of error. But we have two significant circumstances to assist us in the choice between the *thak* and the survey maps. In the *first* place, we know that the features of the land had been changed by diluvion which took place in the interval between the *thak* proceedings and the Revenue Survey; any disagreement, consequently, between the *thak* line and the survey line is attributable, *prima facie*, not to the inaccuracy of the *thak* measurements, but to the altered condition of the lands surveyed. In the *second* place, we find that even after the survey, the parties accepted the *thak* proceedings as evidence of their title and possession, and each of the contesting parties took steps in 1859, 1863 and 1864 for the rectification of what they considered to be errors in the *thak* map; moreover, so recently as 1888, lands were released to proprietors of Chur Bhaga on the basis of the *thak* map, as is clear from the *diara* survey map Exhibit I (1). The *thak* map was made in the presence of the parties or their agents and is *prima facie* binding on them: *Omrita Lal* v. *Kalee Pershad*(24). We are consequently of opinion that the decree in this case should be based, not on the survey map, but on the *thak* map after it has been re-laid with as much accuracy as practicable.

The only other question which requires consideration in the appeal by the proprietors of Sakhipura is that of limitation. The Subordinate Judge has correctly held that as, on the authority of the Judicial Committee in *Secretary of State* v. *Krishnamoni Gupta* (25), the rightful owners must be deemed in law to have been in possession of the submerged lands during the period of diluvion, the only point for investigation is the period of time when the lands reappeared and became fit for occupation. Upon this part of the case, we are generally in agreement with the Subordinate Judge in his conclusion that the possession of the defendants after re-formation of the disputed lands has not extended over the statutory period. In fact, although the attention of the Court has been invited to portions of the evidence on the question of the time of re-formation of the re-formed lands, and their occupation by the defendants, it has been conceded by the appellants in the end that in respect of all lands which fall within the *thak* boundaries of the *churs* owned by the plaintiffs, the objection of limitation cannot be seriously pressed. We hold accordingly that the claim of the plaintiffs is not barred by limitation in respect of lands which lie within the *thak* boundraies of their *churs*.

We have finaly to consider the cross-appeal of the plaintiffs-respondents, in which they claim title, by adverse possession, to lands which lie beyond the *thak* boundaries of their *churs* and are comprised within the ambit of either Sakhipura or Tarabunia. To enable them to succeed in a claim of this description, they are bound to establish, in respect of specific parcels of land, that they have been in occupation thereof to the exclusion of the rightful owner continuously for a period of 12 years; for as was pointed out in *Mohini Mohan* v. *Promada Nath* (26) and *Jogendra Nath Roy* v. *Baladeo Das Marwari* (27), the theory of constructive possession is applied only in favour of a rightful owner and is not extended in favour of a wrong-doer whose possession is treated as confined to land of which he is actually in possession. Tested from this point of view, the claim by adverse possession set up by the respondents turns out to be entirely unsustainable. The attempt to identify and locate specific parcels whereof they allege to have held possession, has completely failed; while the evidence of continuous possession of any definite tract for more than 12 years is untrustworthy. We hold accordingly that the plaintiffs have failed to prove title by adverse possession to any lands not included within the *thak* boundaries of their *churs*.

The result is that this appeal is allowed, the cross-appeal dismissed and the decree of

(24) 25 W. R. 179.
(25) 6 C. W. N. 617; 29 C. 518; 4 Bom. L. R. 537; 29 I. A. 518.
(26) 24 C. 256; 1 C. W. N. 304
(27) 35 C. 961; 6 C. L. J. 735; 12 C. W. N. 127.

the Subordinate Judge is discharged. It is declared that the plaintiffs are entitled to possession of such portion of the disputed lands as lie within the *thak* boundaries of the property known as Bhaga Chur, Chur Datali and Chur Lasti. The case is remanded to the Subordinate Judge in order that the *thak* boundaries of the *churs* mentioned may be re-laid by a Commissioner, who will be free to take evidence to determine the tri-junction point from which the *thak* line is to be re-laid. The plaintiffs will be placed in possession of such lands as may be found to lie within the *thak* lines of the *churs* owned by them, and they will also recover a proportionate amount of the profits of the attached lands in deposit in the Collectorate. The plaintiffs will further recover mesne profits in respect of the lands decreed to them. As regards the costs in the Court below as also in this Court, each party will bear his own costs up to the present stage. The costs of the proceedings after remand will be in the discretion of the Court below.

Appeal allowed; Case remanded.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 377 OF 1913.
CONNECTED WITH FIRST APPEAL NO. 407 OF 1913.
March 24, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

CHUMMUN PRASAD CHOUBE AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
PRANPAT CHOUBE AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Partition between father and son—Grandmother, whether entitled to share.

At a partition between a father and his sons, the grandmother is not entitled to a share under the *Mitakshara* Law. [p. 167, col. 2.]

Sheo Narain v. *Janki Prasad*, 16 Ind. Cas. 88; 9 A. L. J. 749; 34 A. 505, referred to.

First appeal from the decision of the Subordinate Judge of Gorakhpur at Basti, dated the 10th May 1913.

FACTS.—The following genealogical table shows the relationship of the parties:

RAM NATH CHOUBE
|
Musammat Dip Kali (wife) defendant No. 2
|
Pranpat Choube, defendant No. 1
|
Musammat Lakrani (1st wife) defendant No. 3, | *Musammat* Dhanwanta (2nd wife), defendant No. 4.
|
Chumman Prasad, plaintiff No. 1,
|
Ram Birja, plaintiff No. 2.

Chumman Prasad, son, and Ram Birja Choube, grandson of Pranpat Choube, sued Pranpat Choube, his two wives and his widowed mother, *Musammat* Dip Kali, for partition of the family property. Among other pleas, the plaintiffs alleged that *Musammat* Dip Kali was the step-mother of Pranpat Choube and was not entitled to a share at the partition. The defendants contended, among other things, that *Musammat* Dip Kali was the mother of Pranpat Choube and was entitled to a share at the partition. The Subordinate Judge held that she was the mother of Pranpat Choube, but she was not entitled to a share in the property. The Subordinate Judge's judgment being partly in favour of the plaintiffs and partly against them, both parties appealed to the High Court.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Mr. *Iswar Saran*), for the Appellants.

Mr. *Wallach* (with him Mr. *Jang Bahadur*), for the Respondents.

JUDGMENT.—This and the connected Appeal No. 407 of 1913 arise out of a suit for partition, brought by the son and grandson of Pranpat Choube, defendant No. 1. The defendant No. 2 is the mother of defendant No. 1. Defendant No. 3 is the wife of defendant No. 1 and mother of plaintiff No. 1. The defendant No. 4 is, according to the plaintiffs, the mistress of defendant No. 1. According to the defendant No. 1 she is his lawful wife. The plaintiff's main objection to the decree of the Court below is that one-eighth of the estate which has been allotted to the minor plaintiff, has been placed in charge of the defendant No. 1. The case is really a very sad one. The family appears to

have been quite prosperous, possessed of a considerable amount of immoveable property and a good deal of produce of the land. The plaintiff No. 1 comes into Court alleging that his father (the defendant No. 1) is an immoral man, in that he is keeping defendant No. 4 as his mistress. The Court below has considered this question and has come to the conclusion that there is no truth whatever in the allegation. The defendant No. 1 himself went into the witness-box and proved that the defendant No. 4 was his married wife. This was an important admission. If she was a mere mistress, he could never hereafter deny that the lady was his wife. The lady appears to be of the same caste and a person whom he could legally marry. A number of witnesses were produced to prove the marriage, and the uncle of the lady deposed that he paid the expenses. The defendant No. 2, an old lady, proved that the marriage did take place. We entirely agree with the finding of the Court below that the defendant No. 4 is not the mistress but is the married wife of the defendant No. 1. It is an admitted fact that one Mohar Dat (the father-in-law of the plaintiff No. 1) was indebted to defendant No. 1 on a bond, that this bond was handed back by the plaintiff No. 1 to his father-in-law with an endorsenment of payment. The Court has found in another suit that this was a dishonest transaction between the plaintiff No. 1 and the father-in-law, and the latter was made responsible for the bond. Plaintiff No. 1 is at present about 23 years of age, and it seems pretty clear that the present suit is really brought at the instigation of Mohar Dat with the probable result that his son-in-law and his son-in-law's family will be ruined. Against the finding of the Court below of the legal right of the plaintiff No. 1 to have partition, no exception can be taken and we are reluctantly constrained to hold that the plaintiff is entitled to a decree for partition. Under the circumstances we think that it would be most undesirable that his son's share should be placed in his charge. The son's share will, of course, remain in charge of defendant No. 1 who will hold it on behalf of the minor plaintiff.

In the connected appeal it is alleged, *first*, that the plaintiff is not entitled to claim partition. As already stated this position cannot be supported. It is next said that *Musammat* Dip Kali is entitled to a share on partition. This is against the ruling in *Sheo Narain* v. *Janki Prasad* (1). It is lastly contended that one of the villages was purchased with money which belonged to *Musammat* Dip Kali. We entirely agree with the view taken by the Court below upon this point. The result is that both appeals fail.

We accordingly dismiss this appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

(1) 16 Ind. Cas. 88; 34 A. 505; 9 A. L. J. 749.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 749 OF 1913.

March 3, 1915.

Present:—Sir Donald Johnstone, KT., Judge.

MUHAMMAD NAWAZ—PLAINTIFF—APPELLANT

versus

GHULAM HAIDER AND OTHERS—DEFENDANTS—RESPONDENTS.

Burden of proof—Shamilat—*Sale—Interpretation of sale-deed—Misreading of record—Appeal, second.*

The burden of proving that the land was sold to a party lies heavily on that party where the land is not specifically mentioned in the deed of sale and cannot even be said to be mentioned by implication. [p. 167, col. 2.]

A second appeal is competent when the lower Appellate Court is led to a wrong finding through a misreading of the record on vital matters. [p. 168, col. 1.]

Second appeal from the decree of the Divisional Judge, Attock Division at Campbellpur, dated the 20th January 1913, reversing that of the Munsif, 2nd Class, Bhakkar, dated the 24th May 1912, decreeing the claim.

Mr. *Nand Lal*, for the Appellant.

Mr. *Nanak Chand*, for the Respondents.

JUDGMENT.—I have taken time to go carefully into this case. The burden of proving that this land was sold to them lies heavily on the defendants, because (*a*) that land is not mentioned specifically in the deed of sale and cannot even be said to be mentioned by implication, such phrases as *hakk-i-milkiyat-i-khud, ba jamia hakyk-i-dakhili-o-khariji* not importing sale of

shamilat, (*b*) two successive mutations, one on partition in favour of Sarwar and the other on demise of Sarwar in favour of plaintiff were effected without any protest on the part of the defendants. There can be no doubt that plaintiff actually had possession upon the second mutation and was later on ousted by defendants.

This burden of proof the defendants have wholly failed to discharge; the lower Appellate Court has made two cardinal mistakes in reading the record and this affords sufficient ground for interference on second appeal. The first mistake is in reference to the condition in the sale-deed, which purports to convey the same land as that already mortgaged, that if any numbers are omitted they shall also be considered sold, but the lower Appellate Court has failed to observe that the condition is not so general as here represented. It really is to the effect that if any numbers *out of khata* No. 324 have been omitted they shall be considered as sold. Now the land in suit forms no part of *khata* No. 324. Again, the lower Appellate Court errs as to date and says defendants could not have objected to the aforesaid mutations because the sale had not yet been mutated to them. The dates are these:

Sale 15th March 1904.

Mutation entered up 21st February 1907.

Partition (by which Sarwar got the land) *sanctioned* 8th May 1907.

Mutation on sale *sanctioned* 10th June 1907.

Mutation or death of Sarwar *entered up* 27th April 1908.

Sanctioned in favour of plaintiff 13th June 1908.

Mutation on partition *entered*, *i.e.*, sanctioned 15th June 1908.

Now there was nothing to prevent defendants, on 8th May 1907, from objecting that they had bought the land from Sarwar and that their names should be substituted for his, and still more they should, on 13th June 1908, have objected and pointed to the mutation of 10th June 1907. It appears thus that the learned Divisional Judge has gone wholly astray through misreading of the record in these two vital matters.

There are two other points in favour of plaintiff. The deed of mortgage which I have seen in no way helps defendants, and further the deed of sale speaks of the land sold as being under tenants, while the land in suit was at time of sale *banjar* and not in physical possession of any one.

In short the failure of defendants to prove their case is patent.

Appeal allowed and plaintiff's claim decreed with costs throughout.

Appeal allowed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEALS NOS. 15 AND 32 OF 1914.

February 4, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

IN O. S. A. No. 15 OF 1914

RATNA BAI *alias* HIRA BAI AND OTHERS—APPELLANTS

IN O. S. A. No. 32 OF 1914

MURLIDOSS BRIJRATHNADOSS AND OTHERS—APPELLANTS

versus

THE OFFICIAL ASSIGNEE OF MADRAS AND ANOTHER—RESPONDENTS IN BOTH.

Insolvency—Insolvency Act, 1848, 11 *&* 12 *Vict. C.* 21, *ss.* 26, 86, 7, 21—*After-acquired property of insolvent, vesting of, in Official Assignee—Possession of insolvent for over* 12 *years, if adverse against Official Assignee—Limitation Act* (*IX of* 1908), *applicability of, to proceedings in insolvency—Claims relating to properties in hands of insolvent and his representatives—Jurisdiction of Court to decide on application.*

One *B* was adjudicated an insolvent in 1890 and he died in July 1913 and his sons and widow were found to be in possession of a house and considerable moveable property. The house was purchased in the year 1894 in the name of his mother who died in 1897 and after her death the registry of the house was transferred in the name of his wife. The Official Assignee claimed all the said property as the self-acquired property of the insolvent and made an application under section 26 of the Insolvency Act of 1848 for a declaration accordingly and for possession thereof. The sons and the widow of the insolvent pleaded, among other things, that the claim of the Official Assignee was barred by limitation and that the Insolvent Commissioner had no jurisdiction to try the claim on an application, but the Commissioner referred the Official Assignee to a regular suit only in regard to moveables and tried the claim as to the house:

Held, that the Insolvent Commissioner had jurisdiction to adjudicate the claim on an appli-

cation as that was the only and proper procedure to be followed. [p. 170, col. 2; p. 172, col. 2.]

Held, further, that the after-acquired property of the insolvent vested from the date of its acquisition in the Official Assignee and it was not necessary to have a judgment entered up under section 86 of the Insolvency Act of 1848; [p. 173, col. 2; p. 170, col. 2.] and

that the claim of the Official Assignee was not barred by adverse possession. [p. 172, cols. 1 & 2.]

In re Ackrill, 18 M. 24, referred to.

Per *Sadasiva Aiyar, J.*—When jurisdiction is given by Statute to a Court sitting as an Insolvency Court to decide a case in proceedings taken in a particular form and when there is no special reservation of the remedy by a suit to be filed in another Court or in the same Court in its ordinary original civil jurisdiction, the special procedure pointed by the legislature in respect of the decision of those particular questions ought to be brought to their natural and intended conclusion by the Court which is directed to try those questions and the Court has no jurisdiction to refer the applicant to resort to another mode of seeking the same reliefs. [p. 170, col. 2; p. 171, col. 1.]

An insolvent, from the time of his adjudication as insolvent until his final discharge, by the force of the statutory provisions of the Insolvency Act, holds the position of an express trustee for his creditors and he cannot plead adverse possession against the Official Assignee. [p. 172, col. 1.]

Kristocomul Mitter v. *Suresh Chunder Deb*, 8 C. 556; 12 C. L. R. 253, dissented from.

Per *Napier J.*—The Limitation Act has no application to the case. It provides periods with reference to suits, appeals and applications, the last being matters arising out of suits, and under the Insolvency Act the insolvent becomes subject to the peculiar jurisdiction of the Insolvency Court and the High Court has no jurisdiction to entertain any suit by the Official Assignee against the insolvent in the exercise of its original civil jurisdiction. [p. 174, col. 2.]

Quære:—Whether the doctrine of agency can be applied as between the Official Assignee and the insolvent though it may be resorted to in regard to the relations between the insolvent and third parties? [p. 174, col. 1.]

Appeals from the preliminary order, dated 8th December 1913,* and order dated 26th February 1914, respectively, of the Hon'ble Mr. Justice Wallis, in Insolvency Petition No. 2 of 1890.

FACTS.—One Brijrathnadoss Venkatadoss was adjudicated an insolvent in 1890 and obtained his personal discharge on the 5th May 1890. He died in July 1913, leaving him surviving his wife and four sons. They were found to be in possession of a house and considerable property. The house had been purchased in the year 1894 in the name of the insolvent's mother who died in 1897, and the Collector's certificate of the said house was transferred in the name of the insolvent's wife in 1909. The Official Assignee claimed all the moveable and immoveable property as the property of the insolvent and under section 26 of the Insolvent Act, 1848, took out a notice of motion in November 1913 to show cause why a declaration should not be made that all the said properties were the property of the insolvent and as such vested in the Official Assignee and why possession thereof should not be delivered to him. A preliminary objection was raised that the claim of the Official Assignee was barred by limitation. His Lordship the Chief Justice (then Mr. Justice Wallis) negatived the objection, and his judgment was as follows :—" A preliminary point was raised in this case that on the face of it the claim was barred by limitation, on the authority of an observation of Mr. Justice Wilson in *Kristocomul Mitter* v. *Suresh Chunder Deb* (1), where the learned Judge says, ' But even if I thought the defendant's title was not good on the above ground, it is good on another ground. Nilcomul's possession since 1882 was adverse possession against the Official Assignee' " ; the possession in that case, as in this, being possession acquired by the insolvent after the insolvency and before his discharge. I have great hesitation in differing from this as from any other proposition laid down by the learned Judge, but it is to be observed that these observations were *obiter*, that no reasons were given for them and that in *Abdul Kareem Sahib* v. *The Official Assignee of Madras* (2), a Bench of this Court, consisting of the learned Chief Justice and Mr. Justice Subramania Iyer, refused to act on this view which would have afforded a ready answer to the case, and preferred to dispose of it on other grounds. Mr. Justice Wilson refers to *Herbert* v. *Sayer* (3), as containing the law as to the after-acquired property of a bankrupt. That case suggests, it does not lay down, that such property is to be regarded as acquired by the bankrupt as the agent of the Official Assignee, and that may now be taken to be settled law [*In re Bennet* ; *ex parte Official Receiver* (4)].

(1) 8 C. 556; 12 C. L. R. 253.

(2) 28 M. 138.

(3) (1844) 5 Q. B. 965; 8 Jur. 812; 2 D. & L. 49; 13 L. J. Q. B. 209; 14 E. R. 1512.

(4) (1907) 1 K. B. 149; 76 L. J. K. B. 134; 95 L. T. 887; 14 Manson, 6; 23 T. L. R. 99.

* See 22 Ind. Cas. 271—*Ed.*

It is not easy to see how, if the bankrupt acquired the property as agent of the Official Assignee, his possession can ever become adverse to the Official Assignee. A man who possessed himself of property in one character, it is well settled, cannot himself alter that character and begin to possess it in another character. However, even if it were held that the possession of the insolvent were adverse to the Official Assignee, there would be the other difficulty which was pointed out in the argument, namely, that as soon as the property was acquired by adverse possession by the insolvent, the section would again vest it *eo instanti* in the Official Assignee as after-acquired property. I hold that the claim is not barred by limitation." Then on the merits the learned Judge referred the Official Assignee to a regular suit so far as the claims to the moveables were concerned, inasmuch as the insolvent's wife and sons claimed the same as self-acquired property. But he decided to try the claim as regards the house and found in favour of the Official Assignee. His judgment in regard to jurisdiction was as follows :—"This is an application under section 26 of the old Insolvency Act. Having regard to the observations of Collins, C. J., in *Rowlandson* v. *Champion* (5), I consider that it may be properly dealt with under that section, so far as regards the claim to the house by the Official Assignee, I have already held that claim is not barred by limitation.

"I have noted that I decided not to deal with any other claim to the rest of the property on this motion. This is without prejudice to the Official Assignee's right to file a suit, if he so desires."

Messrs. *K. Ramanatha Shenai* and *A. Narayanasarma*, for the Appellants.

Messrs. *M. O. Parthasarathy Iyengar* and *M. D. Devadoss*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—I entirely agree with the judgment just now pronounced by my learned brother, and for the reasons stated by him, that the house in question could not be claimed by the insolvent's widow, Ratna Bai, through any gift from her mother-in-law, that the house vested in the insolvent on his mother's death in 1897 and that the property in the next instant passed over to the Official Assignee. The widow's case that she held it adversely to her husband afterwards is not worth serious notice. I have also nothing to add to the reasons given by my learned brother in support of his conclusion that for the vesting of the property in the Official Assignee, it is not necessary to have judgment entered up under section 86 of the Indian Insolvency Act of 1848 and I join with him in respectfully dissenting from the decision in *In re Ackrill* (6).

Coming to the contention that the Official Assignee should have been referred to a suit even as regards this house (as he was referred to a suit in respect of the moveables), I am inclined to hold that even as regards the moveables, the questions raised, not only might have been, but ought to have been decided in the insolvency proceedings themselves. There is nothing in the Insolvency Act of 1848 (which has continued to apply to present proceedings by reason of section 127, clause (1) of the new Insolvency Act) which empowers the High Court exercising jurisdiction in insolvency proceedings to refer the Official Assignee, who has taken such proceedings under section 26, to a similar suit on original side. In *In the matter of Umbica Nundun Biswas* (7) the learned Judges say (page 442): "We believe that it has always been the practice of this Court to abstain from deciding difficult questions of title under that section," that is, section 26 of the Insolvency Act of 1848, "and to leave parties to settle such questions by a regular suit and we entirely approve of that practice." Speaking for myself, I think that when jurisdiction is given by Statute to the Court sitting as an Insolvency Court to decide a case in proceedings taken in a particular form and when there is no special reservation of the remedy by a suit to be filed in another Court or in the same Court in its ordinary original civil jurisdiction the special procedure pointed out by the Legislature in respect of the decision of those particular questions ought

(5) 17 M. 21 at p. 23.

(6) 18 M. 24.

(7) 3 C. 434; 1 C. L. R. 561.

to be brought to their natural and intended conclusion by the Court which is directed to try those questions, and the Court has no jurisdiction to refer the applicant to resort to another mode of seeking the same reliefs. As, however, it is the same Court, namely, the High Court, which (after the Supreme Court was abolished) tries the suit to which the Assignee is referred, the judgment in the suit to which the Official Assignee is so referred, might be taken as a further judgment of the High Court in the insolvency proceedings in respect of the moveables and the matter becomes one of mere, form and not of substance or jurisdiction.

As regards the last question (prescriptive title) if section 28 of the Limitation Act applies, there can be no doubt that not only the Official Assignee's right to the property was extinguished, but the person whose adverse possession so extinguished the Official Assignee's right acquired a title to the property. Section 28, no doubt, does not expressly state that the person in adverse possession himself gets the right which has been extingnished in his opponent. But as West, J., pointed out in *Radhabai and Ramchandra Konher* v. *Anantrav Bhagvant Deshpande* (8), and as Sir R. Couch, C. J., said in *Ram Lochun Chuckerbutty* v. *Ram Soonder Chuckerbutty* (9), "the title of a true owner is, to use the language of the Judicial Committee, extinguished in favour of the persons who have been in possession of the land for more than 12 years." Statutes of Limitation, though they are in form, they are construed so as to operate as laws of "acquisitive prescription." See also *Budesab* v. *Hanmanta* (10), in which it is said that adverse possession for more than 12 years "creates" a title by negation in the occupant which he can actively assert, if he loses possession, even against the true owner," quoting *Scott* v. *Nixon* (11), *Brassington* v. *Llewellyn* (12) and *Sanders* v. *Sanders* (13).

(8) 9 B. 198.
(9) 20 W. R. 104.
(10) 21 B. 509 at p. 514.
(11) 3 Dr. and War. 388; 2 Con. & L. 185; 6 Ir. Eq. R. 8; 61 R. R. 84.
(12) 27 L. J. 9 Ex. 297; 1 F. & F. 27.
(13) 19 Ch. D. 373; 51 L. J. Ch. 276; 45 L. T. 637; 30 W. R. 280.

The next question is whether section 28 of the Limitation Act is applicable so as to extinguish the Official Assignee's right and to vest it in the insolvent. That depends on the answer to the question, whether the Official Assignee had a right to institute a suit for possession against the insolvent in respect of the property that vested in the Official Assignee. Section 21 of the Act of 1848 directs the Official Assignee to reduce into possession all the property of the insolvent. The Assignee being an officer of Court in whom the property of a party to a litigation (namely, the insolvent) has become vested by operation of law, it follows that all questions between that party and Official Assignee in respect of that property have become the subject of the insolvency proceedings themselves. All assets which become vested in the Official Assignee for the purpose of the insolvency proceedings become part of the property involved in such proceedings. Now it is clear law in an ordinary suit if *A* sues on a good title for possession of his land after 11 years of dispossession, even if the defendant continued in possession for another 12 years during the pendency of litigation and before the suit became finally ripe for decision, judgment ought to be given for possession in plaintiff's favour, the continuance of the defendant's possession for 12 years during the pendency of the suit being wholly ignored. It seems to me that on the same principle rights to properties, which are or become involved in the insolvency proceedings and which rights have to be decided in those proceedings, cannot be affected by the possession in any of the parties to those proceedings during the continuance of those proceedings.

Under sections 20, 21 and 7 of the Insolvency Act, the Official Assignee becomes vested with the rights of the insolvent in all the real and personal estate of the insolvent for certain purposes, those purposes being shortly stated in section 20, to be used in "trust for the benefit of the creditors of such insolvent". Thus the Official Assignee is clearly made an express trustee for the benefit of the insolvent's creditors. Under the new Act, section 33, every insolvent has "to wait at such times and places on the Official Assignee as may be required by the Official Assignee" and

he is also "to aid to the utmost of his power in the realisation of his property and the distribution of the proceeds among his creditors." Though the duty of the insolvent to assist the Official Assignee and the creditors is not stated in such express terms in the old Act of 1848, I am inclined to hold that from the time of his adjudication as insolvent until his final discharge, the insolvent, by the force of the statutory provisions in that Act also, holds the position of an express trustee for his creditors just like the Official Assignee and as a trustee can never plead adverse, that is, hostile possession against his *cestui que trust*, the insolvent cannot also do so. It is on this principle that all the properties acquired by him become vested in the Official Assignee for the benefit of his creditors. Further, any possessory right which he gets by possession for say six months becomes vested in the Official Assignee, because that possessory right is also property belonging to the insolvent and if a man is prohibited by Statute from having such possession in himself as will entitle him to claim for himself the possessory right, it follows that possessory right which also becomes his every six months and which is lost in favour of the Official Assignee at the end of the six months, cannot go on accumulating for 12 years so as to give him a prescriptive title at the end of the 12 years. The accumulation cannot go on when the units which are to be accumulated become non-existent. A man who is prohibited by the Statute to claim hostilely and adversely to the Official Assignee and to his creditors represented by the Official Assignee cannot, it seems to me, be allowed to set up that he did so act adversely or hostilely. I, therefore, respectfully dissent also from the decision in *Kristocomul Mitter* v. *Suresh Chunder Deb* (1), in which it was held that an insolvent can hold after-acquired property adversely to the Official Assignee.

In the result I concur in dismissing the appeals with costs.

NAPIER, J.—These are appeals from two judgments of the Chief Justice (then Mr. Justice Wallis) in Insolvency Petition No. 2 of 1890, arising out of a motion made by the Official Assignee for a declaration that certain moveable and immoveable property was the property of the insolvent. The other parties were the widow and the four sons of the insolvent. The learned Judge declined to deal with the moveable property and referred the Official Assignee to a suit. But he inquired into the claim for the immoveable property and held that it vested in the Official Assignee. The first judgment dealt with the question of limitation and the second with the other points arising in the matter. I shall deal with both in one judgment.

The points urged before us, some of which were also urged before the learned Judge, are, (1) that the Court had no jurisdiction to entertain the motion as the insolvent was dead, (2) that the matter was not one which could properly have been dealt with on motion, (3) that the property belonged to the widow of the deceased, either by gift from her mother-in-law or by adverse possession, and (4) that even if at one time it vested in the Official Assignee through the insolvent, the latter had acquired against the Official Assignee a new title by adverse possession.

The widow's claim by gift from her mother-in-law is given up, there being no registered document. Her claim by adverse possession is negatived by the learned Judge, on the ground that the husband treated the property as his own by mortgaging and that, therefore, the evidence did not establish possession in her at all. I entirely agree in this conclusion.

It remains to consider the claim through the insolvent. I am entirely unable to accept the contention that the Court had no jurisdiction. The suggestion was that the property had not vested in the Official Assignee completely before the death of the insolvent, the argument being that judgment should have been entered up under section 86 of the Indian Insolvency Act of 1848, 11 and 12 Vic., C. 21, and reliance is placed on the case reported in *Ackrill, In re* (6) and the cases quoted therein. Undoubtedly there is an observation in that case which supports the contention. But I am unable to agree with the observations of the learned Judge therein, and think that they must have been intended to be limited to the facts of that case, which was one of money paid under a policy of insurance on th life of the insolvent to a person who had

purchased his interest in the policy from the Official Assignee. It being found that the purchase was partly for the benefit of the insolvent the Court held that it vested in the Administrator-General, it being treated as property acquired after death. The observation, however, is as follows: "Seeing that future-acquired property does not vest in the Official Assignee from the date of the filing of the petition, it is only by proceedings subsequently taken during the lifetime of the discharged insolvent that it may be made available for the scheduled creditors when a judgment is entered up under section 86 of the Insolvency Act." With great respect to the learned Judge, if he intended this observation to apply to property acquired by the insolvent prior to his death, it is not supported by the language of the section or the recognised practice of the Court. Section 86 clearly has application only to the conditions that arise after the granting of a discharge in the nature of a certificate. After the discharge has been granted the Insolvency Court has no jurisdiction and, therefore, for the purpose of making future-acquired property available for the creditors, the Court was empowered on granting the final discharge to make it a condition that the insolvent shall consent to judgment being entered up against him in the High Court for so much of the creditors' claims as appear at that time to be due. To apply it to the stage prior to the issue of the certificate would be inconsistent with the clear language of the Act and create a double jurisdiction over the insolvent. Sections 7 and 11 are perfectly clear. By the vesting order all the real and personal estate and all future estate, right, title and interest in real or personal estate etc., is vested in the Official Assignee for the time being, and by section 21, every such Assignee is required with all convenient speed to take possession of all such estate of which immediate possession may be obtained and use his best endeavours to reduce into possession the rest of such estate. By the terms of the Act nothing further is required to complete the title of the Official Assignee. Mr. Shenai has relied on certain English cases in support of his contention. It is sufficient to say that those decisions are on Insolvency Acts with an entirely different procedure, a procedure under which future-acquired property does not vest in the Official Assignee until an order has been made on motion after notice to the insolvent. These cases are of no assistance to us in construing the Indian Insolvency Act. There can be no question that all further-acquired property at once vests in the Official Assignee and this is the every day practice of the Court, vide *Rowlandson* v. *Champion* (5), and *Abdul Kareem Sahib* v. *The Official Assignee of Madras* (2).

The next point is that the learned Judge should have referred the Official Assignee to a suit. This is entirely a matter for the discretion of the Court, and it is hardly necessary to say that we shall be slow in appeal to differ from the view of a Judge on the original side on a matter of discretion. Further in my opinion the learned Judge exercised, if I may say so, a very wise discretion. The two claims were of an entirely different character. The widow and the sons claimed the moveable property against the insolvent as being their self-acquired property. On that view they were third parties, and although the Court has power under section 26 and other sections to adjudicate on the claim, the learned Judge thought a regular suit would be the more fitting course. The claim for the house was not against the insolvent but through, him and was a matter entirely between him and the Official Assignee. The disposal of the matter by the learned Judge as Commissioner was, therefore, *prima facie* the more proper course.

I now come to the last point which is a far more difficult question. The facts are as follows:- The house was purchased by the insolvent's mother from one of the creditors in 1894, four years after the petition. In 1897 the mother died and the property undoubtedly vested in the insolvent. From that date to the year 1913 when he died, he was in undisputed possession of the house. It is contended that, if the title of the Official Assignee accrued from the date when the insolvent acquired the property in 1897, which he undoubtedly did, the insolvent has acquired by 12 years' adverse possession a title against the Official Assignee by virtue of Article 144 and section 28 of the Limitation Act, IX of 1908,

The learned Judge has negatived this contention on two grounds: (1) that the possession of the insolvent was that of an agent for the Official Assignee and (2) that if the title did vest in him in the year 1909 by 12 years' adverse possession, it immediately re-vested in the Official Assignee. It is argued that both these views are incorrect. Speaking for myself I am not prepared to rest my decision on either of these views, though I must not be taken to have dissented from them. I have grave doubts whether the decisions that have held the insolvent to be an agent of the Official Assignee can be applied as between them. The learned Judge relies on *In re Bennet*; *Ex parte Official Receiver* (4) in support of the proposition. Quoting *Herbert* v. *Sayer* (3), and *Cohen* v. *Mitchell* (14), Bigham, J., states that the first case establishes that a bankrupt who acquires property after his bankruptcy acquires it as agent for the trustee and is entitled to deal with it as such agent, unless and until the trustee as principal intervenes. Tindal, C. J., gives as the basis of that decision that otherwise there would be no protection to persons dealing with an uncertified bankrupt and in *Cohen* v. *Mitchell* (14), Lord Esher states the proposition as follows:—"Until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing *bona fide* and for value, in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee." It is clear, therefore, that the cases at all events confine the proposition to the relations between the insolvent and third parties and expressly base it on the protection of the rights of third parties.

The learned Judge also relies on the fact that this contention would have afforded a ready answer in *Abdul Kareem Sahib* v. *The Official Assignee of Madras* (2) but that decision did not turn on that point. That is so, but it is clear from the report that the point was not raised. In *Suja Hossein* v. *Monohur Das* (15), O'Kinealy and Hill, JJ., took the opposite view, though in that case the basis of the decision in favour of the insolvent appears to have been that the Official Assignee had knowledge of his possession and that, therefore, the possession was adverse. For these reasons I am doubtful whether the doctrine of agency is an answer to the claim by adverse possession. I am further doubtful whether assuming a title by adverse possession to have been acquired, that title would vest in the Official Assignee. Section 28 of the Limitation Act does not say in express terms that the title is acquired. It says that "at the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished." It is true that decisions have construed this as meaning that the title becomes vested in the adverse owner. But it seems to me to be rather straining the language of the section to say that, although the Official Assignee's title has been extinguished, he at once acquires a new title. I prefer to rest my decision on the view that the Limitation Act has no application. The Limitation Act provides for periods with reference to suits, appeals and applications, the last being applications in matters arising out of suits. It is contended that the Official Assignee could have brought a suit against the insolvent. In my opinion the High Court would have no jurisdiction to entertain any such suit. Under the Insolvency Act the insolvent becomes subject to the peculiar jurisdiction of the Insolvency Court. Orders are made against him on the application of the Official Assignee. He can be directed to hand over property and he can even be tried and sentenced by the Commissioner. Where the intervention of the procedure of the High Court is provided for, it is only, as pointed above, for the purpose of affecting him after he has passed out of the jurisdiction of the Insolvency Court, and even then it has to be noted that by section 86 no proceeding by suit in the High Court is contemplated, but only that he shall *consent to judgment* being entered up against him in the High Court. It seems to me impossible that there could be a concurrent jurisdiction with respect to the insolvent. Obviously if the Official Assignee could bring a suit against the insolvent in the High Court, the latter could institute a suit against the former. I have asked for a reference to any case where either of these

(14) 25 Q. B. D. 262; 59 L. J. Q. B. 409; 63 L. T. 206; 38 W. R. 551; 7 Morrell, 207.

(15) 24 C. 244.

have been done and the learned Advocate has been unable to refer me to any. It seems to be impossible that the Legislature could have contemplated that a man should in respect of his property be subject to two concurrent jurisdictions and that while the Commissioner in Insolvency was making an order against the insolvent with respect to any property, the High Court might be deciding that he was entitled to the property. Such a position would, of course, lead to conflict and an insolvent might, if that were possible, find himself being tried for contempt by the Insolvency Court for claiming the benefit of a decree of the High Court. I have no doubt that there has never been either in the Supreme Court or in the High Court any original civil jurisdiction as between the Official Assignee and an insolvent. The Official Assignee is an officer of the Court in a position analogous to that of a Receiver. A Receiver would not be required to proceed by suit in ejectment against a party who persists in remaining in possession of a portion of the property, but would apply to the Court for orders for his eviction *vide* Kerr on Receivers (6th edition), page 226, and *In re Sacker, Ex parte Sacker* (16), the judgment of Fry, L. J., on page 185. In like manner under the Insolvency Act the Official Assignee could apply for orders in respect of a recalcitrant insolvent, and I have no doubt that the Court could deal with him, if necessary, in contempt. It is true that there is no provision in the Insolvency Act of 1848 corresponding to the specific words in the Presidency Towns Insolvency Act, III of 1909, section 33 (4), under which such an insolvent is held to be guilty of contempt of Court and can be punished accordingly, and that though the old Act specifically provides for orders to deliver up property being issued against third parties, it nowhere speaks of such orders as against the insolvent. But the absence of the specific provision with regard to a person, who is under the personal control of the Court, no more prevents the application of the process for contempt against him than does the corresponding absence of any such provision in the case of Receivers or with respect to other disobedience of a party to suit to the orders of the Court, where the Court has been held to have an inherent power to commit. I am not certain that this procedure by contempt is not of itself an answer to the theory of adverse possession, for it would be strange that an insolvent could acquire a title to property by refraining from doing his duty to assist the Official Assignee in realising his assets for the creditors. I am aware that in *Abdul Kareem Sahib* v *The Official Assignee of Madras* (2) it was held that there is no provision in the Insolvency Act of 1848 imposing upon an insolvent the duty of disclosing to the Official Assignee that he has become possessed of property since the making of an order of personal discharge, and that consequently non-disclosure by an insolvent that he has become so possessed of a house cannot be regarded as a fraud either on the creditors or on the Official Assignee, so as to render section 18 of the Limitation Act applicable. But speaking with the very greatest deference to the learned Judges, I am not satisfied that that view is correct. It is the duty of the insolvent to assist the Official Assignee. They are not at arm's length and it is difficult to draw a line between non-disclosure and concealment. I am more inclined to take the view that section 33 (4) does not alter the law, and if so, whether it be fraud within section 18 of the Limitation Act or whether the principle is that an insolvent will not be allowed to defy the jurisdiction of the Insolvency Court over his property, I am inclined to think that he could not rely on adverse possession against the Official Assignee. It is not, however, necessary to decide this point and I rest my decision on the language of the Insolvency Act. Dismissed with costs. (One Counsel).

Appeals dismissed.

(16) 22 Q. B. D. 179; 58 L. J. Q. B. 4; 60 L. T. 344; 37 W. R. 204.

MOTI LAL *v.* GANGADHAR.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 6 OF 1915.

March 20, 1915.

Present:—Mr. Justice Chamier.

MOTI LAL—DEFENDANT—APPLICANT

versus

GANGADHAR AND OTHERS—PLAINTIFFS —RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115—Judgment delivered—Formal decree not prepared—Case decided—Appeal allowed—Revision, whether maintainable.

Where a Subordinate Judge has delivered judgment in a case and all that remains is the preparation of a formal decree, the case must be deemed to have been decided and if an appeal lies against such decree, the High Court would not interfere in revision under section 115 of the Civil Procedure Code.

Civil revision against an order of the Subordinate Judge of Mirzapur.

Mr. *L. M. Banerji* (with him Mr. *P. L. Banerji*), for the Appellant.

Dr. *S. N. Sen*, for the Respondents.

JUDGMENT.—This is an application by the defendant in a suit brought against him by the respondents for dissolution of partnership and for accounts. The application is for revision of an order dismissing the applicant's objections to a Receiver's report, because the applicant failed to deposit in Court Rs. 220 as directed by the Subordinate Judge. It appears that the applicant's objections were filed on December the 2nd, 1914, and that he had at the same time applied for the issue of summonses to witnesses to support his objections. The order passed on that was "file with the record." Seven days later the case was taken up by the Subordinate Judge, who proceeded to examine the objections. He evidently came to the conclusion that many of the objections had been put forward in order to gain time and to prolong the proceedings, and he ordered that the objector should deposit Rs. 10 for each objection, or Rs. 220 in all, to be awarded to the plaintiffs and the Receiver on account of costs if they appeared to be entitled to costs. The applicant having failed to deposit the money, his objections were dismissed. The plaintiffs thereupon withdrew their objections; the Subordinate Judge accepted the report of the Receiver and directed that a decree should be prepared for the sums specified in that report with costs and interest. By means of applications to this Court the applicant endeavoured to delay the preparation of a formal decree; but this attempt was defeated by the other side, who managed not only to procure the preparation of the decree but also arrested the applicant in execution thereof even before the formal decree had been prepared. The proceedings in this case since December the 9th 1914 have been certainly of an extraordinary character, particularly the proceeding in which the applicant was, so to speak, made to bet Rs. 10 on each of his objections. If I could see my way to interfering with the orders that have been passed, I should certainly do so, though I cannot say what would be the proper order to pass if the merits of the objections were enquired into. Under section 115, Civil Procedure Code, this Court may call for the record of any case which has been decided by a Subordinate Court and in which no appeal lies. There has been some difference of opinion as to what amounts to a case within the meaning of this section. But there can be no doubt that a case had been decided before this application for revision was presented and that an appeal lay to this Court. The Subordinate Judge had delivered judgment in the case, and all that remained was the preparation of a formal decree. It is quite impossible for me, consistently with the decisions of this Court, to hold that this application is maintainable. The applicant's remedy is evidently by way of appeal against the decree, and the fact so much pressed on me by the applicant that an appeal will be a most expensive proceeding is no reason whatever for allowing this application.

I accordingly dismiss it with costs.

Application dismissed.

CALCUTTA HIGH COURT.

CIVIL RULES *Nisi* NOS. 360 AND 1090 OF 1914.

January 26, 1915.

Present:—Mr. Justice Holmwood and Mr. Justice Walmsley.

IN No. 360 OF 1914.

SATYENDRA MOHAN GHOSE AND OTHERS—PETITIONERS

versus

RAJ MOHAN GUHA AND OTHERS—OPPOSITE PARTIES

IN No. 1090 OF 1914.

Srimati UDAYTARA CHOWDHURANI AND OTHERS—PETITIONERS

versus

RAJ MOHAN GUHA AND OTHERS—OPPOSITE PARTIES.

Bengal Tenancy Act (VIII of 1885), s. 100, Rules made under—Common manager, powers and duties of—High Court, jurisdiction of—Common manager, position of.

The High Court having made rules under section 100 of the Bengal Tenancy Act, defining the powers and duties of managers, it has power under section 15 of the Charter to superintend and revise the orders of a District Judge. [p. 177, col. 2.]

The position of a common manager under the Bengal Tenancy Act is analogous to that of a Receiver appointed by the Court under the provisions of Order XL of the Code of Civil Procedure, save and except that he is not liable to be sued. [p. 177, col. 2.]

Naba Kishore Mandal v. *Atul Chandra Chatterjee*, 16 Ind. Cas. 193; 17 C. W. N. 846; 40 C. 150, followed.

In the matter of Common Manager's Case No. 1 of 1886 of the Court of the District Judge of Dacca.

Mr. *Casperz* (Counsel), Dr. *Sarat Chandra Basack* and Babu *Bepin Chandra Bose*, for the Petitioners.

Dr. *Rash Behary Ghose* and Babus *Joges Chandra Roy*, *Dwarkanath Chakravarti*, *Trailokhya Nath Ghose*, *Upendra Lal Roy* and *Jatindra Mohan Ghose*, for the Opposite Parties.

Babu *Biraj Mohan Mazumdar*, for the Deputy Registrar.

JUDGMENT.

HOLMWOOD, J.—Two Rules were obtained in this matter of a common manager for an estate in Dacca. The first, which is Rule No. 360, was a Rule calling upon the opposite party to show cause why the order of the District Judge refusing to remove the common manager should not be set aside on the grounds stated in the petition, and why such other order should not be passed as to this Court may seem fit. The second Rule, No. 1090, was in respect of a specific order made by the District Judge permitting the common manager to raise Rs. 7,000 for litigation and other necessary purposes by giving *karmi* grants to *raiyats*.

With regard to the *first* matter, we do not in any way wish to enter into the question whether the common manager is good or bad or whether he ought or ought not to be removed. What we do find is that the District Judge has not made the inquiry which, in our opinion, he should have made upon the allegations before him and which under jurisdiction conferred on him by section 98 of the Bengal Tenancy Act he was bound to make. As a matter of fact a question has been raised as to the jurisdiction of this Court to interfere. But it is obvious that this Court having made rules under section 100 of the Bengal Tenancy Act, defining the powers and duties of managers, it must have power under section 15 of the Charter to superintend and revise the orders of the District Judge under Chapter IX. It has been laid down in the case of *Naba Kishore Mandal* v. *Atul Chandra Chatterjee* (1), that the position of a common manager under the Bengal Tenancy Act is analogous to that of a Receiver appointed by the Court under the provisions of Order XL of the Code of Civil Procedure, save and except that he is not liable to be sued. The learned Judge tells us that the parties were represented by legal practitioners in his Court and that he only took notice of such points as they chose to press before him. That does not appear to be the intention of the Act. If, as was argued by the other side, this is not, strictly speaking, a judicial proceeding, then those learned gentlemen had no authority to press or to waive any point. As a matter of fact it is, in our opinion, a power which the Judge is bound to exercise judicially and the position of the learned legal practitioners who appeared before him is that of *amicus curiæ*. It does not in any way derogate from the responsibility of the Judge himself to decide on the allegations which are made, either by taking evidence himself where questions of fact are

(1) 16 Ind. Cas. 193; 17 C. W. N. 846; 40 C. 150.

involved or by appointing a Commissioner to go into any necessary accounts or other matters which require local investigation. It is impossible for the Judge to say that the manager has discharged his duty properly, in the face of positive allegations of misfeasance, without making any inquiry and without taking any evidence.

We are, therefore, of opinion that this Rule No. 360 should be made absolute and the case should be sent back to the learned District Judge, and that he should make an inquiry, either by himself or by a Commissioner, into the allegations which go contrary to the rules framed under the Bengal Tenancy Act, and also into any allegations which go to show that the common manager ought to be removed by reason of his having infringed any of the provisions of section 98. We think, in the circumstances of the case, as these attacks upon the manager have been made by various co-sharers at distant periods during the time of his management, that in the first instance the expenses of the commission should be deposited by the parties who now seek it; but the ultimate costs will, of course, abide the result of the inquiry which is to be made. We assess one hearing fee of four gold *mohurs* to be borne by the several parties who are appearing to show cause.

With regard to the other Rule, No. 1090, we do not think that any question of jurisdiction under the provisions of the Code or the Charter arises. The learned Judge has to decide for himself whether the specific sum asked for by the common manager should be raised or not, and if in the exercise of his discretion he finds, as in this case, that it is necessary, there does not seem to be any reason or indeed authority for interference by this Court.

The Rule No. 1090, as regards the raising of Rs. 7,000, therefore, will be discharged with costs, two gold *mohurs*, to the common manager.

WALMSLEY, J.—I agree in the orders.

Rule No. 360 *made absolute*;
Rule No. 1090 *discharged.*

MADRAS HIGH COURT.
FULL BENCH.

REFERRED CASE No. 10 OF 1914.

March 18, 1915.

Present:—Sir John Wallis, KT., Chief Justice, Mr. Justice Ayling and Mr. Justice Sadasiva Aiyar.

GUDA WILLIAM—PLAINTIFF

versus

GUDA KARUNAMMA—DEFENDANT.

Divorce Act (IV of 1869), *ss.* 16, 17, 69—*Divorce decree by District Judge—Reference to High Court—Practice—Parties absent, effect of—Decree* nisi, *definition of—Prostitute, who is—Evidence Act (I of* 1872), *s.* 112—*Legitimacy.*

Per *Wallis, C. J. and Ayling, J.*, (*Sadasiva Aiyar, J.*, dissenting.)—The jurisdiction of the High Court to confirm the decree in a divorce suit arises immediately upon a reference. To complete that jurisdiction it is not necessary that there should be a personal appearance of the petitioner before the High Court. [p. 179, col. 1.]

Per *Sadasiva Aiyar, J.*—The order passed in a divorce case by a District Court is not a decree *nisi*. It is only a divorce decree passed by a High Court on its original side which is called a decree *nisi*. Under the Divorce Act the person who wants the confirmation of a decree pronounced by a District Judge ought to make an application to the High Court for confirmation and without such application the High Court should not confirm the decree passed by the District Judge. [p. 179, col. 2.]

William Arthur Forshaw v. *Eunice Geraldine Forshaw*, 3 Ind. Cas. 969; 6 A. L. J. 793; 6 M. L. T. 96; 31 A. 511, followed.

The mere fact that a woman talks promiscuously with all, does not show her to be a prostitute, though she may be a coquette or a flirt. [p. 180, col. 1.]

Roe v. *Roe*, 3 B. L. R. App. 9, followed.

The presumption of a child's legitimacy can be said to be rebutted, if it is shown by strong, distinct, satisfactory and conclusive evidence that the husband before conception had not access to his wife. [p. 180, col. 2.]

Atchley v. *Sprigg*, (1864) 33 L. J. Ch. 345; 3 N. R. 360; 10 Jur. (N. S.) 144; 10 L. T. 16; 12 W. R. 364; 143 R. R. 357; *Barony of Saya and Sele*, (1848) 1 H. L. C. 507; 9 E. R. 357, followed.

Case stated under section 17, Act IV of 1869, by the District Judge of Godavari at Rajahmundry, submitting for confirmation of the High Court the decree *nisi* passed in Original Suit No. 15 of 1914.

JUDGMENT.

WALLIS, C. J.—It has always been the practice of this Court, since the passing of the Indian Divorce Act of 1869, to post and dispose of decrees sent up from the District Court for confirmation after

notice to the parties without requiring the petitioner to appear and move for confirmation. I see no sufficient reason to depart from this practice, which appears to me to give effect to the intention of the Legislature. It was in the interest of poor suiters that jurisdiction in divorce was conferred upon District Judges instead of on a Central Divorce Court as in England, and it would be a restriction of the boon to require a petitioner who has obtained a decree in a District Court, to take proceedings for confirmation in the High Court. The mere appearance of the petitioner would be no protection against collusion which is guarded against by the other provisions of section 17, and as regards the possibility of the parties having died or come together again subsequent to the decree of the District Court the serving of notice seems a sufficient safeguard.

As to the facts the petitioner has no doubt failed to prove the specific act of adultery shortly after the marriage on which he relied, besides which condonation has been proved. But with regard to the allegation that the petitioner was not the father of the infant born to the respondent in September 1913, the District Judge, who saw the witnesses, has accepted the evidence of witnesses who, if believed, in my opinion sufficiently prove non-access on the part of the petitioner and misconduct on the part of the respondent. The case really turns on whether the husband had access to his wife about the time the child was conceived. The parties had been separated some months before, when at the instance of the missionaries an effort was made to reconcile them. Plaintiff's 2nd witness speaks to going with the petitioner to her mother's house and finding her absent and to staying the night and their going over to Achutapuram, where she was keeping a night school for adult men as well as boys. There does not seem to have been any opportunity of access on that occasion, and the evidence, in my opinion, negatives anything of the kind. The fact of her having previously to this contracted a venerial disease which she did not accuse her husband of having given her and of her keeping the night school shows the sort of woman she was. I think the adultery is sufficiently proved and would confirm the decree.

AYLING, J.—I agree.

SADASIVA AIYAR, J.—This case is described as a "case referred under section 17 of Act IV of 1869 for confirmation of the *decree nisi* passed by the District Court of Godavari in Original Suit No. 15 of 1914" on the file of that Court. I have to make two remarks in connection with this. In the *first* place, section 14 of the Act IV of 1869, does not call the decree pronounced by the District Court a *decree nisi*. It is only a divorce decree passed by the High Court on its original side which is called a *decree nisi* in section 16 of the Act. In the *second* place, there is no provision for the District Court referring the decree to this Court. Section 17 merely says "that every decree for dissolution made by the District Judge shall be subject to confirmation by the High Court." I am not aware of any rules passed by the High Court under section 62 of the Indian Divorce Act enabling the District Court to make any such reference. I might further add that in this case I find that a head clerk of the District Court, as the officer in charge in the absence of the District Judge from the station, has made this reference on the 13th May 1914. Even holding that a reference by the District Court is contemplated by the Act and we are bound to act on such reference, I think we must decline to act on a reference made by the head clerk of the District Court who is left in charge of the administrative duties and of the establishment during the absence of the District Judge.

I further think that even if a reference is admissible and is properly made, the person who wants the confirmation of the decree pronounced by the District Judge ought to make an application to this Court for such confirmation and without such an application, I am inclined to hold with the Full Bench of the Allahabad High Court [see *William Arthur Forshaw* v. *Eunice Geraldine Forshaw* (1)] that we should not confirm the decree passed by the District Judge.

(1) 3 Ind. Cas. 969; 31 A. 511; 6 A. L. J. 793; 6 M. L. T. 96.

I might be permitted to quote the following from that judgment:

"We are wholly unable to say whether or not the parties have come to terms and arranged their differences. It may be that since the *decree nisi* was passed the petitioner and respondent have co-habited and so the adultery has been condoned." I might further add that it may be that one of the parties has even died after the pronouncement of the decree by the District Court which is now nearly a year old. While I am not prepared to say that we have no jurisdiction to consider this case because there has been no proper reference and there has been no application by the party, I think that the practice might be introduced of requiring an application from the interested party. Most of the Indian Christians are, no doubt, very poor and hence, jurisdiction in divorce matters was given to the District Court, so that the expenses and trouble of going to the High Court of Madras and securing attendance of witnesses there might be avoided. But, in such a momentous matter as confirmation of a divorce, often involving the legitimacy of children, a petitioner might be expected to manifest at least the interest required to apply to the High Court therefor, and if it is too great trouble to go to Madras to put in the application, the rules might provide for his sending it through the District Court.

So much for the preliminary difficulties in this case. On the merits also I am inclined to hold that it is not proved that the respondent has been guilty of adultery. The petitioner (husband) is not at all a straightforward witness, and his story that he caught his wife in adultery with a man (now deceased) in broad daylight in a school house a few days after his marriage is not worth a moment's belief. The respondent is no doubt proved to be a bold, immodest woman. Her talking freely to other males and opening and conducting for sometime a school for adult males do show her to be a coquette and flirt, but I am not prepared to hold that she has lived "the life of a public prostitute" as stated in paragraph 9 of the petition. In fact there is no evidence at all of her having led a life of promiscuous intercourse with all who sought her. [See *Roe* v. *Roe* (2) as to who is a public prostitute]. That the petitioner went to her residence in January 1913 is admitted by the petitioner. He says he had no intercourse with her on that occasion. She says, on the other hand, that he had and she attributes to him the paternity of the child born to her in September 1913, between eight and nine months after this visit. He, no doubt, went to her with mediators in order to persuade her to live with him. I, however, do not think it so very improbable that she did allow him to have intercourse with her at that time, though she refused to return to his place to live with him continuously. I am not prepared to brand the child born to her in September 1913 as a child born of the adultery of its mother with some unknown paramour, having regard to the stringent provisions of section 112 of the Evidence Act. That the mediator witness says that to his knowledge there was no access between the petitioner and the respondent when he went to her in January 1913, is of very little value. In *Atchley* v. *Sprigg* (3), it was said that the presumption of a child's legitimacy can be rebutted "if it is shown by strong, distinct, satisfactory and conclusive evidence that the husband, whether before or after marriage, had not access to his wife." In the *Barony of Saye and Sele* (4), it was held that circumstantial evidence showing that the husband and wife were living separately from each other at such a distance that they could not have had intercourse during the three or four months during which alone the child could have been begotten was sufficient evidence. I do not think that in this case any facts proving non-access beyond reasonable doubt are proved, and I am not prepared on the mere denial of the petitioner to hold that he had no access to his wife in January 1913. I might add that there is clear evidence in this case that the petitioner, who was anxious to get at his wife even in March 1913, has since begun to love another native Christian woman and is, therefore, anxious to get rid of the respondent and

(2) 3 B. L. R. App 9.
(3) (1864) 33 L J. Ch. 345; 3 N. R. 360; 10 Jur. (N. S.) 144; 10 L. T. 16; 12 W. R. 364; 143 R. R. 357.
(4) (1848) 1 H. L. C. 507; 9 E. R. 857.

that he is not a person of much delicacy of feeling. I would, therefore, on the merits also refuse to confirm the decree.

BY THE COURT.—Following the opinion of the majority the decree is confirmed.

Decree confirmed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 100 OF 1913.

February 12, 1915.

Present:—Mr. Justice Sharfuddin and Mr. Justice Coxe.

GAJADHAR PERSHAD SAHU—PLAINTIFF—APPELLANT

versus

BINDUBASHINI PERSHAD—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 15—Execution of decree—Personal decree against Hindu woman with limited estate—Debt incurred for legal necessities—Suit based upon allegations of necessity—Decree-holder entitled to prove necessity in execution—Payment of Government demands, whether legal necessity—One of several decree-holders can apply for execution of the whole decree.

Where the suit is founded upon a purely personal debt or contract of a Hindu woman with a limited interest in the estate, the estate is not bound to satisfy that debt. In order to bind the estate the suit should be so framed as to show that it is not merely a personal demand on the female in possession, but that it is intended to bind the entire estate and the interests of all those who come after her. [p. 182, col. 2.]

In execution of a personal decree against a Hindu woman with a limited interest in the estate obtained upon a plaint expressly alleging the debt to have been incurred for legal necessities, the decree-holder, in order to make the estate liable, is entitled to adduce evidence to prove the necessities for which the debt was contracted. [p. 183, col. 1.]

Government revenue and other Government demands are claims of Government on the land and their payment must be made by the estate and if these payments cannot be made out of the income and money has to be borrowed to make them, the estate is liable to satisfy these debts. [p. 183, col. 1.]

Any one of the several joint decree-holders may, unless the decree imposes a condition to the contrary, apply for execution of the whole decree. [p. 183, col. 1.]

Appeal against the order of the Subordinate Judge of Mozuffarpore, dated the 14th December 1914.

Babus *Umakali Mukerjee, Lakshmi Narain Singh* and *Baldeo Narain Singh*, for the Appellant.

Babus *Mohendra Nath Roy, Bulwant Sahay* and *Raghunath Singh*, for the Respondent.

JUDGMENT.

SHARFUDDIN, J.—This is an appeal against the order of the Subordinate Judge of Mozuffarpore, dated the 14th December 1912. The decree-holders are the appellants.

In order to appreciate the arguments addressed to the Court, I think, it is necessary to refer to the salient facts which resulted in the order appealed against.

One Sant Protap had two daughters, one of them was named Manjhuri. She died after the decree. The other daughter had two sons, named Baranashi and Bindubashini. This daughter died leaving the two sons named above. Baranashi, one of her sons, is also dead. After Sant Protap's death, his surviving daughter was the holder of his estate with the limited interest of a daughter. His reversioner was Bindubashini. Manjhuri, as observed before, died after the present appellants had obtained a decree against her and the only surviving reversioner, namely, Bindubashini succeeded to the estate of Sant Protap.

It appears that Manjhuri, during the period she held the estate of her father, entered into business dealings with the appellants, who advanced to her, from time to time, various sums of money for necessary purposes, at least it is so alleged in the plaint. On the 13th October 1893, a document, purporting to be a mortgage-deed, was executed by Manjhuri in favour of the appellants in lieu of the previous debts and also for the purpose of meeting with the legal demands against the estate of her father, as for example, Government revenue and other Government demands. The appellants sued her on that bond and obtained a mortgage-decree on the 1st May 1901. Manjhuri, the judgment-debtor, appealed to this Court. This Court held that the bond could not be treated as a mortgage-bond as no witness was examined to say that Manjhuri had executed that bond in his presence. This Court, on the above ground, gave a personal money decree against Manjhuri on the 14th June 1904.

It appears that some of the plaintiffs of the original suit transferred their share of the decree to Mr. Christian, who did not

join in the application for execution of the decree.

In Execution Case No. 212 of 1912 Gajadhar Prosad and Mahadeo Prosad, two of the the three decree-holders, applied for execution of the decree against Bindubashini, the legal representative of the judgment-debtor, Munjhuri, who died in 1909, and sought to sell the properties which originally belonged to Sant Protap and then held by Bindubashini as the reversioner of Sant Protap. Bindubashini objected to the execution on the ground that the decree having been a personal decree against Manjhuri, the estate of her father was not liable for the satisfaction of the debt incurred by Manjhuri.

The Subordinate Judge held that Manjhuri not having been sued in her representative character and the decree being a personal decree against her, the decree-holders had no right to execute that decree against the reversioner or against the estate left by Sant Protap. He further held that the meaning of section 50, Civil Procedure Code, was that all the decree-holders should join in the application for execution and that as Mr. Christian had not so joined, the application was not maintainable. This order was passed on the 14th December 1912, and it is this order which has been appealed against by the appellants. It appears from the order of the Subordinate Judge that the appellants applied to him to adduce evidence to prove that the debts incurred by Manjhuri were for legal necessities. The Subordinate Judge did not allow this, on the ground that this would be making a new case in the execution department which was not the case in the plaint and that there was no issue framed with regard to legal necessities.

We are asked in this appeal to consider whether any new case was attempted to be set up by the appellant and to hold that the estate of Sant Protap was bound to satisfy the debts, as they were incurred for legal necessities. In order to discuss whether the appellant desired to set up a new case not made out in the plaint we have to advert to the plaint itself. In paragraph 2 of the plaint there is an allegation in most distinct terms that the debts were incurred by Manjhuri to pay off the debts due to other creditors, which Manjhuri contracted for paying the Government revenue and other Government demands and for meeting other necessary and legal expenses. It is, therefore, clear that the question was raised in the plaint, but a plaintiff cannot have questions decided unless the allegations are disputed. Manjhuri had no motive to dispute the allegation. If she had to pay, it made no difference to her whether the estate would have to pay after her death or not. For this very reason it seems that no issue was framed, but the question of legal necessity was no doubt raised in the plaint.

The decree against Manjhuri was a money decree and a personal decree and hence the question resolves itself into this: either Manjhuri borrowed for legal necessities or she did not. If she did, the loan bound the estate and the respondent Bindubashini is her legal representative. If not, the loan was a private loan and the respondent is not her legal representative.

The question whether the respondent is her legal representative or not, comes within the provisions of section 47, Civil Procedure Code.

This question again turns on the further question whether the loan was for legal necessities. This question has never been decided.

It is settled law that where the suit is founded upon a purely personal debt or contract of a Hindu woman with a limited interest in the estate, the estate is not bound to satisfy that debt. In order to bind the estate the suit should be so framed as to show that it is not merely a personal demand on the female in possession, but that it is intended to bind the entire estate and the interests of all those who came after her. We have already observed that the suit in the present case was so framed, and the basis of that suit against her was that the estate which she held was bound and that she was compellable to pay not out of her own assests, but out of the estate. This is clear from paragraph 2 of the plaint. A Hindu woman who succeeds as heir, whether to a male or to a female, has not complete dominion over the property inherited by her, so as to enable her to alienate it otherwise than in case of necessity. This is no doubt the law, but there can be

no doubt that the Government revenue and other Government demands are claims of Government on the land and the payment must be made by the estate, and if these payments cannot be made out of the income and money has to be borrowed to make them, the estate is liable to satisfy those debts. In the above circumstances, I am of opinion that the appellants are entitled to adduce evidence to prove the legal necessities for which the debt was contracted.

In disposing the application of the decree-holder the Subordinate Judge has referred to section 50 of the Civil Procedure Code and has held that all the decree-holders should have joined in the application for execution, but this is not so as Order XXI, rule 15, provides that if there are more than one decree-holder, any one of them may, unless the decree imposes a condition to the contrary, apply for execution of the whole decree. It is admitted that the execution in the present instance was applied for by two out of three decree-holders for the whole decree.

In the above circumstances, I am of opinion, that this case should be remanded to the lower Court. with a direction that both parties should be allowed to adduce evidence on the point whether the debt incurred by Manjhuri was or was not for legal necessities. If this is found in the affirmative Bindubashini must be held to be the legal representative and execution must proceed against him. If it is not found in the affirmative, the application must be refused. Costs will abide the result. Hearing fee five gold *mohurs*.

COXE, J.—I agree.

Case remanded.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 119 OF 1913.

March 11, 1915.

Present:—Sir John Wallis, KT., Chief Justice and Mr. Justice Tyabji.

DEVARASU VENKATACHALA DWARAKA NADHA RAO, MINOR, BY MOTHER AND NEXT FRIEND NARASUBAYAMMAH—PLAINTIFF—APPELLANT

versus

DEVARASU VENKATARAO PANTULU AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Partition not by metes and bounds, effect of—Tenants-in-common—Adverse possession—Relinquishment—Ouster—Evidence of exclusion—Limitation Act (IX of 1908), Sch. I, Art. 127.

Where the members of a joint undivided Hindu family are divided in status, but do not effect a division by metes and bounds, they are tenants-in-common and the possession of one such tenant enures to the benefit of another, unless such another is shown to have renounced his share of the property in possession of the tenants-in-common or there has been something amounting to his ouster. [p. 183, col. 2.]

Where no ouster is proved there cannot be said to be an "exclusion" from joint family property within the meaning of Article 127, Schedule I of the Limitation Act. [p. 184, col. 1.]

Ramachandra Narayan v. *Narayan Mahadev*, 11 B. 216, dissented from.

Sammantha Gramany v. *Devasikamany Gramany*, 5 Ind. Cas. 924; 20 M. L. J. 364; 7 M. L. T. 174; (1910) M. W. N. 511; *Sellam* v. *Chinnammal*, 24 M. 441; *Dhoorjetti Subbayya* v. *Doorjetti Vankayya*, 30 M. 201; 2 M. L. T. 184, followed.

Where one of the members of a co-parcenary was shown to be in possession of the house site and he erected upon it a superstructure, the proper decree to be passed is to allow him to retain the house site and direct him to pay its price to the other co-sharer who claims a share in the house site alone. [p. 184, cols. 1 & 2.]

Appeal against the decree of the District Court of Krishna at Masulipatam, in Original Suit No. 2 of 1912.

Mr. *V. Ramadoss*, for the Appellant.

Mr. *P. Nagabhushanam*, for Respondents Nos. 1 and 2.

JUDGMENT.

WALLIS, C. J.—In this case the plaintiff appeals from a decision of the District Judge in a partition suit refusing him a share of a certain site on which the family house formerly stood. The family house was washed away by the great cyclone in the sixties and another house was subsequently constructed by the defendants. The plaintiff does not claim any share in the superstructure, but claims that in the partition he is entitled to a share of the site.

The District Judge has relied on a variety of circumstances showing that the plaintiffs had abandoned their right. The proper principle to start with, in our opinion, is that assuming, as found by the District Judge, that shortly after the cyclone the parties became divided in status, yet that until there was a partition by metes and bounds they would be in possession as tenants-in-common of what had been the joint family property, and with regard to the tenants-in-common the presumption is that the possession of one is the possession

of all, and, therefore, the possession of the defendants would enure for the benefit of the plaintiff at any rate, unless it were shown either that the plaintiff had renounced his share of the property in possession of the tenants-in-common or possibly that there had been something amounting to ouster.

Now, looking at the case from this point of view, there is oral evidence of three witnesses, who say they remember long ago that the plaintiff's grandfather said that he renounced his share of the family house. This is not the evidence upon which the District Judge has acted in arriving at the finding he has arrived at and we do not think it is evidence on which it would be safe to act, and, therefore, it comes to this,—that as there is no evidence of anything that could be considered as ouster, the possession of the defendants must all along be considered to have been the possession of their tenants-in-common.

Then it is said that the suit is barred by limitation under Article 127 of the Limitation Act. But if the possession of the defendants is considered to be the possession of the plaintiff, it cannot be said that there has been exclusion of the plaintiff within the meaning of the Article. A case to the contrary has been cited, *Ramachandra Narayan* v. *Narayan Mahodev* (1), that the exclusion of the plaintiff within the meaning of the Article should be presumed by the defendants having been in possession. But as observed by Benson and Krishnasawmi Iyer, JJ., in *Sammantha Gramany* v. *Devasikamany Gramany* (2), the observations of West, J., in that case have not been accepted as a sound interpretation of Article 127 in this Court, citing *Sellam* v. *Chinnammal* (3) and *Dhoorjetti Subbayya* v. *Dhoorjetti Venkayya* (4). We are, therefore, not prepared to follow those observations and we hold that on the evidence here, there is nothing to show that the plaintiff was in law excluded within the meaning of the Article. As, however, the defendants have been allowed to occupy this site for so long and as the relations of the parties do not appear to be very good, we think it will be best to direct that in the final decree the whole site should be allotted to the defendants and that, as now agreed, Rs. 388 should be paid by the defendants to the plaintiff in lieu of the plaintiff's share of the house and site.

With regard to costs, we think that as there was dispute about this house site the plaintiff was obliged to bring his suit and as he was obliged to bring his suit, he was obliged to include the whole of the joint family properties, and that each party should bear his own costs in the Court below. Both parties should pay and receive proportionate costs of this appeal.

TYABJI, J.—I agree.

Appeal partly allowed.

(1) 11 B. 216.

(2) 5 Ind. Cas. 924; 20 M. L. J. 364; 7 M. L. T. 174; (1910) M. W. N. 511.

(3) 24 M. 441.

(4) 30 M. 201; 2 M. L. T. 184.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 69 of 1914.

March 5, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

TADIBOYINA PEDA PUNNAYYA—DEFENDANT No. 1—APPELLANT

versus

DEBBAKUTTI KATTAMMA, MINOR, BY MATERNAL AUNT AND NEXT FRIEND VEERA NAGAMMA AND OTHERS—PLAINTIFF AND DEFENDANT No. 2—RESPONDENTS.

Hindu Law—Stridhanam—*Property acquired by a woman without aid from funds from her husband or third party—Devolution—Daughter preferential heir to son.*

Where a woman purchased certain immoveable property and paid the purchase-money by mortgaging the same and subsequently redeemed it:

Held, that the property was acquired by her wits and was her *stridhanam* property and, therefore, devolved on her daughter in preference to her sons. [p. 186, col. 2; p. 187, col. 1.]

Subramanian Chetty v. *Arunachelam Chetty*, 28 M. 1, followed.

Debi Mangal Prosad Singh v. *Mahadeo Prasad Singh*, 14 Ind. Cas. 1000: 9 A. L. J. 263; 11 M. L. T. 217, 16 C. W. N. 409; (1912) M. W. N. 324; 14 Bom. L. R. 220; 15 C. L. J. 344; 22 M. L. J. 462; 34 A. 234; 39 I. A. 121, distinguished.

Second appeal against the decree of the District Court of Guntur, in Appeal Suit No. 410 of 1912, preferred against that of the Court of the District Munsif of Tenali, in Original Suit No. 904 of 1911.

TADIBOYINA PEDA PUNNAYYA *v.* DEBBAKUTTI KATTAMMA.

Mr. *P. Narayanamurthi*, for the Appellant.

Mr. *V. Ramesam*, for the Respondents.

JUDGMENT.

AYLING, J.—The plaintiff in this case (1st respondent) sued to set aside a deed of exchange, dated 1st June 1911, executed by her father (2nd defendant) in favour of the 1st defendant (appellant) in respect of certain lands, the property of her (plaintiff's) deceased mother, Subbamma, and which she claims by inheritance as the latter's heir. The District Munsif dismissed the suit on the ground that the property passed on the death of Subbamma not to the plaintiff, but to plaintiff jointly with her brothers who are no parties to the suit, and that the suit was not maintainable by the plaintiff alone. The District Judge, differing from the Munsif, held that the plaintiff alone succeeded to the property on her mother's death and finding the other disputed point in favour of the plaintiff, gave her a decree.

The sole question argued before us is, whether the plaintiff is the sole heir of her mother in respect of the plaint property and as such entitled to maintain the suit alone.

Subbamma purchased the property on the 27th September 1905 by Exhibit B for Rs. 200, which appears to be very much less than its real value. She raised the sale price by means of a mortgage of the very same property. This sounds somewhat improbable; but it is the finding of the District Munsif which was not questioned either in the lower Appellate Court or before us and we must take the facts to be so. The plaintiff's mother in effect acquired this property by her wits: and it must, in my opinion, be regarded as her separate acquisition.

The question is whether property so acquired descends to her daughter in preference to her sons in accordance with the method of devolution laid down in Chapter II, section 11, clauses 12 and 13, of the *Mitakshara*; or, in other words, whether it comes under what Mr. Mayne called the mysterious word "adyam" in the text of Yajnavalkya therein dealt with.

The leading case on the point in this Presidency is the Full Bench decision *Subramanian Chetty* v. *Arunachelam Chetty* (1). The property in that case had been acquired by a widow by means of savings out of monies received by her under a maintenance decree, and it was held to descend to the widow's own heirs in the female line, just as if it were a *stridhanam* in the narrowest sense of the term.

The present case is, of the two, the stronger from the plaintiff's point of view. The learned Vakil for the appellant in fact admits that if the above ruling is followed our decision must go against him; but contends that its authority has been destroyed by a later decision of the Privy Council reported as *Debi Mangal Prosad Singh* v. *Mahadeo Prasad Singh* (2), on which he himself relies.

Now the decision in *Subramanian Chetty* v. *Arunachelam Chetty* (1) seems to me to be entitled to the very greatest weight. It was that of a Full Bench of this Court, the main judgment being delivered by a very eminent Hindu Judge, then officiating as the Chief Justice. The question was evidently most elaborately argued by Vakils on both sides of quite phenomenal ability and repute. The decision has been followed ever since and was based on the *Mitakshara*, universally recognised as the leading authority in this part of India. I do not think we should be justified in departing from the principles laid down in this decision, unless it is quite clear that adherence to it would be counter to the view taken by an even higher tribunal.

A careful consideration of the judgment of the Privy Council in *Debi Mangal Prosad Singh* v. *Mahadeo Prasad Singh* (2) does not seem to me to necessitate anything of the kind. The question for decision in that case was thus propounded by Lord Robson who delivered the judgment (page 238): "whether immoveable property obtained by a Hindu widow on partition under the *Mitakshara* Law is part of her *stridhanam* in the narrow sense of that word, indicating her separate property or peculium which passes on her death to her own heirs; or is merely part of her *stridhanam* in the wider sense in which the word is sometimes used, as indicating any property in which she may have some right of proprietorship."

Such a question could never arise in this Presidency where the custom of allowing a share on partition to the wid w of

(1) 28 M. 1.

(2) 14 Ind. Cas. 1000; 34 A. 234; 9 A. L. J. 263; 11 M. L. T. 217; 16 C. W. N. 409; (1912) M. W. N. 324; 14 Bom. L. R. 220; 15 C. L. J. 344; 22 M. L. J. 462; 39 I. A. 121.

a deceased co-parcener does not obtain; the effect of this decision was simply to place property thus acquired by a widow on the same footing as regards devolution of property acquired by inheritance. That property acquired by inheritance is an exception to the general rule laid down by Vignaneswara is recognised by Subramania Iyer, officating Chief Justice in the Full Bench case.

Reliance is placed by appellant's Vakil on the general remarks regarding Chapter II, section 11, of the *Mitakshara* to be found on pages 239 and 240 of the report. The effect is simply this. Their Lordships say that Yagnavalkya's language is open to the meaning that a woman's property *of whatsoever kind* descends always to her own heirs. They say: "It is difficult to adopt the latter construction in view of the undoubted fact that, as Sir Arthur Wilson said in delivering the judgment of their Lordships' Board in *Sheo Shankar Lal* v. *Debi Sahai* (3), 'most of the old commentators recognise, with regard to the property of a woman, whether called *stridhanam* or by any other name, that there may be room for differences in its line of descent according to the mode of its acquisition.'"

Now the Full Bench decision of this Court does not by any means proceed on the construction that a woman's property, of whatever kind, always descends to her heirs; as already pointed out, one important exception (property acquired by inheritance) is specifically recognised. On the other hand, their Lordships of the Privy Council do not go so far as to say that the dictum of Vignanesvara regarding property derived from the additional sources specified in clause 2 of the section is devoid of authority. Then in the course of their judgment they are careful to explain the very limited question for their determination (the devolution of a woman's property acquired by partition) and as I understand them, they go no further in the passage relied on than to point out that the *Mitakshara* passage should not be regarded as an authoritative and conclusive rule of law placing all kinds of woman's property on the same footing as regards devolution. What their decision would have been regarding the devolution of property acquired in the way the suit property was acquired, it is impossible to say. I, therefore, am of opinion that the Privy Council decision is no authority for refusing to follow the ruling in *Subramanian Chetty* v. *Arunachelam Chetty* (1).

I would, therefore, dismiss the second appeal with costs.

TYABJI, J.—The question in this appeal is whether the plaintiff, who is the daughter of one Subbamma, is entitled to the property referred to in the plaint as against her brothers. It has been argued before us with reference to the questions (1) whether the property must be considered to be the *stridhanam* property of the said Subbamma and (2) whether the incidents annexed to this property, so far as devolution and succession are concerned, must be determined by the rules prevailing in regard to *stridhanam* property or whether some other rule of succession must be applicable to it.

The property in question was, it is admitted, acquired by Subbamma without the aid of any funds derived either from her husband or from any third party. It has been found that she purchased it and paid the purchase-money by means of a loan secured on the mortgage of the very property which she purchased, and that subsequently the loan was paid off and the mortgage redeemed.

The texts relating to *stridhanam* property have often been the subject of interpretation, and they have recently been considered by the Privy Council in *Debi Mangal Prosad Singh* v. *Mahadeo Prasad Singh* (2). The argument before us has been that the property in question cannot be considered to be the *stridhanam* property of Subbamma, inasmuch as it does not fall within any of the six specified clauses of what has been termed strict *stridhanam*. It is beyond dispute that the property was not given to Subbamma by (1) the father, (2) the mother; (3) the husband or (4) a brother or (5) received by her at her nuptial fire, (6) or presented to her on her husband's marriage to another wife; and the only question is whether it can fall under the final word "adayam" occurring in Yajnawalkya's description of *stridhanam*, which word, in the light of judicial interpretation, may be rendered as "and the like". The argument for the appellant has been that the interpretation of that expression

(3) 25 A. 468; 5 Bom. L. R. 828; 13 M. L. J. 330; 7 C. W. N. 831; 30 I. A. 202 (P. C.).

"adhyam" or "and the like" by *Mitakshara* cannot now be accepted, that as that interpretation has been made to include property acquired in five different modes, namely by (*a*) inheritance, (*b*) purchase, (*c*) partition, (*d*) seizure or (*e*) finding, and as there are decisions [See *Sheo Shankar Lal* v. *Debi Sahai* (3)] binding upon this Court that property acquired by a woman by inheritance and by partition does not form her *stridhanam* in such a sense that on her death it passes to her *stridhanam* heirs in the female line to the exclusion of males—therefore it must follow that property acquired in any of the three modes referred to by the author of *Mitakshara* is not *stridhanamt* and in particular that property acquired in the mode in which Subbamma acquired her property should also be excluded from *stridhanam* property in the said sense.

The real question before us, however, seems to be, what is the rule of succession applicable with reference to this property of which Subbamma died possessed. It seems to me that the decisions holding that, where a woman has inherited property or acquired it in the course of partition she does not form a stock of descent, but that she is to be considered to have held it as limited owner and that succession is to be traced again as from the last full owner—decisions to that effect are not sufficient to form the basis on which we ought to proceed for the purpose of the decision in the present case.

In *Subramanian Chetty* v. *Arunachelam Chetty* (1) the underlying principle is more than once suggested, or I might say assumed, to be—whether the property in question was at the absolute disposal of the woman. On page 5 Sir Subramania Iyer says: "In the absence of any clear provisions of Hindu Law, defining the character of her interest in the income, it must, on general grounds, be held that what becomes vested in her in her own right and what she can dispose of at pleasure is her own property, not limited but absolute, exclusive and separate in every sense and devolving as such." On the other hand on page 6 he says: "No doubt it is now settled that, notwithstanding Vignaneswara's authority, property inherited by a female from a male or a female would not pass to her own heirs, that is to say, the woman so inheriting takes a limited and qualified estate with reverter annexed to it."

If this be the principle, then it is possible to understand and reconcile the decisions restricting property which may be described as *stridhanam* property excluding, therefore, such property as a woman has inherited or acquired by partition; for in the case of property acquired by inheritance or partition, it may be assumed on general principles that it was intended that the woman should take only a limited interest therein and that after providing for her maintenance thereout during her life-time, it should revert to the heirs of the last full owner.

With reference to the property now in question, however, it is difficult to see how it can be said to revert, inasmuch as Subbamma cannot, by any stretch of the principle to which I have just alluded, be considered to have acquired this property only with limited rights, nor can the rights of any third person be so extended as to allow of our proceeding on the basis that during the life of Subbamma they had even any inchoate right in the property.

In this connection the following text and comment on it taken from *Subramanian Chetty* v. *Arunachelam Chety* (1) is particularly pertinent: "Still more to the point," says Sir Subramania Iyer, "is the text of Devala: 'Her subsistence, her ornaments, her perquisites and her *gains* are the separate property of a woman.' This is quoted and relied in the Digests of Bengal, Benares and Southern Schools such as the Daya Bhaga (Chapter IV, section , verse 15), the Viramitrodaya (Chapter V, part I, section 7), the Madaviya (Burnell's Translation, page 46) and the Saraswati Vilasa (Foulke's translation, section 276, page 57). Compare also the Smrithi Chandrika, Chapter IX, section I, placita 6 to 10. This text is certainly not to be confined, as suggested on behalf of the defendant, to gifts for maintenance made out of affection, for, as pointed out by Dr. Jolly (Hindu Law of Partition, Inheritance and Adoption, page 236), the Sanskrit term Vritti (subsistence) in the text has been understood by commentators to include what is given by the heirs, and in *Manilal Rewadut* v. *Bai Rewa* (4) arrears of maintenance

(4) 17 B. 758.

recovered by a wife under a decree against her husband were held to be *stridhanam*, though *aparibhashika stridhanam* with reference to the distinctions peculiar to *Mayukha*."

What then is the rule of succession applicable to property which must be taken to have been the absolute property under the control of a woman governed by Hindu Law—property with reference to the succession to which it was conceded before us that the woman must be taken to be the stock of descent? It seems to me that for the reasons indicated in *Subramanian Chetty* v. *Arunachelam Chetty* (1), in the case of property found to be the absolute property of a woman under her entire unfetttered control there ought to be only one rule of succession recognized in Madras, namely, the rule of succession with reference to *stridhanam* property. The learned Pleader for the appellant had very great difficulty in suggesting any other rule as being applicable. It was impossible for him not to concede that Subbamma must be taken to be the stock of descent and his argument could, therefore, be only treated on the basis that Subbamma's heirs must be taken to be her sons either in preference to, or conjointly with, her daughter. It seems to me to be impossible to give effect to a rule of law which cannot even be stated with certainty by the person who desires to rely upon it. The only authorities that could be cited in favour of the nebulous suggestion made by the appellant were drawn from Bombay and based on the *Mayukha*—a text which, it is admitted, is not prevalent in Madras. This fact and the great weight due to *Subramanian Chetty* v. *Arunachelam Chetty* (1) enable me to omit from consideration the decisions given by the Bombay High Court, although Westropp, C. J., and West and Telang, JJ., took part in those decisions, *Vijiarangam* v. *Lakshman*(5), *Manilal Rewadut* v. *Bai Rewa* (4).

For the reasons that I have given, I am of opinion that the lower Appellate Court was right in applying the *stridhanam* rule of succession to the property in question, and agree, therefore, that the appeal should be dismissed with costs.

Appeal dismissed.

(5) 8 Bom. H. C. R. 244.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 36 OF 1913.

February 25, 1915.

Present:—Sir John Wallis, Kt., Offg. Chief Justice, and Mr. Justice Coutts-Trotter.

VENKATARAMANNA—DEFENDANT No. 2 —APPELLANT

versus

K. J. VENKATAPATHI NAYANI VARU, MINOR, BY HIS AGENT AND NEXT FRIEND D. VASUDEVA ROW—PLAINTIFF— RESPONDENT.

Grant—Kayam patta—*Construction — Surrounding circumstances and conduct of parties.*

Where a grant under the heading *kayam patta* was made in 1857 and the grantees dealt with their tenants as if they were entitled to permanent rights and in compensation for acquisition of land for public purposes the grantee and grantor both shared and evidence proved that the grantor regarded the grant in the terms of neighbouring villagers as a permanent grant:

Held, that a heritable permanent grant was conveyed in those terms. [p. 190, col. 2.]

Wallis, C. J.—Prima facie the words *"kayam patta"* mean 'perpetual lease.' But a long course of decisions have held that these words and the words *"istimrari mokurari"* and *"kayam sasvata"* do not *prima facie* convey more than life-estates. When land or interest in land is intended to be transferred hereditarily, it is usual to indicate that intention by the use of the words 'from son to grandson' or 'from generation to generation' or the like. In construing grants one has to look to the surrounding circumstances and to the conduct of the parties to see what their real intention was in the grant. [p. 189, col. 1.]

Coutts-Trotter, J.—In *Tulshi Pershad Singh* v. *Ram Narain Singh*, 12 C. 117; 12 I. A. 205; 9 Ind. Jur. 433; 4 Sar. P. C. J. 646, the Privy Council have expressly used those words to leave the Courts free to give the fullest effect to the circumstances of each case and to avoid laying down any hard and fast rule of construction. [p. 190, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge of North Arcot in Original Suit No. 79 of 1911.

Mr. *L. Venkataraghava Aiyar*, for the Appellant.

Mr. *S. Swaminadhan*, for the Respondent.

JUDGMENT.

WALLIS, C. J.—This case is one of some difficulty and rather on the line, but after hearing the very full arguments of the Counsel on both sides we have come to the conclusion that we cannot support the decision of the Subordinate Judge.

The question is as to whether the terms of Exhibit A amounted to a permanent

grant. The words used are "*kayam patta*" which are translated as 'perpetual lease.' *Prima facie*, of course, these words would be taken to mean what they say. But there is a long course of decisions, mostly in cases arising in Northern India but treated by this Court as applicable also to this part of India, that having regard to the general usage of the country such words as these and the words "*istimrari mokurari*" do not *prima facie* convey more than life-estates. That doctrine was applied to this part of India and to a term similar to that in the present case in *Rajaram* v. *Narasinga* (1). The term there was "*kayam saswata patta*" which is even stronger, as the word *saswata* is not used here, and yet the Court consisting of Parker and Shephard, JJ., held that it did not convey a permanent right, and in *Foulkes* v. *Muthusami Goundan* (2), Subramania Aiyar and Moore, JJ., did not differ from the law as there laid down. They say "It is quite true, as urged for the appellant, that when land or even an interest in land is intended to be transferred hereditarily, it is usual to indicate that intention by the use of the words 'from son to grandson,' from 'generation to generation' or the like. In the present instance, however, there was no transfer of land or an interest in land, but only an agreement as to the rate at which assessment was to be paid in respect of lands in which the party bound to pay the assessment admittedly already possessed a heritable estate." They accordingly distinguished the case before them on that ground. But while that is the general principle, at the same time it has been again and again laid down by their Lordships of the Judicial Committee that we are to look to the surrounding circumstances and to the conduct of the parties to see what their real intention was in the grant. For that proposition it is only necessary to refer to the decision *Tulshi Pershad Singh* v. *Ram Narain Singh* (3). On page 130 their Lordships say: "After this review of the decisions, their Lordships think it is established that the words *istimrari mokurari* in a *pattah* do not *per se* convey an estate of inheritance, but they do not accept the decisions as establishing that such an estate cannot be created without the addition of the other words that are mentioned, as the Judges do not seem to have had in their minds that the other terms of the instrument, the circumstances under which it was made, or the subsequent conduct of the parties, might show the intention with sufficient certainty to enable the Courts to pronounce that the grant was perpetual." The question which is one of some difficulty with which we are faced here is to decide whether the subsequent conduct of the parties is sufficient to enable us to say that the grant was perpetual, and we think that on the whole that question must be answered in the affirmative. The grant was made in 1857 and there are a number of documents, Exhibits I, IV and VIII, which would not perhaps be of very great value if they stood alone, showing that the grantees dealt with their tenants as if they were entitled to permanent rights. Then we have Exhibit IX of the year 1879 which is a mortgage by the grantee to the grantor for Rs. 700. It is said that it may have been the life-interest only of the grantee that was mortgaged; but that is by no means apparent, when we consider this grant with the further documents which have been referred to. We have Exhibit B of the year 1895, which is a document of compromise between the grantor and the grantee and his sons; and in that document it is distinctly stated that the grantee has a permanent right. Not only is the grant spoken of as a permanent grant, which expression would scarcely have been used by the *zemindar's* people so soon before the right of redemption was likely to fall in if they denied the permanent character of the grant, but also there is this stipulation: "Out of the Rs. 80, the permanent total yearly amount of demand which you have to pay, every year we shall remit permanently at the rate of Rs. 40 a year." In "which you have to pay" the plural 'you' is used, and in a document from a superior to an inferior suggests that it applied both to the grantee and his sons. Then we have Exhibits XV and XV (*a*) which show that when certain of these lands were acquired for public purposes, the compensation was paid to the grantee and that grantor and his heirs made no claim to any share in it. But stronger than all these is the evidence as to the way in which the grantor regarded grants in these

(1) 15 M. 199.
(2) 21 M. 503; 8 M. L. J. 207.
(3) 12 C. 117; 12 I. A. 205; 9 Ind. Jur. 433; 4 Sar P. C. J. 646.

terms of neighbouring villagers. Exhibit VI is a purchase by the grantor from the grantee under Exhibit V, which is similar in terms to the present document. It is sought to suggest now that this was a purchase only of the life-interest of the grantee; but there is nothing in the document to support that suggestion. Then we have a still stronger instance in Exhibits XVII and XVII (*a*). Under Exhibit XVII a representative of the grantee sold a share in the village to a third party and under Exhibit XVII (*a*) the heir of the grantor in the year 1892, that is, forty years after the date of the grant in question, purchased that part of the village which had been alienated under Exhibit XVII. It is immaterial whether the original grantee was dead, as he most probably was at that period, because forty years after the grant his expectation of life must be very small in this country and not worth purchasing. It is, we think, exceedingly significant, as showing the way in which these grants were regarded by these people, that the grantor's heirs should have purchased back part of the grant. On the whole I think there is sufficient in the subsequent conduct of the parties to take the case out of the rule which is laid down in *Rajaram* v. *Narasinga* (1) and I would, therefore, reverse the decree of the Subordinate Judge and dismiss the suit with costs throughout.

COUTTS-TROTTER, J.—I agree. I should only like to add this. I think the language which their Lordships of the Privy Council employed in *Tulshi Pershad Singh* v. *Ram Narain Singh* (3) was expressly used in order to leave the Courts free to give the fullest effect to the circumstances of each case and to avoid laying down any hard and fast rule of construction; and I think we are carrying out the intention of their Lordships in giving full effect to the surrounding circumstances of the case.

Appeal allowed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 429 OF 1913.

April 7, 1915.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

GHASI RAM AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Musammat DEBI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Gift in favour of one member of family—Property treated as joint property—Burden of proof—Donee's marriage expenses met out of joint funds—Lien on gifted property.

Prima facie a property acquired under a gift by one member of a joint Hindu family belongs exclusively to him; if other members of the family allege that it was treated as joint family property it is for them to prove it. [p. 191, col. 2.]

The fact that the expenses of the marriage of that member of the family, in whose favour the gift had been made, were met out of the joint family funds, gives the joint family no lien on the gifted property. [p. 191, col. 2.]

First appeal from the decision of the Subordinate Judge of Agra, dated the 18th June 1913.

Mr. *S. K. Dar*, for the Appellants.

Mr. *A. P. Dube*, for the Respondents.

JUDGMENT.—The genealogical tree which is set out in the judgment of the Court below will explain the relationship between the parties. The plaintiffs are some of the members of the family of Chiranji Lal. They sue as against *Musammat* Debi, the widow of Narain and mother of Gopal Das, and they also implead other members of the family who have not joined them in the suit. Their case is that the family was joint family and that the property situated in the three villages Baranda, Marhakar and Garhi Chandraman is the joint family property, that *Musammat* Debi as widow of Narain and mother of Gopal Das had no title whatsoever to any share therein, that she only had a right of maintenance, that her name was entered in the Government records for the purpose of consolation only, that by reason of that entry she had sued for and obtained a decree for profits of a portion of the estate and that she had applied for partition of another portion. The plaintiffs, therefore, came into Court asking for a declaration that the property was the property of the joint family and the defendant, *Musammat* Debi, had no title

whatsoever thereto. In asking for this relief the plaintiffs also said that if in the Court's opinion they were not in legal possession of the property, then the Court might put them into possession and that they were ready and willing to pay the Court-fee in respect thereto. *Musammat* Debi's defence was that her husband, Narain, had separated from his brother in his life-time, that she held the properties of Baranda and Marhakar as the mother of a separated Hindu. In regard to the property of Garhi Chandraman she pleaded that the property was her *stridhan*, that at the time of her marriage her grand-mother and brother had gifted this property to her, but that the deed of gift was executed in the name of her husband, Narain, in whose name the property stood and after him in the name of Gopal Das, his son. She also pleaded that the plaintiffs were not in possession and were not entitled to a declaration in view of the terms of section 42 of the Specific Relief Act. Four issues were framed, one as to the value of the property with which we are not concerned. Issue No. 2 is whether section 42 is a bar to the suit. Issue No. 3, is the property in suit joint property of the parties or separated property? Issue No. 4, did defendant get Garhi Chandraman property from her mother and her brother and is it ancestral property? The defendant gave evidence as to the alleged separation. The Court below rejected that evidence as valueless and held that the family was a joint family. In respect to the properties in Baranda and Marhakar it held that they were joint family property. In respect to the property in Garhi Chandraman it held that this property had been gifted to Narain, that it was his separate property, that it descended to his son and from his son to the defendant, *Musammat* Debi. It held, that by reason of the decree for profits which *Musammat* Debi had obtained (which profits had been paid by the plaintiffs) and also by reason of the fact that Garhi Chandraman was in the possession of the defendant and not of the plaintiffs, that the plaintiffs' suit for declaration was barred by section 42 of the Specific Relief Act and, therefore, it dismissed the suit *in toto*. The plaintiffs have come here on appeal. It is urged that in view of the circumstances of the case and the fact that the plaintiffs are what has been termed collecting co-sharers *i.e.*, co-sharers who collect the income from the tenants, that it was unnecessary for the plaintiffs to sue for anything else beyond a declaration at least in respect to the two villages, Baranda and Marhakar. It is urged that even if that were necessary, the plaintiffs had all along been perfectly willing to pay necessary Court-fees and that their suit ought not to have been dismissed without giving them a chance of paying the necessary fee. In regard to Garhi Chandraman it is urged that as the gift to Narain had been made at the time of the marriage, the property belonged to the joint family because the expenses of the marriage had been met out of joint family funds. On behalf of the respondent it has been urged that the evidence on the record clearly proves the separation of Narain from his brother and that on this ground also the plaintiffs' suit ought to have been dismissed. In so far as the actual facts are concerned, we have no hesitation whatsoever in agreeing with the Court below that the alleged separation between Narain and his brother is not proved. A perusal of the evidence is quite sufficient to show that the statement of the witnesses is not worth the paper on which it is written. The presumption is in favour of jointness and it was for the defendant to prove the alleged separation. In our opinion she has utterly failed to do so. In regard to the village Garhi Chandraman we cannot accept the argument which is now put before us. The gift was clearly a gift in the name of Narain. The fact that Narain's marriage expenses were met out of joint family funds gave the joint family no lien on the gifted property. Of course it was perfectly possible for this gifted property to have been treated by the family as such. But if this were the case it was the plaintiffs' duty to prove it by evidence. *Prima facie* the gift to Narain made Narain the sole owner of the property, which would descend to his son and on his son's death to his widow. *Prima facie* it was not joint family property at all. It was for the plaintiffs to prove that it had been treated as such. But on that point they have not given any evidence whatsoever. In regard to this village we are of opinion that the decision of the Court below was perfectly correct.

There remains the question of section 42 of the Specific Relief Act in respect to the villages Baranda and Marhakar. *Musammat* Debi sued for her share of the profits of one of these villages. Her name being recorded in the Government papers the Revenue Court was bound to decree her claim. The fact that she sued is an admission that the opposite party was collecting the income of the property. Therefore, in so far as legal possession of a *zemindar* is concerned, the actual possession was in the hands of the plaintiffs. We do not think that the mere fact that *Musammat* Debi sued and obtained her share of the profits from the opposite party would be sufficient reason for forcing the plaintiffs to bring a suit for possession. The question of title could only be decided in one way in the Revenue Court by reason of the provisions of the Tenancy Act. Otherwise it would have been open then to the plaintiffs to contest *Musammat* Debi's title to the share which stood in her name. This is one of those cases in which it is difficult to say which party is in possession. But in any case the action of the lower Court was wrong in dismissing the suit in view of the fact that the plaintiffs had in their plaint offered to pay the necessary Court-fee. In the circumstances of the case, however, we are of opinion that it was unnecessary for the plaintiffs to sue for anything more than a declaration. The result, therefore, is that the plaintiffs' suit will be decreed in respect to the properties in *Mouzas* Baranda and Marhakar *i.e.*, the declaration for which they ask is granted. In regard to the property of Garhi Chandraman the suit will stand dismissed. Parties will pay and receive costs in proportion to failure and success in both Courts.

Appeal partly allowed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 282 OF 1912.

March 2, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

NAGAR DAMODAR SHANBHOGUE—PLAINTIFF—APPELLANT

versus

GUDLIMAR RAMA RAO AND OTHERS—DEFENDANTS—RESPONDENTS.

Presidency Banks Act (XI of 1876), s. 371, scope of —Third parties cannot take advantage—Directors, agents or trustees--Security to cover future advances, whether void—Provision merely directory.

Section 37 of the Presidency Banks Act XI of 1876, must be regarded as containing instructions for the guidance and governance of the Directors and as defining the powers exercisable by them. If the Directors of a Presidency Bank act in disregard of those powers they render themselves liable to the Bank for any loss that it may sustain by unauthorised acts. The section does not enable third parties, with whom contracts have been entered into, to deny their liability to the Bank if the Bank chooses to act upon the contract of its Directors. The action of the Directors under such circumstances will not be *malum prohibitum*. [p. 193, col. 1.]

The Directors are not identical with the Bank. They fill a double character, (1) as agents of the Bank, (2) as trustees for shareholders of the power committed to them. Whatever may be the extent of liability *inter se* between the Directors and the Bank or the trustee and *cestui que trust*, it does not affect transactions with outsiders so as to enable the latter to claim exemption from the performance of their obligations. [p. 194, col. 2; p. 195, col. 1.]

The action of the Directors in taking the security to cover future advances, although it may be in excess of their powers, is not void *ab initio*. It is open to the Bank to have accepted such contract. [p. 194, col. 1.]

If a prohibition is in the interest of the shareholders and is based on considerations of public policy it must be regarded as *malum prohibitum*. [p. 194, col. 1.]

Under the Presidency Banks Act it is not the Bank that is prohibited from taking security in regard to future advances in the shape of immoveable property, but only the Directors. Section 37 only contains instructions to the Directors as to how they should manage the business of banking. [p. 194, col. 2.]

It is well settled that where there are provisions in an Act which are only directory and not mandatory, any disregard of those provisions will not make the transaction void altogether. Section 37 is only directory of the powers of the Directors. [p. 194, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge of South Canara, in Original Suit No. 30 of 1911.

Messrs. *K. P. Madhava Rao*, *B. Sitarama Rao* and *K. P. Lakshmana Rao*, for the Appellant.

Mr. *K. N. Aiya*, for the Respondents.

JUDGMENT.—The defendants Nos. 1 to 4, the father of defendants Nos. 4 to 6 and the 6th defendant executed to the Bank, the 12th defendant in this case, a deed of mortgage (Exhibit E on the 5th August 1898. The property was to be regarded as security for a sum of Rs. 54,000—already advanced to the defendants, and "for other credits and advances" which may be made to them from time to time. Payments were made towards the debt. On the 2nd June 1905 the Bank transferred the balance due to it from the defendants to the plaintiff under Exhibit A. The plaintiff sued under the assignment. The defendants admitted the execution of Exhibit E, but pleaded payment in full before the date of the transfer. There were subsidiary pleas of limitation with reference to portions of the claim. The defendants also contended that the document, Exhibit E, cannot be sued upon, as it was made to secure future advances. The Subordinate Judge came to the conclusion that the claim was based upon an invalid document, and dismissed the plaintiff's suit.

In appeal it has not been argued by the appellant that the Directors had power under the Presidency Banks Act, XI of 1876, to take a security upon immoveable property or in respect of future advances, as it was not necessary for the disposal of the appeal. The main contention pressed before us was that the limitations on the powers of the Directors only affected the relationship *inter se* between them and the Bank and that even if the Directors exceeded their powers, the transaction entered into by them would not be illegal. Section 36 of Act XI of 1876 defines the scope of banking transactions and enumerates the various powers conferred upon a Bank. Section 37 deals with the duties of the Directors of the Bank. In our opinion section 37 must be regarded as containing instructions for the guidance and governance of the Directors and as defining the powers exercisable by them. If the Directors act in disregard of those powers, they render themselves liable to the Bank for any loss it may sustain by the unauthorised acts. That section does not enable third parties with whom contracts have been entered into to deny their liability to the Bank, if the Bank chooses to act upon the contract of its Directors. In a very elaborate judgment Mr. Justice Russell in *Turner* v. *Bank of Bombay* (1) points out that the action of the Director under such circumstances will not be *malum prohibitum*. On appeal Sir Lawrence Jenkins, C. J., and Tyabji, J., accepted this view. We are of the same opinion. Mr. Aiya Ayyar referred to section 7 and 24 of the Act and contended that the Directors are identical with the Bank and that if there is a prohibition against the Directors it is also a prohibition against the Bank. We are unable to agree with this contention. As pointed out in Buckley on Companies (9th Edition) page 626, "the Directors of a Company fill a double character. There are (*i*) agents of the Company, and (*ii*) trustees for the share-holders of the powers committed to them." It is this dual capacity that is recognized throughout the Indian Act. If an agent exceeds the authority conferred upon him by the principal, it is open to the principal to adopt it as if the agent acted within the scope of his authority. The party with whom the contract has been entered into is not entitled to repudiate the transaction. Of course if the unauthorised dealing is opposed to public policy, there can be no ratification. In *Great Eastern Railway Company* v. *Turner* (2), Lord Selborne defines the position of Directors thus: "The Directors are the mere trustees or agents of the Company—trustees of the Company's money and property, agents in the transactions which they enter into on behalf of the Company," and then he says: "I entirely assent to what was said by Sir Richard Baggallay, that there is no difference between an unauthorized investment of the money of a public Company by its trustees, and an unauthorized investment of the moneys belonging to any other trust by the trustees of that trust. It would be monstrous—it would be extravagant to the very last degree—to say, that because the money of *cestui que trust* has been laid out in an unauthorized manner, that, therefore, they are not to have the benefit of whatever value there is in the property bought with their

(1) 25 B. 52; 2 Bom. L. R. 803.
(2) (1873) 8 Ch. App. Cas. 149; 42 L. J. Ch. 88; 27 L. T. 697; 21 W. R. 163.

money." The reason of the rule is that, whatever may be the extent of liability *inter se* between the Directors and the Bank or the trustee and *cestui que trust*, it does not affect transactions with outsiders so as to enable the latter to claim exemption from the performance of their obligations. The view enunciated in *Turner* v. *Bank of Bombay* (1) has been applied in Madras to cases arising under the Indian Trusts Act. In *Kadir Ibrahim Rowther* v. *Arunachelam Chettiar* (3), the learned Judges held that where a trustee exceeded his powers in granting a lease, the transaction was only voidable at the option of the *cestui que trust* and was not void altogether. In *Sinoya Pillai* v. *Munisamy Ayyan*(4), where a guardian exceeded the powers given to him by the Guardians and Wards Act, the learned Judges held that his act was only voidable at the option of the ward. We must, therefore, hold that the action of the Directors in taking the security to cover future advances, although it may be in excess of the powers, was not void *ab initio* and that it was open to the Bank to have accepted the contract as concluded by the Directors. Mr. Aiya Aiyar relied very strongly upon the decision in *National Bank of Australasia* v. *Cherry* (5); one essential difference between that decision and the case before us is that in the former the prohibition which was contravened was against the Bank itself and not against the Directors. Lord Cairns, in delivering the judgment of the Judicial Committee, came to the conclusion that as the Bank was prohibited from entering into transactions of a certain class, any contravention of such an express prohibition vitiated the contract altogether. Courts have recognised that if a prohibition is in the interests of the share-holders and is based on considerations of public policy it must be regarded as *malum prohibitum*. *See* per Blackburn, J., at page 379 in *Taylor* v. *Chichester and Midhurst Railway Company* (6). In the present case, the contract does not affect the rights of the share-holders nor does it offend public policy. It is not the Bank that is prohibited from taking security (in regard to future advances or in the shape of immoveable property), but only the Directors. Therefore, the decision relied upon by Mr. Aiya Aiyar does not affect the present case. Moreover the Act of 1876, regulating banking transactions in this country was passed after the decision in *National Bank of Australasia* v. *Cherry* (5), and when the Legislature has advisedly not prohibited the Bank but only the Directors by section 37 from entering into transactions of a particular nature, it is reasonable to hold that the section only contains instructions to the Directors as to how they should manage the business of banking. It is well settled that, where there are provisions in an Act which are only directory and not mandatory, any disregard of those provisions will not make the transactoin void altogether. [*Queen* v. *Lofthouse* (7) and *Queen* v. *Ingall* (8).] In our opinion section 37 is only directory of the powers of the Directors. The parties with whom the contract has been entered into are not entitled to plead that they are absolved from liability, because the transaction is one which the Directors had no power to enter into. Curiously enough the Subordinate Judge quotes *Turner* v. *Bank of Bombay* (1), but entirely misunderstands the decision. We must, therefore, reverse his decision and direct him to take back the case on his file and dispose of it upon the other points arising in the case.

As the decree itself is reversed, it is not necessary to pass separate orders on the memorandum of objections. The costs in this Court of all parties will abide the result and should be provided for in the revised decree.

Appeal allowed; Decree reversed.

(3) 4 Ind. Cas. 1082; 33 M. 397; 19 M. L. J. 737.
(4) 22 M. 289; 9 M. L. J. 64.
(5) 3 P. C. 299.
(6) 2 Ex. Cases 356; 39 L. J. Ex. 217; 4 H. L. 628; 23 L. T. 657.
(7) 1 Q. B. 433; 7 B. & S. 447; 35 L. J. Q. B. 145; 12 Jur. (N. S.) 619; 14 L. T. 359; 14 W. R. 649.
(8) 2 Q. B. 199; 46 L. J. M. C. 113; 35 L. T. 552; 25 W. R. 57.

PUNJAB CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 1623 OF 1914.

February 15, 1915.

Present:—Mr. Justice Scott-Smith.

Musammat DAULAT—PLAINTIFF—APPELLANT

versus

KHAN—DEFENDANT—RESPONDENT.

Burden of proof—Marriage—Suit for declaration that

MANIYAM KUPPANNA *v.* KUPPANA GOUNDEN.

plaintiff was not wife of defendant—Presumption —Divorced woman continues unmarried until proved to have married again.

The defendant having stated in a criminal case that the plaintiff was his wife, the plaintiff sued for a declaration that she was not the wife of the defendant:

Held, that it was for the defendant to prove that the plaintiff was married to him.

Held, also, that in the absence of an objection on the part of the defendant that the onus was wrongly placed on him by the original Court, the Appellate Court ought not to have shifted it on to the plaintiff.

In the case of a divorced woman the presumption is that she continues unmarried until proved to have married again.

Miscellaneous appeal from an order of the Divisional Judge, Multan, dated the 14th May 1914, reversing that of the Munsif, first Class, Multan, dated the 8th April 1914 (decreeing plaintiff's claim), and remanding the case for fresh decision.

Lala *Chandâr Bhan*, for the Appellant.

Mirza *Mahbub Beg*, for the Respondent.

JUDGMENT.—In the suit out of which the present appeal arises *Musammat* Daulat, plaintiff, asked for a declaration that she is not the married wife of Khan, the defendant. The plaint showed that she wished for this declaration because in a complaint instituted by Khan under section 498, Indian Penal Code, on the 15th of October 1913, against Ghulam Hussain and *Musammat* Karam, the defendant alleged that she was his wife. The first Court laid the onus of proving that the plaintiff was the lawfully married wife of the defendant upon the latter and finding that he had not discharged it, decreed the claim. On appeal the Divisional Judge was of opinion that the onus was upon the plaintiff to prove that she was not the wife of the defendant. He, therefore, reversed the decree of the first Court and remanded the case for re-decision under Order XLI, rule 23, Civil Procedure Code.

From this order of remand the plaintiff has appealed to this Court. The *first* matter to note is that neither in the first Court, nor in the lower Appellate Court, did the defendant object to the onus having been laid upon him. It is, therefore, not understood why the lower Appellate Court shifted the onus and remanded the case. I am unable to agree with the learned Divisional Judge that the onus in this case was upon the plaintiff. The general rule as to the onus of proof and the consequent obligation of beginning is that the proof of any particular fact lies on the party who alleges it, not on him who denies it. The issue must be proved by the party who states an affirmative, not by a party who states a negative. See in this connection the Law of Evidence by Ameer Ali and Woodroffe, 5th Edition, page 629. If the plaintiff was married to the defendant, the fact is especially within his knowledge and he can easily prove it. The onus is, therefore, on him having regard to section 106 of the Indian Evidence Act, 1st paragraph. Again, the plaintiff was formerly the wife of another man who divorced her. The presumption is that she continued unmarried until proved to have married again. See page 712, note 12, of Ameer Ali and Woodroffe's Law of Evidence.

I, therefore, accept the appeal and setting aside the order of the lower Appellate Court, remand the case thereto for decision of the appeal according to law. Stamp in this Court will be refunded and other costs will be costs in the case.

Appeal accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1644 AND 1645 OF 1913.

March 10, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Coutts-Trotter.

MANIYAM KUPPANNA GOUNDEN AND OTHERS—DEFENDANTS—APPELLANTS

versus

KUPPANA GOUNDEN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Vendor and purchaser—Obligation to secure quiet and peaceful enjoyment—Signing of sale-deed, if sufficient—Contract of sale and delivery of possession—Defence against ejectment—Specific performance—Claim for mesne profits, essence of.

Per *Spencer, J.*—It is the duty of every seller of

MANIYAM KUPPANNA *v.* KUPPANA GOUNDEN.

immoveable property to secure his purchaser in quiet and peaceable enjoyment of the subject of the sale. This obligation cannot be considered as discharged by the mere signing of the sale-deed, but will continue until the purchaser has got an indefeasible title to the property which the seller purported to convey. [p. 196, col. 2.]

A contract of sale followed by delivery of possession cannot be pleaded in defence to an action for ejectment where there is no registered sale-deed, but the defendant can avoid the difficulty by suing for specific performance and getting the action in ejectment postponed pending the result of the suit. [p. 197, col. 1.]

Per *Coutts-Trotter, J.*—A vendor is under no obligation to register the document he had given. [p. 197, col. 1.]

The essence of a claim for mesne profits is that it rests upon an agreement implied in law that when one person occupies property of another, he must be deemed to have tacitly assented to the condition that he is liable for an occupation rent in respect of that occupation. [p. 198, col. 2.]

Second appeals against the decrees of the Court of the Subordinate Judge of Trichinopoly, in Appeal Suits Nos. 312 and 279 of 1912, preferred against those of the Court of the District Munsif of Namakal, in Original Suits Nos. 598 and 342 of 1910, respectively.

Mr. *T. M. Krishnaswami Aiyar*, for the Appellants.

Mr. *R. Shadagopachariar*, for the Respondents.

JUDGMENT.

SPENCER, J.—These two appeals arise out of the same transaction. Second Appeal No. 1644 of 1913 is a suit by a purchaser to compel the seller to execute a proper sale-deed for the land which he purchased in 1906 under a sale-deed which was not registered.

The Appellants' main contention is that the verbal agreement between the parties in October 1909 to execute a fresh sale-deed is not capable of being enforced, as it is devoid of consideration.

It has been found by the Subordinate Judge that over and above the Rs. 200 which formed the consideration for the original sale-deed of 1906, which remained unregistered owing to the sickness of the vendee, Rs. 25 were paid at some date subsequent to the execution of that sale-deed.

This sum will serve as sufficient consideration for the later agreement; but it is argued that the Subordinate Judge's conclusion that this was paid as an inducement to execute a fresh deed was not warranted by the evidence. It is true that plaintiffs' witnesses Nos. 1 and 2 do not in so many words state that the Rs. 25 formed the consideration for the agreement of 1909, but I think that this inference could fairly be drawn, as the Subordinate Judge has drawn it, from the fact that the stamp on Exhibit C, the paper on which the second sale-deed was to be written, was a three rupees stamp, whereas Exhibit A was drawn up on a two rupees stamp which was appropriate for the original consideration of Rs. 200. This fact also indicates that the payment of Rs. 25 described as gratuitous was not intended by the parties to give rise to no obligation, moral or legal, on either side. Moreover, it is the duty of every seller of immoveable property to secure his purchaser in quiet and peaceable enjoyment of the subject of the sale. This obligation cannot be considered as discharged by the mere signing of the sale-deed, but will continue until the purchaser has got an indefeasible title to the property which the seller purported to convey. Even in the absence of the payment of the additional sum of Rs. 25, I should be prepared to hold that there was consideration for the contract to execute a fresh sale-deed. In this view of the case, it becomes unnecessary to deal further with the questions whether the verbal agreement of 1904 was fully performed and whether its enforcement is now barred by limitation. The appellants' case has no merits, but is an unscrupulous attempt to take advantage of the respondent's failure, owing to the sickness and the death of the original purchaser, to get his sale-deed registered within the time allowed by the Registration Act.

This second appeal must be dismissed with costs.

In Second Appeal No. 1645 of 1913 the seller seeks to treat the purchaser as trespasser, to eject him and to recover mesne profits from him during his occupation. He alleges that no consideration was paid for the sale of 1906 and relies on the fact that the sale-deed was not registered.

In *Kurri Veerareddi* v. *Kurri Bapireddi* (1)

(1) 1 M. L. T. 153; 29 M. 336; 16 M. L. J. 395 (F. B.).

the question was considered by a Full Bench whether a contract of sale followed by delivery of possession could, when there was no registered sale-deed, be pleaded in defence to an action for ejectment, and the question was answered in the negative. It was pointed out, however, by two of the learned Judges that the defendant could avoid the difficulty by suing for specific performance and getting the action in ejectment postponed pending the result of his suit. That is exactly what has been done in this case, and I have no difficulty, therefore, in deciding that the issne of this suit must follow the result of the suit for specific performance and that this second appeal must be dismissed with costs.

COUTTS-TROTTER, J.—In Second Appeal No. 1644 of 1913, I agree and I only desire to add a few words in deference to the very able argument advanced on behalf of the appellants by Mr. Krishnaswami Aiyar. He very frankly and, in my opinion, very wisely admitted that his clients' case on the facts as found was devoid of merits and rested wholly on contentions of law. That admission makes it only the more incumbent on us to see that full effect is given to his strict legal rights. In order to ascertain what they are, it is necessary to go carefully into the facts of the case. The facts of the case are as follows:—In 1904 there was an agreement by the 1st defendant to sell the lands in dispute to Periana Gounden, the plaintiffs' predecessor-in-title, for a sum of Rs. 200. Possession was given under that contract to the purchaser and the 1st defendant has been out of possession ever since. The purchase price was paid and a sale-deed was executed on the 2nd October 1906. That document was handed to the purchaser, but for reasons which are now immaterial, it was never registered according to to law. It was argued for the appellants that the transaction was then complete and that the 1st defendant had done all that was required of him and that Rs. 200, which was the consideration for that transaction, was exhausted by it and could not be further pleaded in aid to support any later transaction. With those contentions I agree. I do not think the vendor was under any obligation to register the document which he had given and if the matter stopped there, I think the plaintiff's suit would fail on the grounds that he had no legal title perfected by registration and that any suit to enforce that contract would be barred by limitation. But the matter did not stop there. It is clear that at some time or other between October 1906 and October 1909, the 1st defendant promised to execute a new sale-deed so as to make good the title of the purchaser. It is said that for that agreement there was no consideration and that in so far as the lower Court has purported to find that there was consideration, that finding is unsupported by any evidence.

Now the last date for registration of the original sale-deed (Exhibit A) was March 1907 and Perianna Gounden, the original purchaser died in October 1907. At some period before his death Perianna Gounden unquestionably paid the 1st defendant a further sum of Rs. 25. An expression is used which is said to indicate that that was a gift; but I do not think that that expression can be pressed to mean more than this: that it was a payment which he regarded as being one that he was under no moral obligation to make or do. I think on the known facts of the case there was no moral obligation on him to pay it. In October 1909 a stamp for Rs. 3 was purchased, it is not material by whom, out of moneys provided by the plaintiffs and that stamp would be the requisite stamp on a sale for consideration of Re. 225. Now on that the learned Judge in the lower Appellate Court came to the following conclusions which are to be found on page 17 of the printed pleadings paper. He says thus:—"If the paper, that is, the stamp, was purchased in accordance with the agreement of October 1909, there would appear to be no reason to doubt that the 1st defendant himself purchased it." That I think is an indication that he was prepared to find that the stamp was purchased in accordance with the new agreement. He goes on: "There is also evidence that as an inducement to 1st defendant to execute a fresh sale-deed he was even paid an extra sum of Rs. 25 over and above the price of Rs. 200 already paid. This extra sum of Rs. 25 was obviously intended as a consideration for the fresh agreement and it is probable, therefore, that as it did not form part of the original agreement it

was not considered necessary to mention it, either in the plaint or in the criminal proceedings. That a stamp paper of the value of Rs. 3 was purchased lends some support to this payment of Rs. 25 and probably the parties intended to bring about a sale-deed for Rs. 225." Now it is said that that finding is unsupported by the evidence. I, therefore, turn to what the evidence in regard to that matter is. We find it in the depositions of two on behalf of the plaintiffs, witness No. 1 and witness No. 8 for the plaintiffs. Plaintiffs' witness No. 1 says this: "As the time for registration was over, I asked 1st defendant to buy a fresh stamp paper for Rs. 3 and gave him Rs. 3 and he bought a stamp paper and gave it to us: he gave us this stamp. My brother's wife paid Rs. 3 to 1st defendant. We agreed to pay him Rs. 25 in excess as a present (that is the translation of the *Tamil* word '*enamaga*') and my brother paid him Rs. 25, it appears. As we refused to sell some other property to 1st defendant and sold it to a *parian* as previously agreed, he refused to execute a fresh sale-deed." And plaintiffs' witness No. 8 on page 34 of the printed documents paper says this: "Then 1st defendant agreed to execute a fresh sale-deed in respect of the plaint lands on our advising him to do so, and so Muthammal paid me Rs. 3 for a stamp-paper and I paid it to 1st defendant;" and then in cross-examination he says, "I was told by my sister that Rs. 25 was paid in addition to Rs. 200 and I said that three rupees stamp must be purchased." I agree with the contention of the learned Pleader for the appellants that this is clearly not evidence, and I do not think we need pay any attention to it in the absence of any means of knowing what question was put to elicit that answer. But it is not difficult from the other evidence to conclude that something of the sort must have happened.

Now reading that evidence, what is the proper inference to be drawn from it? I think the proper inference to be drawn is this: that sometime between March 1909—before that date there would be no object in paying a further sum of money to get the document registered in accordance with the original agreement—and his death in October 1909 the original purchaser, Perianna Koundan, paid Rs. 25 to the 1st defendant in order to induce him to execute a new document of title and that he agreed to do so; that that agreement remained in force and unexecuted until the purchase of the three rupees stamp was made in October 1909. I think that there was good consideration for that fresh agreement and that the 1st defendant first definitely broke it when he refused to make use of the stamp provided for the purpose and execute a fresh sale-deed in October 1909. I think that the plaintiffs' right to sue on this agreement accrued on that date and that, therefore, the suit which was filed on the 26th July 1910 is not barred by limitation. I, therefore, agree that the appeal fails and must be dismissed with costs.

IN SECOND APPEAL NO. 1645 OF 1913.

With regard to the appeal in the other suit, so far as the claim for possession of the property is concerned, in view of the decision in the earlier suit any relief of that kind at this date would obviously be useless and futile; and, therefore, this appeal resolves itself into a claim for mesne profits in respect of the claim for possession during the period when the purchaser had no legal title to the land. It may be conceded for the purposes of the argument that the appellants were entitled to possession and, therefore, by the Transfer of Property Act, would in the ordinary course be entitled to the rents and profits of the land. That seems to be the effect of the decision in *Kurri Veerareddi* v. *Kurri Bapireddi* (1) and though doubts have been cast upon that decision, it is not necessary to question its authority for the purpose of the present case. But a decree for possession would be, as I said, futile; and so the appellants only claim mesne profits. The essence of a claim for mesne profits is this: that it rests upon an agreement implied in law that when one person occupies property of another, he must be deemed to have tacitly assented to the condition that he is liable for an occupation rent in respect of that occupation. Now the facts here are quite inconsistent with any such implied obligation at all. The appellant knew perfectly well

the exact relation between himself and the person to whom he had agreed to sell the land. He knew that he was under a moral obligation not only to allow him to have possession, but to perfect his title to that possession by the execution of the necessary documents, and I think it is impossible to say that, such being the circumstances under which the possession was taken, there was an implied agreement between them that he should pay mesne profits in respect of an occupation to which, to the knowledge of both the parties, he was clearly morally entitled and only required the formal execution of a document.

I think that this appeal also fails and should be dismissed with costs.

Appeals dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 652 OF 1913.

March 11, 1915.

Present:—Mr. Justice Shadi Lal and Mr. Justice Rossignol.

RADHU RAM—PLAINTIFF—APPELLANT

versus

Malak MOHAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 44, 91—Hindu Law—Joint family—Alienation of joint family property—Suit by minor member after attaining majority against vendee for possession of his share in immoveable property—Limitation.

The plaintiff's brothers during his minority sold the joint family land to the defendant including the share of the plaintiff. After expiry of three years from the date of plaintiff's attaining majority he sued for his share of the land. The suit was dismissed as barred by limitation under Article 44 of the Limitation Act. On second appeal it was contended for the respondents that the suit was rightly dismissed and that it was in any case barred under Article 91:

Held, that the suit was not barred, that neither Article 44 nor 91 was applicable to the case and that the plaintiff had 12 years to sue for possession of the land. [p. 201; col. 1.]

That the sale must be regarded as one made by the adult members of the family on behalf of the entire co-parcenary body including themselves and their youngest brother. The alienation could not be viewed as one made on behalf of the minor by his guardian to make Article 44 applicable, for minor's undivided share in joint family estate is not property which can be dealt with by his guardian. [p. 200, col. 1.]

Gharibullah v. *Khglak Singh*, 25 A. 407 at p. 413 (P.C.); 5 Bom. L. R. 478; 7 C. W. N. 681; 30 I. A. 165; *Bindaji* v. *Muthura Bai*, 30 B. 152; 7 Bom. L. R. 809, referred to;

That Article 91 is not intended to apply to suits for possession of immoveable property alienated by managers of joint families and endowments or by Hindu widows or other persons whose powers are restricted. In such cases if the person who executes the document had no authority in law to execute it, the plaintiff need not sue to set it aside. An express prayer in the plaint for the cancellation of such an instrument may be treated as not an essential part of the plaintiff's relief. [p. 200, col. 2.]

Unni v. *Kunchi Amma*, 14 M. 26; *Balwantrao* v. *Ramkrishna*, 3 Bom. L. R. 682; *Sheo Shankar* v. *Ram Shewak Chowdhri*, 24 C. 77 at p. 82 and *Din Dial* v. *Har Narain*, 16 A. 73; A. W. N. (1894) 1, referred to.

Second appeal from the decree of the Additional Divisional Judge, Shahpur Division at Lyallpur, dated the 3rd January 1913, reversing that of the District Judge, Jhang, dated the 24th August 1911, decreeing plaintiff's claim.

Mehta *Bahadur Chand*, for the Appellant.

Bhagat *Govind Das*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the appellant, Radhu Ram, for posession of his share in the land sold during his minority by his brothers, Das Ram and Sadhu Ram, by a registered sale-deed, dated the 20th August 1900. The Court of first instance decreed the suit in favour of the plaintiff, but the learned Divisional Judge on appeal held that Article 44 of the Limitation Act was applicable and that as the action was brought after the expiry of three years from the date of the plaintiff's attaining majority, it was barred by time under that Article. The plaintiff has preferred a second appeal to this Court, and after hearing the learned Pleaders on both sides, we have come to the conclusion that the finding on the point of limitation cannot be upheld and that this appeal must be accepted and the case remanded to the lower Appellate Court for decision on the merits.

The learned Divisional Judge has accepted the contention of the respondents that the three brothers constituted a joint Hindu family at the time of the alienation and we are of opinion that that finding is correct. The pre-

sumption is certainly in favour of the jointness and the evidence on the record is wholly insufficient to rebut that presumption. The sale must, therefore, be regarded as one made by the adult members of the family on behalf of the entire co-parcenary, body including themselves and their youngest brother who was then a minor. We are, however, unable to concur in the view that, so far as the minor is concerned, the alienation should be viewed as one made on his behalf by his guardian, and that the present suit is to be considered as one brought by a *quondum* minor to set aside a sale by his guardian within the purview of Article 44. The law is fairly established that the minor's undivided share in the joint family estate is not property which can be dealt with by his guardian. As observed by their Lordships of the Privy Council in *Gharibullah* v. *Khalak Singh* (1): "It has been well settled by a long series of decisions in India that a guardian of the property of an infant cannot properly be appointed in respect of the infant's interest in the property of an undivided *Mitakshara* family. And in their Lordships' opinion those decisions are clearly right, on the plain ground that the interest of a member of such a family is not individual property at all, and that, therefore, a guardian, if appointed, would have nothing to do with the family property. And applying these observations to the present case their Lordships think that the mortgages under consideration were not mortgages by the guardian, assuming the mother to have been a guardian, but mortgages by the family, entered into by the *karta* of the family with the concurrence of Jangli, the only other adult member of the family, if indeed he was an adult." See to the same effect *Bindaji* v. *Mathura Bai* (2). In view of these observations we think that Article 44 is wholly inapplicable and that the decision of the lower Appellate Court cannot be maintained.

The learned Pleader for the respondents has asked us to apply Article 91 to the case, but we think that that Article cannot be invoked for the purpose of establishing the bar of limitation against the plaintiff. An instrument of alienation, executed by a person who, not being the *full* owner of the property, has a *conditional authority* only to dispose of it, need not be set aside if the condition under which the authority might be exercised had not been fulfilled. Such are the cases of a sonless Hindu widow, the *karta* or manager of a joint family and the *karnavan* of a Malabar *tarwad*. In these cases it is not only not necessary, but it is not possible, to have the instrument of alienation cancelled and delivered up, because, as between the *parties* to it, it may be a perfectly valid instrument. All that is needed is a *declaration* that the plaintiff's interest is not affected by the instrument, and that declaration is merely *ancillary* to the relief which may be granted by delivery of possession. The plaintiff may treat the instrument as non-existent, and sue for his right as if it did not exist. Even an express prayer in the plaint for the cancellation of such an instrument may be treated as not an essential part of the plaintiff's relief. [See *Unni* v. *Kunchi Amma* (3)]. In *Balwantrao* v. *Ramkrishna* (4), the Bombay High Court approved of this Madras ruling, and applied it to the case of a deed of sale of joint family property executed by a *Mitakshara* father without the assent of his son. As the sale was not proved to have been made for any purpose sanctioned by Hindu Law, the deed was not binding on the son, and Article 91 was held to be inapplicable to the son's suit to recover his share of the property sold. Article 91 has never been applied to an alienation by the manager of an endowment, the manager of an infant heir, a Hindu widow or any other of the persons whose powers are placed on the same footing by *Hanuman Prasad Pandey's* case. If the person who executes the document had no authority in law to execute it, the plaintiff need not sue to set it aside but may treat it as of no effect [*Sheo Shankar* v. *Ram Shewak Chowdhri* (5)]. See to the same effect *Din Dial* v. *Har Narain* (6). Mr. Govind Das has not been able to cite a single judgment in which Article 91 has been applied to the suit of a member of *Mitak-*

(1) 25 A. 407 at p. 416 (P. C.); 5 Bom. L. R. 478; 7 C. W. N. 681; 30 I. A. 165.
(2) 30 B. 152; 7 Bom. L. R. 809.
(3) 14 M. 26.
(4) 3 Bom. L. R. 682.
(5) 24 C. 77 at p. 82.
(6) 16 A. 73; A. W. N. (1894) 1.

shara family for possession of his share of the property alienated by the manager thereof and on the authorities cited above, we are of opinion that the period of limitation for a suit of this kind is twelve years.

We must, therefore, hold that neither Article 44 nor Articale 91 operates as a bar to the suit and that as it has been brought within twelve years from the date of the alienation, it is clearly within time. The lower Appellate Court has not given definite findings on the merits of the case and we must, therefore, accept the appeal, set aside the judgment and the decree of the lower Appellale Court and remand the case for decision on the remaining points in controversy between the parties. The Court, fee on the memorandum of appeal shall be refunded and other costs shall be costs in the cause.

Appeal accepted; Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 917 OF 1914.

March 17, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Coutts-Trotter.

VELAPPA GOUNDEN—PLAINTIFF—APPELLANT

versus

PALANI GOUNDEN AND ANOTHER—DEFENDANTS NOS. 1 AND 2—RESPONDENTS.

Document, construction of—Principle—Plain and unambiguous words—Court, duty of—Evidence Act (I of 1872), s. 94—Deed—Language plain and definite—Evidence, admissibility of, to prove language applies to other facts.

Per *Spencer, J.*—When the language used is plain and applies accurately to existing facts, evidence is not admissible for the purpose of showing that it was not meant to apply to those facts. [p. 201, col. 2.]

Per *Coutts-Trotter, J.*—Where the words used in a document are definite and unambiguous, the Court must not travel outside the words used to found or confirm speculations as to the parties to the document having in fact intended other than what they have said. [p. 202, col. 2.]

Shore v. *Wilson*, 9 Cl. & F. 355; 11 Sim. 592; 7 Jur. 781; 8 E. R. 450; 57 R. R. 2, followed.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Coimbatore, in Appeal Suit No. 9 of 1913, preferred against that of the Additional District Munsif of Tirupur, in Original Suit No. 677 of 1911.

Mr. *T. Rangachariar*, for the Appellant.

Messrs. *S. Swaminadhan* and *S. Ranganadha Aiyar*, for the Respondents.

JUDGMENT.

SPENCER, J.—Five survey fields, Nos. 367, 368, 369, 371 and 421, measured acres 10, cents 11 according to the old survey. The 1st defendant sold on 18th November 1909 a moiety, *viz*, acres 5, cents $5\frac{1}{2}$ to the 2nd defendant.

To make up this extent he included the whole of survey Nos. 368, 369 and 371, which amounted to acres 4 and cents 46, and added thereto $59\frac{1}{2}$ cents out of survey No. 367, the total area of which was acres 4, cents 18.

Of the five above-mentioned fields which descended to the 1st defendant and another from a common ancestor, no portion of survey No. 421 was included in the 1st defendant's sale-deed to the 2nd defendant.

It was subsequently ascertained at the re-survey that the extent of land in survey No. 367 in the 1st defendant's possession was acre 1, cents 29. Deducting the $59\frac{1}{2}$ cents which he had sold to the 2nd defendant there remained thus $69\frac{1}{2}$ cents. He sold those $69\frac{1}{2}$ cents to the plaintiff on the 29th December 1910 and the plaintiff brought this suit to recover this portion.

He succeeded in the first Court, but failed in the Appellate Court when the second defendant appealed.

The Subordinate Judge misdirected himself when in his judgment he set out to consider whether the parties intended that the whole extent which came into the 2nd defendant's possession should be conveyed by the earlier sale-deed. The District Munsif stated the point for consideration correctly when he observed that the main point for determination was the extent of land actually sold to the 2nd defendant by the 1st defendant according to Exhibit I. When the language used is plain and applies accurately to existing facts, evidence is not admissible for the purpose of showing that it was not meant to apply to those facts (section 94 of the Evidence Act). Now Exhibit I declares that the extent sold to the 2nd defendant

out of survey field No. 367 is 59½ cents and nothing more ("only these items of land I have sold" together with easement rights of irrigation.)

It further mentions that this extent was in the 1st defendant's enjoyment ("those in my enjoyment are" and then the details follow) and that it was on the northern side of the field.

Boundaries are not given. In the absence of boundaries, should the description of the plot afforded by its exact extent and the assessment payable on that extent prevail? Or, are we to ignore all that and draw the inference that because the vendor declares that the plots which he is selling are in his possession, there was really a sale of all the extent which he happened to possess at that date within the limits of the field?

To adopt the latter course would be, in my opinion, to disregard the meaning of plain language and to has our decision upon mere surmise, preferring vagueness of description to certainty. If *A* says to *B*, "I sell you one acre out of Whiteacre and the portion of Blackacre which is in my possession", it becomes necessary to inquire how much of Blackacre was in *A*'s possession at the date of sale, but it does not signify whether *A* possesses one acre or two acres of Whiteacre, as mention is made of a definite area. Of two kinds of descriptions, preference must be given to the more definite.

I consider that the appeal should be allowed and that reversing the lower Appellate Court's judgment, the decree of the District Munsif should be restored with costs throughout, with the modification that the 2nd defendant shall be allowed to select his 59½ cents out of the whole acre 1, cents 29 and the balance should be placed in the plaintiff's possession.

COUTTS-TROTTER, J.—This was an action brought by the plaintiff to establish his title to certain land sold to him by a deed of 29th December 1910 by Ramasami Gounden, the first defendant. The deed purported to convey to him 69½ cents of land, forming a portion of Government Survey No. 367 in the village of Savandappur; it was duly executed and registered, and no question arises under it. When he sought to take possession, however, the plaintiff found himself confronted by a claim to the land put forward by the 2nd defendant, Palani Gounden, who based his title upon a previous sale-deed executed in his favour on the 18th November 1909 also by the 1st defendant, which was alleged to have conveyed the self-same piece of land to the 2nd defendant. The plaintiff thereupon brought his action against both the defendants to try the issue of title as between himself and the second defendant, and the sole issue both in the action and the appeals is as to whether the sale-deed of 18th November 1909, on its true construction, did in fact convey this parcel of land to the second defendant. The trial Judge decided that it did not; the Subordinate Judge took the opposite view, and this Court has to decide, on the plaintiff's appeal, which construction was the right one.

The rule of construction which the Court must obey in determining this question is well understood and long established and is best expressed in the well-known opinion of Tindal, C. J., in *Shore* v. *Wilson* (1). Though the object of the Court must always ultimately be to ascertain the intention of the parties, yet the intention must be gathered from the words they have used where those words are definite and unambiguous; and the Court must not travel outside the words used to found or confirm speculations as to their having in fact intended something other than what they have said.

Turning to the words of the present document, it is obvious that what was conveyed was a portion of Survey No. 367 and the only question is, what portion. The operative words begin with an enumeration of some property belonging to the first defendant and another person jointly, and among it is field No. 367 with an acreage of 4·88 acres. The document then goes on, "out of these, those in my enjoyment are" certain other properties, and "the northern side in field No. 367 acre 0—59½.....only these items of land have I sold". I do not feel on very sure ground in attempting to construe words

(1) 9 Cl. & F. 355; 11 Sim. 592; 7 Jur. 781; 8 E. R. 450; 57 R. R. 2.

which are a translation of the original language, but I do not feel it possible to hold that there is any clear definition of the portion of Survey No. 367 other than that it consists of 59½ cents. As my learned brother is acquainted with the original *Tamil* and has come to the same conclusion, I am encouraged to think that my judgment is not vitiated by ignorance of the language used by the parties. And it is a comfort to reflect that this construction, while leaving the 2nd defendant with the same acreage that he paid for, prevents a gross injustice to the plaintiff.

I agree that the appeal should be allowed with costs.

Appeal allowed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 234 OF 1914.

March 9, 1914.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

GODAVARTHI PERIA *alias* ETHIRAJAYYA—PETITIONER—APPELLANT

versus

GODAVARTHI LAKSHMIDEVAMMA AND OTHERS—RESPONDENTS.

Costs to abide—Costs to abide and follow the result, meaning of.

The words "to abide and follow the result" convey the suggestion that the successful party must be given his costs. But the words "abide the result" only connote that the order as to costs is to await till decision is given in the case. They do not have the effect of fettering the discretion of the trying Court.

Appeal, under clause 15 of the Letters Patent, against the judgment of the Hon'ble Mr. Justice Tyabji, in Civil Revision Petition No. 348 of 1913, preferred against that of the District Court of Guntur, in Original Petition No. 196 of 1910.

Mr. *T. Ramachandra Row*, for the Appellant.

Mr. *N. S. Narasimhachari*, for the Respondents.

JUDGMENT.—In remanding the civil miscellaneous appeal, the High Court ordered "that the costs shall abide the result". On the re-hearing the Court below in the exercise of its discretion refused to give costs to the appellant. It is contended that the language of the order of the High Court makes it incumbent upon the Court below to award costs to the person who succeeds, and that the District Judge has no jurisdiction to pass any other order: We are not prepared to agree with this contention. If the words used were "to abide and follow the result", they may be interpreted as conveying the suggestion that the successful party must be given his costs. But the words "abide the result" only connote that the order as to costs is to await till decision is given in the case. They have not the effect of fettering the discretion of the trying Court. In *Templeton* v. *Laurie* (1) the language was "to follow the event." The learned Judge held that the Court below had no discretion in the matter. The expression used in the Bombay judgment have the same import as the words "to abide and follow the result."

The words '*abide the result*', broadly speaking, are equivalent to the words "costs in the cause." We are of opinion that the Court below had a discretion to apportion costs. The observations of Lord Esher in *Brotherton* v. *Metropolitan District Joint Committee* (2) support this view. The decision in *Fani Bhushan Roy Chowdury* v. *Rama Sundari Debi* (3) is not inconsistent with this conclusion as pointed out by Mr. Justice Tyabji, The learned Judge is right in the view he has taken.

This Letters Patent appeal is dismissed with costs.

Appeal dismissed.

(1) 25 B. 230 at p. 237; 2 Bom. L. R. 244.
(2) (1894) 1 Q. B. 666; 9 R. 154; 70 L. T. 218; 42 W. R. 273.
(3) 4 C. W. N. 343.

OFFICIAL ASSIGNEE *v.* BANGY ABDUL RAZACK SAHIB.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 92 OF 1913.

February 23, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

THE OFFICIAL ASSIGNEE OF MADRAS —APPELLANT

versus

BANGY ABDUL RAZACK SAHIB AND OTHERS—RESPONDENTS.

Presidency Towns Insolvency Act (III of 1908), s. 56 *—Vendee in good faith, when not—Sale, validity of—Official Assignee.*

Where a sale was made for a price appreciably lower than the real value of the property and the vendee was actuated by the intention to get a much larger benefit for himself than he was fairly entitled to as a diligent creditor and where he conspired with the vendor to assist the vendor to defraud or delay other creditors:

Held, that the vendee was not a vendee in good faith within the meaning of section 56 of the Presidency Towns Insolvency Act; [p. 204, col. 2.]

that the sale was void as against the Official Assignee. [p. 205, col. 1.]

Appeal from an order of the Hon'ble Mr. Justice Bakewell, dated the 25th September 1913 in the Insolvency Jurisdiction of this Court, in Insolvency Petition No. 110 of 1913 in the matter of A. S. Mahammad Oosman Sahib and Co., Insolvents.

FACTS.—The Official Assignee presented a petition on behalf of the general body of creditors of an insolvent, named A. S. Mahammad Oosman, a merchant in George own, to the original side of the High Court before Mr. Justice Bakewell sitting as Commissioner in Insolvency. The insolvent filed his schedule on 18th May 1910, but prior thereto he had conveyed all his available immoveable property in favour of his father-in-law, the alleged consideration being Rs. 5,800, a major portion of which was in respect of an old debt due to the vendee and Rs. 1,500 paid in cash before the Sub-Registrar at the time of the registration of the sale-deed. Mr. Justice Bakewell held that, the vendee "having acted in good faith," the sale could not be impeached.

Against that order the Official Assignee preferred this appeal.

Mr. *M. K. Ramasawami Aiyar*, for the Appellant.

Messrs. *M. A. Tirunarayana Chariar* and *Short & Bewes & Co.*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The only question in this appeal is whether the sale deed for Rs. 7,000 executed by the insolvent to his father-in-law, who is now represented by the respondents, can be upheld as against the Official Assignee. In other words, the question is whether Abdul Kadir, the vendee, was a "purchaser in good faith and for valuable consideration" within the meaning of section 55 of the Insolvency Act. If the sale was made for an adequate price and if further the vendor's debt, which was discharged out of the purchase-money, was equal to or nearly equal to the value of the property, I am not disposed to treat the transaction as fraudulent, or to hold that the vendee is not a vendee in good faith. If, however, the sale was for a price appreciably lower than the real value of the property and if there are facts indicating that the vendee was actuated by the intention to get a much larger benefit for himself than he was fairly entitled to as a diligent creditor or that he conspired with the vendor to assist the vendor to defraud or delay other creditors, then the vendee cannot be treated as a vendee in good faith.

The Rs. 7,000 purchase money is made up of Rs. 5,817 and odd due by the insolvent to the vendee on prior dealings and a sum of Rs. 1,150 alleged to have been paid in cash to the insolvent. Though this sum of Rs. 1,150 was paid before the Registering Officer, I think, that it was a sham payment as the insolvent's books do not contain any entry about the payment of this Rs 1,150 and the entries in the account books of the vendee contain suspicious recitals as to the source from which the Rs. 1,150 was obtained for payment before the Sub Registrar. Having also in view the relationship of the parties, I am unable to agree with the learned trial Judge that the sum of Rs.1,150 was really paid to thei nsolvent. If, however, the value of the property was only Rs. 7,000, which is the price mentioned in the sale-deed, it may be that, notwithstanding the failure to pay Rs. 1,150, the transaction might be upheld as there *was consideration for the sale* to the extent of nearly Rs. 6,000. But on the evidence of the plaintiff's 6th witness

which I see no reason to disbelieve, I am satisfied that the value of the properties sold, excluding the six shops, was about Rs. 13,000 and adding the value of the shops, the total value of the properties sold was about Rs. 14,000, just double the price mentioned in the sale-ded. I am unable to agree with the learned Judge that Rs. 7,000 was fair price, because the sale was in the nature of a forced sale. There is nothing to show that the insolvent could not have sold the properties for more than Rs. 7,000 or that there was such pressure placed by his father-in-law on him that he was obliged to part with these properties at such a great loss to himself.

The conduct of the insolvent, from a few days before the date of this sale till he was adjudicated an insolvent in May 1910, also clearly indicates his intention to keep his properties out of the clutches of his other creditors and to defraud his other creditors.

Of course, it might be said that though the insolvent might have had a fraudulent intention, the vendee is not a stranger to the insolvent and the probabilities are that the vendee and the vendor were acting together in collusion to defraud the other creditors.

Following the principles laid down in the case *Chidambaram Chettiar* v. *Sami Aiyar* (1), I would hold that the sale was wholly void as against the Official Assignee and I would set aside the judgment of the learned Judge and declare accordingly in favour of the Official Assignee, who is entitled to get his costs in both Courts from the respondents. This order is of course without prejudice to the respondents proving their claim as unsecured creditors in respect of the moneys due to Abdul Kadir by the insolvents.

Costs to be on the original side scale certified for two Counsel.

NAPIER, J.—I concur.

Appeal allowed.

(1) 30 M. 6; 16 M. L. J. 427; 1 M. L. T. 351.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 2 OF 1915.

April 19, 1915.

Present:—Justice Sir P. C. Banerji, KT.

SHEO PRASAD AND ANOTHER—DEFENDANTS —APPELLANTS

versus

LALA RAM—PLAINTIFF—RESPONDENT.

Contribution, suit for—Court, duty of, to determine liability of each defendant—Joint decree erroneous.

In a suit for contribution it is the duty of the Court to determine the amount of liability of each defendant and to make a decree apportioning to each of them the amount for which he is found to be liable. A joint decree is clearly erroneous. [p. 206, col. 1.]

In such a suit what the Court ought to determine is whether the plaintiff has paid for the defendants their share of liability for the original debt. So far as the creditor is concerned, he is entitled to recover what is due to him from all the debtors, but as between the debtors, each of them is liable for so much of the debt as he has not paid to the creditor and as the plaintiff has paid for him. [p. 206, col. 1.]

Petition for revision against an order of the Officiating Small Cause Court Judge of Allahabad, dated the 17th June 1914.

Mr. *Haribans Sahai*, for the Appellants.

Mr. *K. N. Laghate*, for the Respondent.

JUDGMENT.—This application for revision arises out of a suit for contribution brought in the Court of Small Causes at Allahabad so far back as the year 1911. The case came up to this Court once before and after certain issues had been sent down to the Court below, it was finally remanded to that Court for re-trial in accordance with the judgment of Mr. Justice Tudball reported as *Lala Ram* v. *Sheo Prasad* (1). The facts are these:—

The plaintiff and the two defendants jointly took a lease from the Oudh and Rohilkhand Railway Company for cutting grass. The rent reserved by the lease was Rs. 2,000. The Railway received on account of rent the total sum of Rs. 1,533-5-6; for the balance, namely Rs. 466-10-6, a suit was instituted on behalf of the Secretary of State against the three defendants and a decree was obtained on the 28th of May 1909. The amount of the decree was realised from the plaintiff alone and thereupon he brought the suit, out of which this application for revision arises, for contribution against the two defendants. The.

(1) 20 Ind. Cas. 176; 11 A. L. J. 657.

suit was first dismissed, on the ground that it could not be maintained until after an account of the partnership had been taken. The defendants contended that they had paid off their share of liability for the rent and that nothing was due by them. After the remand by this Court the case was tried by the learned Judge of the Court of Small Causes and he made a decree for the full amount of the claim against the two defendants.

This decree is clearly wrong in one respect. It was made jointly against both the defendants. In a suit for contribution it is the duty of the Court to determine the amount of liability of each defendant and to make a decree apportioning to each of them the amount for which he is found to be liable. A joint decree is clearly erroneous.

There is another error in the decision of the Court below, and it is this.

The learned Judge thinks that because a decree was passed against the plaintiff and defendants, therefore the defendants are liable for 2/3rd of the decretal amount. This view also is clearly erroneous.

In a suit for contribution what the Court ought to determine is, whether the plaintiff has paid for the defendants their share of liability for the original debt. So far as the creditor is concerned he is entitled to recover what is due to him from all the three debtors, but as between themselves each of them is liable for so much of the debt as he has not paid to the creditor and as the plaintiff has paid for him. If the learned Judge had proceeded to try the case from this point of view, he would not have made a decree in the manner in which he made it. After the remand no evidence was given to show how the partnership account stood and, therefore, the case had to be tried independently of the partnership account, there being no materials before the Court to enable it to judge what would be the liability of each partner if a complete account of the partnership were taken.

As I have said above, the total amount of rent payable by the parties was Rs. 2,000; each of them was, therefore, liable out of that amount for Rs. 666-10-8. We have to see how much was paid by each of them out of this amount. From the evidence of Mr. Bowder, the Engineer of the the Railway, it appears that two sums of Rs. 500 each were paid up to the 19th of October 1907. There is no clear evidence as to who made these payments, that is to say, who found the funds with which this sum of Rs. 1,000 was paid. The plaintiff says in his deposition that he paid the first item of Rs. 500 out of funds in hand, by which he apparently meant the partnership funds, that is to say, the proceeds of the sale of grass. If that statement is true, then all the partners contributed that sum. As for the 2nd item there is an absence of evidence as to who contributed that sum. Mr. Bowder makes a somewhat vague statement on the point, as he says that one or other of the defendants must have paid the last six items mentioned by him. In the absence of clear evidence it must be presumed that the second sum of Rs. 500 was also paid by all the three persons; so that out of this sum of Rs. 1,000 each of the two defendants, Shiv Prasad and Shiv Tahal, must be deemed to have paid one-third, *i. e.*, Rs. 333-5-4. Mr. Bowder's evidence shows that Shiv Prasad paid Rs. 300 more on three different dates and that Shiv Tahal paid Rs. 233-5-6. In the absence of any evidence to show that this money was paid by them out of the proceeds of the partnership business, they must be presumed to have paid the two sums mentioned above. Therefore, the total amount contributed by Shiv Prasad must be held to have been Rs. 633-5-4 and that contributed by Shiv Tahal Rs. 566-10-10. Shiv Prasad and Shiv Tahal were, as I have said above, liable for Rs. 666-10-8 each. Therefore, the amount contributed by Sheo Prasad was short by Rs. 33-5-4 and that contributed by Shiv Tahal was short by Rs. 99-15-10. These are the amounts for which these two persons must be held liable to the plaintiff. The result is that I discharge the decree of the Court below and make a decree in the plaintiff's favour for Rs. 33-5-4 against Shiv Prasad and Rs. 99-15-10 against Shiv Tahal.

Having regard to all the circumstances of the case, I direct that the parties bear their own costs of the whole litigation including the costs in this Court.

Appeal allowed; Decree modified.

ROHILKHAND AND KUMAUN RAILWAY COMPANY v. ISMAIL KHAN.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 167 OF 1914.

March 5, 1915.

Present:—Mr. Justice Piggott.

THE ROHILKHAND AND KUMAUN RAILWAY CO.—DEFENDANT—APPELLANT

versus

ISMAIL KHAN—PLAINTIFF—RESPONDENT.

Railway—Goods consigned—Indemnity bond—Risk note form A—Goods, shortage of—Liability of Railway Company—Right of consignee.

Where the sender of goods through a Railway Company signs "risk note form A", he indemnifies the Company and makes it free from all responsibility for the condition into which the goods may be delivered to the consignee at destination and for any loss arising from the same. The consignee, however, is entitled to have the consignment weighed on the spot in the presence of some respectable servant of the Railway Company and it is the duty of the Railway servants responsible for the delivery of the goods to offer reasonable facilities for this operation. If the Railway servants do not allow the consignee to have the goods weighed at the time of delivery and thus let them remain lying in the Railway go-down to the detriment of the consignee, the Company is liable in damages. [p. 208, cols. 1 & 2.]

A risk note in form A is simply an indemnity bond by the sender for the benefit of the Company. It cannot in itself affect the rights of the consignee who is entitled to receive the consignment as ordered by him and to claim compensation in the event of the consignment suffering loss or damage. [p. 209, col. 2.]

Petition for revision against an order of the Small Cause Court Judge, Bareilly, dated the 21st July 1914.

FACTS.—A consignment of 11 tins of *ghi* was made over to the applicant Company at Tanakpur Railway Station for delivery to Ismail Khan at Bareilly. The sender was required to sign a risk note, as the goods were defectively packed and were liable to leakage and wastage. By this risk note, the sender covenants that he will hold the Railway Company free from all responsibility for the condition in which the goods may be delivered to the consignee. When the goods reached Bareilly, the consignee thought that five tins had suffered damage and he refused to take delivery except on certain conditions. After some time the Company sold the goods at auction. The plaintiff brought the present suit for damages, and it was decreed by the first Court. The defendant Company applied in revision to the High Court.

Mr. *B. E. O'Conor*, for the Appellant:—The applicant Company was not liable for any loss arising from leakage or wastage in transit. The consignor was required to sign the risk note with this object and the risk note having been signed, all responsibility of the Company ceased.

The Judge has decreed the suit on the ground also that the Company acted unreasonably in refusing delivery to plaintiff on his terms. The Company was not in any way bound to endorse the shortage on the Railway receipt. The plaintiff wanted an admission by the Company's servants of the shortage and wanted to supply evidence for his case from the Company, and this the Company could refuse to do. The consignee could not demand delivery subject to the condition that the shortage should be noted down by the Company on the receipt or in its books.

I rely on *Jwala Pershad* v. *Great Indian Peninsular Railway* (1).

Even if the endorsement had been made, the consignee could not sue the Railway Company for loss in view of the risk note and so no injury accrued to plaintiff by the conduct of the Company. The Company was always willing to help the plaintiff and up to the last moment before auction, it gave him notice to remove the goods under sections 55 and 56 of the Railways Act.

Dr. *S. M. Suleman*, for the Opposite Party:—The plaintiff did not sign the risk note. Plaintiff wrote several times to the Company. He wanted that the goods should be weighed at the Railway Station but the Company did not heed him. The Station, Master wanted receipt for the full amount of *ghee* and refused to weigh. This fact was represented to the Company. Still no action was taken.

The plaintiff never wanted the Railway Officials to endorse the shortage. He was willing to note it himself.

The execution of the risk note did not entitle the Company to demand receipt for the full quantity which was not delivered.

Even if the plaintiff could not have been able to sue the Company, he could sue the consignor and hence his attitude in wanting to note the shortage was reasonable.

Mr. *B. E. O'Conor*, in reply:—The Railway receipt was in possession of the plaintiff.

(1) 21 Ind. Cas. 448; 11 A. L. J. 772.

He could have endorsed the shortage on the receipt and given it to the Station Master. No one could prevent him from doing so. His attempt was to get an endorsement from the Station Master and to collect evidence in his favour.

JUDGMENT.—This is an application in revision on the part of the Rohilkhand and Kumaun Railway Company, against whom the opposite party, who was the plaintiff in the Court below, has obtained a decree for a sum of Rs. 311 from the Court of Small Causes at Bareilly. The case has been brought before this Court, because the defendant Company desires to obtain an authoritative decision as to the respective rights and liabilities of the parties in respect of goods consigned under what is known as a "risk note, form A." The essential facts are simple. The plaintiff was the consignee of eleven tins containing *ghi* which were made over to the defendant Company at Tanakpur Railway Station for delivery to the plaintiff at Bareilly. When the consignment was tendered, it appeared to the Railway Company that the goods were so defectively packed as to be liable to damage, leakage or wastage in transit. Accordingly the sender was required to sign the risk note above referred to. This document is in effect an indemnity bond, whereby the sender covenants that he will hold the Railway Company harmless and free from all responsibility for the condition in which the aforesaid goods may be delivered to the consignee at destination, and for any loss arising from the same. When the consignment reached Bareilly, the consignee was of opinion that the five out of the eleven tins had suffered damage in transit. He refused to take delivery except on certain conditions. A lengthy correspondence followed, and finally the defendant Company sold the *ghi* at auction. The *ghi* had clearly deteriorated in value and the price realised was a small one. The Court below has held that the plaintiff was entitled to compensation, which has been assessed at the sum already stated. With regard to the position of the parties at the moment the consignee inspected the goods at Bareilly Station and the proper course for the consignee, to have followed under the circumstances it seems to me that the principles involved are fairly obvious and have been very correctly laid down by this Court in the case of *Jwala Pershad* v. *Great Indian Peninsular Railway* (1), and in another case which is printed as a foot-note* to the report above-mentioned. The consignee was entitled to have the goods weighed then and there before he surrendered the railway receipt. When this had been done, he was entitled to endorse on the back of the railway receipt a statement that he accepted delivery of the consignment as it stood, while taking note of the fact that its actual weight was only so much and not the full weight as given in the railway receipt itself. He would probably also have been entitled to add to his endorsement any remarks which he might think proper to make for his own protection regarding the appearance of the consignment at the moment of his accepting delivery. The Station Master or other local officials of the Railway Company at the delivery Station were bound to offer to the consignee reasonable facilities for weighing the goods on the spot, and would, in my opinion, be going beyond their legal rights if they insisted on the surrender of the railway receipt, with a mere endorsement to the effect that the goods therein specified had been duly received, before allowing the consignee access to the goods for the purpose of verifying the weight. It being obvious, on the other hand, that the Railway Company were bound in self-protection, and would be perfectly entitled, to maintain effective custody of the goods through their servants and agents until the railway receipt was delivered up to them, the practical result is that the plaintiff's rights were to have this consigment weighed on the spot in the presence of some respectable servant of the Railway Company and that it was the duty of the Railway servants responsible for the delivery of the goods to offer reasonable facilities for this operation. Now it is quite certain that the consignee in this particular case was not allowed to do what I have above suggested. The case for the defendant Company is that the only reason why he was not allowed to do so was that he did not content himself with asking merely for this, but he required the Station Master or some other official of the Company to certify by his signature, either on

*See *Koka Mal* v. *G. I. P. Railway*, 21 Ind. Cas. 428; 11 A. L. J. 775 *note*.—*Ed.*

the endorsement proposed to be made on the railway receipt, or on some other document, that the consignment in question was in fact being delivered short weight and perhaps also in a damaged condition. This is really a simple issue of fact, and the utmost that could be said in support of this application for revision would be that the position has not been fully appreciated in the Court below and the mind of that Court not directed with sufficient clearness to the investigation of the precise question of fact on which the rights or liabilities of the parties should have been made to depend. I think there is a certain amount of force in this argument; but I am not disposed to allow it to prevail. For one thing I am of opinion that, if there was any misapprehension of the essential issues of the case in the Court below, that was largely due to the attitude taken up by the defendant Company in their pleadings before that Court, a point as to which I have a few words to add presently. I am further of opinion that, from any possible point of view, the Company in this particular instance must be held to have made themselves liable to the payment of *some* damages at any rate to the plaintiff by reason of the delay which took place before the claim of the plaintiff consignee to take delivery, either of a portion only of the consignment or of the entire consignment subject to conditions, was either accepted or definitely rejected on behalf of the Company. It seems to me that those responsible for the action taken on behalf of the defendant Company in this matter were not only under some misapprehension as to the extent of their legal rights, but were at the same time using their advantageous position, as being the party in possession of goods of a peculiarly perishable nature, in order to put pressure on the consignee to accept delivery on their own terms. The Company was in no hurry, being under the impression that any loss which might result from the deterioration of the *ghi* lying in their godown would inevitably be borne by the consignee. There was always the possibility in their favour that the latter might become nervous as to the extent of this loss and the soundness of his legal position, and might close the transaction by accepting delivery on a railway receipt endorsed with a mere acceptance of the goods as despatched. From the arguments that have been addressed to me in support of this application, I think there is some misapprehension on the side of the Railway Company with regard to the legal effect of a risk note in "form A." That document is simply an indemnity bond by the sender for the benefit of the Company. It cannot in itself affect the rights of the consignee. The latter is obviously entitled to receive the consignment as ordered by him and to claim compensation in the event of the consignment suffering loss or damage. The question whether, in this particular case, if delivery had been made on the railway receipt endorsed as already suggested, the consignee would have been entitled to claim damages in the first instance from the Railway Company, leaving the Company to enforce their legal remedy against the sender under the risk note, is one which does not arise on the facts as they stand. As a matter of fact I have a little doubt that any consignee, claiming damages under the circumstances suggested, would, in his own interests, have impleaded both the Railway Company and the sender and would ordinarily, at any rate, have obtained a decree against the sender alone, the latter having accepted all responsibility for the condition of the consignment when placed in the hands of the Railway Company. As the case stands, I am clearly of opinion that the defendant Company have made themselves liable in damages to the plaintiff by their conduct, when delivery was asked for by the latter. Even supposing that there was some misunderstanding between the parties at Bareilly, and that neither the plaintiff consignee nor the local officials of the Railway Company in charge of the consignment clearly appreciated their respective rights and liabilities, I think the defendant Company should definitely have offered the plaintiff facilities for weighing the consignment on the spot before requiring him to part with the railway receipt. I hold them liable in damages partly for this reason, partly for their long delay in returning a definite answer to the plaintiff's claim and partly for having sold the consignment at auction under circumstances which did not warrant the adoption of that course. The application before me raises no serious question as to the amount of the damages awarded and consequently I do not discuss this point. The result is that the application fails and I dismiss it with costs.

Application dismissed.

MAKHDOOM BAKHSH SHAH *v.* HASHIM ALI.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 538 OF 1914.
April 22, 1915.
Present:—Mr. Justice Piggott.
MAKHDOOM BAKHSH SHAH AND OTHERS—DEFENDANTS—APPELLANTS
versus
HASHIM ALI—PLAINTIFF—RESPONDENT.

Specific Relief Act (I of 1877), s. 9—Suit for possession based on possessory title—Defence—Defendant's right to set up title.

A suit in ejectment on the basis of possessory title is maintainable against any person who cannot show title in himself, apart altogether from the provisions of section 9 of the Specific Relief Act. The difference is that in a suit under the Specific Relief Act, the defendant will not be allowed to plead or to prove title in himself; whereas in a suit upon possessory title brought independently of the provisions of the Specific Relief Act, or even after the period of limitation prescribed for a suit under section 9 of that Act has expired, the defendant will be allowed to plead his title and to prove it, if he wants to do so. If he fails to do so, the plaintiff can get a decree, even though he has been able to prove nothing more than possession by himself of the property in suit up to the date of his wrongful ejectment by the defendants. [p. 211, cols. 1 & 2.]

Pemraj Bhavaniram v. *Narayan Shivaram Khisti*, 6 B. 215; *Wali Ahmad Khan* v. *Ajudhia Kandu*, 13 A. 537; A. W. N. (1891) 196; *Gobind Prasad* v. *Mohan Lal*, 24 A. 157; *Ismail Ariff* v. *Mahomed Ghous*, 20 C. 834; 20 I. A. 99, referred to.

Second appeal from the decision of the District Judge of Azamgarh, dated the 3rd February 1914.

Mr. *Shafi-u-zaman*, for the Appellants.

Dr. *S. M. Suleman*, for the Respondent.

JUDGMENT.—This is one of those second appeals in which the only real difficulty is to ascertain with certainty what facts the lower Appellate Court intended to find, or must be taken to have found. The suit was one for recovery of possession over a certain plot of land and a tree situated thereon. If I rightly understand the pleadings there never was any question of title, strictly so called, in issue between the parties. The land in question is situated in the *abadi*, or inhabited site, of an agricultural village, and the proprietors of the soil are no doubt the *zamindars* of the village. The plaintiff alleged that he had been for many years in actual possession and occupation of the land in suit, having erected a thatched hut thereon and possessing the rest of the land, not actually covered by the suit, as a courtyard appertaining to the same. He further alleged that, during his absence from the village, the defendants, without any sort of right or title, had demolished the hut which belonged to him and taken possession of the land and of the tree, erecting a shed of their own on some portion of the land. The defendants' reply was that the plaintiff had never been in possession, that they had never dispossessed him, but that on the contrary they themselves had been in possession and occupation of the land for many years. The first Court found that the plaintiff had failed to prove any title to the land in himself, and, upon this finding alone, dismissed the suit. One of the grounds expressly taken by the plaintiff when he appealed to the Court of the District Judge was that he was entitled to a decree on proof of the fact of his possession. At the hearing of the appeal by the District Judge, a question of procedure arose which has to some extent complicated the case. The defendants themselves in the Court of first instance had pleaded that the land in suit had, many years previously, been occupied by the residential house of a tenant named Reoti. They alleged that the said Reoti had died many years prior to the institution of the suit, leaving no heir, and that they had themselves occupied the site ever since the time of Reoti's death. In connection with this plea the plaintiff produced in the Court of first instance a mortgage-deed in his favour purporting to be executed by this Reoti Kahar. The learned Munsif seemed to have thought that the production of this document could not help the plaintiff's case, because there was nothing in his plaint to indicate that he claimed possession of the land in suit on the strength of any title as a mortgagee. He also held that the document had not been sufficiently proved by the evidence of the scribe, Uttam Lal. The learned District Judge has not clearly stated that he held this document to be proved; but there is a passage in his judgment which shows that he regarded it as evidence of the fact of the plaintiff's possession. The document is unregistered, and the transaction was one of usufructuary mortgage for a sum of less than Rs. 100 so that it could have been effected at the date in question without execution of any document. Under the circumstances the learned District Judge was entitled to hold it proved, and he seems to have so held, that Reoti, who was admitted

before him to have been the former occupier of the land in suit, had transferred, or purported to transfer, whatever rights of occupation he possessed to the plaintiff by way of usufructuary mortgage. What the learned District Judge has, in my opinion, undoubtedly found is that, on the evidence as a whole the fact of the plaintiff's being in possession, and of his wrongful dispossession by the defendants at or about the date alleged in the plaint, is satisfactorily proved. On this finding he has decreed the plaintiff's suit. The contentions before me in second appeal are substantially three. *One* is to the effect that there has been no clear finding by the lower Appellate Court on the fact of the plaintiff's possession and with regard to his dispossession by the defendants. This plea is to my mind concluded by a perusal of the judgment of the lower Appellate Court. The *second* point taken is that the unregistered mortgage by Reoti in favour of the plaintiff was not legally proved. I think, under the circumstances of the case, there was evidence on the record upon which the lower Appellate Court was entitled to come to the finding which I have already set forth. The *third* point taken is that the lower Appellate Court made an entirely new case for the plaintiff. This has been argued before me on the assumption that the learned District Judge must be taken to have decreed the plaintiff's claim as a claim for recovery of possession under section 9 of the Specific Relief Act. There is authority for the proposition that a suit for recovery of possession based upon title should not be allowed to be converted into one under section 9 of the Specific Relief Act. I do not think however, that the learned District Judge has offended against this principle. The argument addressed to me on behalf of the defendants-appellants overlooks the fact that there can be a suit in ejectment on the basis of possessory title, maintainable against any person who cannot show title in himself, apart altogether from the provisions of section 9 of the Specific Relief Act. The difference is that, in a suit under the Specific Relief Act, the defendant will not be allowed to plead or to prove title in himself; whereas in a suit upon possessory title brought independently of the provisions of the Specific Relief Act, or even after the period of limitation prescribed for a suit under section 9 of that Act has expired, the defendant will be allowed to plead his title, and to prove it if he wants to do so. If he fails to do so, the plaintiff can get a decree, even though he has been able to prove nothing more than possession by himself of the property in suit up to the date of his wrongful ejectment by the defendants. Authority for these propositions may be found in *Pemraj Bhavaniram* v. *Narayan Shivaram Khisti* (1), *Wali Ahmad Khan* v. *Ajudhia Kandu* (2), *Gobind Prasad* v. *Mohan Lal* (3) and *Ismail Ariff* v. *Mahomed Ghous* (4). As I have already pointed out, the present suit is one in which title, other than what may be called possessory title, was not set up by, and was not in fact vested in, either of the parties, I do not think that the decision of the learned District Judge is open to objection upon any of the grounds taken. I dismiss this appeal with costs.

Appeal dismissed.

(1) 6 B. 215.
(2) 13 A. 537; A. W. N. (1891) 196.
(3) 24 A. 157.
(4) 20 C. 834; 20 I. A. 99

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 311 OF 1913.

February 8, 1915.

Present:—Mr. Justice Sharfuddin and Mr. Justice Coxe.

KESHAWE SURENDRA SAHI AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

Rani DEVENDRABALA DASI—OPPOSITE PARTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 90, O. XXXII, r. 3—Application to set aside sale on ground of fraud and collusion, maintainability of—Minor substituted as judgment-debtor—Guardian ad litem not appointed—Sale, effect of.

On the death of a judgment-debtor an application for substitution of the name of the sole legatee of the judgment-debtor, a minor, and his father and others was made. No application was made under Order XXXII, rule 3, of Civil Procedure Code, for the appointment of a guardian *ad litem*. The father acted throughout and eventually the property was sold and purchased by the decree-holder. The mother, acting as the guardian and next friend of the minor, applied to have the sale set aside under section 47 and Order XXI, rule 90, Civil Procedure Code, alleging fraud and collusion;

KESHAWE SURENDRA SAHI *v.* DEVENDRABALA DASI.

Held, that under the circumstances of the case the mother was entitled to make the application and that she should be appointed guardian *ad litem* of the minor. [p. 213, col. 1.]

Held, further, that the sale of the property without appointing such a guardian was in itself an irregularity which would vitiate the sale, if it caused injury to the minor. [p. 213, col. 1.]

Appeal against an order of the Subordinate Judge, first Court of Saran, dated the 4th of June 1913.

Babus *Mohendra Nath Roy* and *Rajendra Prosad*, for the Appellant.

Dr. *Ghosh* and Babu *Girija Prosonna Rai Chowdhury* and *Uma Charan Saha*, for the Respondents.

JUDGMENT.

SHARFUDDIN, J.—In this appeal the appellant is a minor. He had, on the 10th July 1912, applied under section 47 and Order XXI, rule 90, of the Civil Procedure Code, to set aside the sale of his properties in execution of a decree on the ground of irregularities resulting in inadequacy of the price fetched at the sale. This petition was put in on his behalf by his mother as guardian and next friend of the minor.

The decree that brought about the sale was a mortgage-decree, the mortgagor being Baboo Shyam Surendra Sahi, the uncle of the minor. Shorty after the first execution petition the mortgagor died and thereafter on the 22nd March 1909, an application for substitution was made by the decree-holder. The present appellant is the sole legatee of his uncle, the mortgagor, under a Will. The above application was that the name of the minor, along with that of his father, Hari Harendra Sahi, and some others should be substituted. No application, however, was made under Order XXXII, rule 3, for the appointment of a guardian *ad litem* of the minor. Nor does it appear that any such order was ever made under the above provisions. But on the above application by the decree-holder substitution was made, but the minor was not described in the amended execution petition as being under the guardianship of his father. The minor in this amended execution petition was simply named and described as a minor. It is admitted, however, that the father began to act as guardian of his minor son and he did act as such in the previous stages of the execution proceedings and the Court allowed him to act as such. The father, as already observed, was himself one of the substituted judgment-debtors. The father of the minor has another son by another wife and this son is married to the sister of the present Maharaj Kumar of Hutwa, and it is the Hatwa Raj which is the purchaser at the sale.

It appears that there were five execution proceedings. The last ended in the sale of the properties.

The sale was fixed for the 3rd June 1912 which was a public holiday, and the Court was closed on that day. On the 4th June, *i. e.*, on the re-opening day, a petition was put in only on behalf of the father of the minor, under a *vakalatnamah* executed only on behalf of the father. In the body of the petition it is mentioned that by the arrangement suggested in the petition the minor would also be benefited. But it is clear that so far as this petition goes, the minor was not represented. By this petition the Court was informed that the Maharani of Hatwa was willing to purchase the properties at the sale on behalf of her ward, the Maharaj Kumar of Hatwa, and as for that end she had to move the High Court, the sale should be postponed for a week.

This petition also waived the right to demand a fresh proclamation by stating that the sale proclamation had been duly published and served. The sale was postponed and was fixed for the 11th June. The sale proclamation had notified that 48 *mahals* had to be sold. In the ordinary course these *mahals* should have been put up one by one and not in one lot. On the 11th June, before the sale, an application was put in on behalf of the minor alone without stating who acted for him as guardian. The scribe of this petition is one Sridhar Lal, who is an agent of the minor's father (Vide *vakalatnamah*, dated 1st June and filed on the 4th June). There is a little difference in the name. In the petition he signs as Sridhar Lal and in the *vakalatnamah* as Sridhar Prosad. We have been assured that it is one and the same man. It is a matter for inquiry. Let us now examine this petition of the 11th June, wherein the minor is not at all represented. Contrary to the notification in the proclamation of sale, the prayer in this petition is that all the *mahals* (48 in number) should be sold in one lot because there were big and monied

men who wished to purchase the *mahals*. The Subordinate Judge accepted the prayer and all the 48 *mahals* were sold in one lot and purchased by the Hatwa Raj.

On the 10th July 1912 the mother of the minor, styling herself as the guardian and next friend of her minor son, applied under section 47 and Order XXI, rule 90, of the Code on various allegations of fraud and collusion, but the learned Subordinate Judge rejected that petition on the ground that so long as the minor's father, who had acted as guardian throughout the execution proceedings for four years, is not removed from his office, the mother had no *locus standi* to make the petition.

If the learned Subordinate Judge had only taken the trouble of reading the petitions of the 4th and the 11th June, he would have found that the minor was not at all represented in these petitions.

It is admitted that no application for the appointment of a guardian was ever made and no such order was ever passed. The father was never formerly appointed guardian, and I do not see how one could ask the Court to remove a man from guardianship who was never appointed by the Court. On the application of the decree-holder filed on the 22nd March 1909, it was the imperative duty of the Subordinate Judge, after making some inquiry, to appoint a proper person as a guardian of the minor to act for him in the execution proceedings. No such thing was done. A number of authorities have been placed before us by the respondents showing that when a person, although not formally appointed, has acted for the minor throughout a proceeding or a suit, the Court ought to hold that the minor was represented. But in the present proceedings the minor was not represented by his father as already pointed out.

We hold that, in the circumstances stated above, the mother was entitled to make this application and that she should be appointed guardian *ad litem* of the minor. The sale of the property without appointing such a guardian is in itself an irregularity, which will vitiate the sale if it has caused injury to the minor. Accordingly we remand the case under Order XLI, rule 23, for disposal on the merits. The Subordinate Judge must decide whether any irregularities, other than that mentioned above, have been proved, and whether, if so, the minor has been injured, either by the irregularity to which we have referred or by those found by the Subordinate Judge. Costs will abide the result.

COXE, J.—I agree.

Case remanded.

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL NO. 1119 OF 1914.

February 25, 1915.

Present:—Justice Sir George Knox, KT.

MUHAMMAD HASAN ASKARI—DECREE-HOLDER—APPELLANT

versus

NIAZ HUSAIN AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Execution—Power of execution Court to complete an ambiguous decree—Decree, ambiguity in.

Where a decree is incomplete and ambiguous, it is not the duty of the Court executing the decree to complete it and to give a definite expression to the ambiguity. [p. 215, col. 1.]

Pirbhu Narain Singh v. *Rup Singh*, 20 A. 497: A. W. N. (1898) 93; *Biladhar* v. *Chaturbhuj*, 21 A. 277; A. W. N. (1899) 64; *Ram Lapit Ram* v. *Chooaram*, 4 C. L. R. 97, referred to.

Execution second appeal from the decision of the Subordinate Judge of Allahabad.

The Hon'ble Mr. *Abdul Raoof*, for Mr. *Rahmat Ullah*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondents.

JUDGMENT.—The Munsif of Allahabad passed a decree in the following terms: "It is ordered and decreed that the plaintiff's claim, for pre-emption, be dismissed with costs as against all the defendants with the exception of defendants Nos. 5 and 6, that the plaintiff's claim for pre-emption, in respect of the shares of defendants Nos. 5 and 6, if any in the property in dispute, be decreed; and that if the plaintiff deposits for payment to defendants Nos. 5 and 6, within one year from this date, the proportionate amount of the consideration money, equal to the price of the shares of defendants Nos. 5 and 6, with reference to the entire consideration money, Rs. 780, specified in the sale-deed, then on his so depositing the aforesaid money, he (the plaintiff) shall be entitled to get possession over the shares of defend-

ants Nos. 5 and 6, if any, in the property in dispute."

That decree was neither taken into appeal nor has it in any way been altered since it passed.

The decree-holder applied to execute the decree, and in his application he asks that he may be put into actual and formal possession of the shares in the *zemindari* property sought to be pre-empted, being the share of *Musammat* Sakina Bibi and Kaniz Bano Bibi specified below. He then goes on to say that under the orders embodied in the decree, he had deposited in Court Rs. 102-14-9, and he sets out, as the share over which he asks to be put in possession, a share amounting to 17 *karants* in *Mauza* Manauri, *Patti* Hub-bun-nisa, *Pargana* Chail.

The Munsif of Allahabad, in whose Court this application was filed, at once found himself face to face with objections. These objections were several in number. One of them was that the decree-holder sought to execute the decree not against the property of Sakina Bibi and Kaniz Bano Bibi, but against the property of the heirs of Abid Husain; and further that the ladies above-mentioned had no interest in the property pre-empted, this share had not been set apart or specified in the decree; also that their share could not be determined in the execution department and the decree was not a decree which could be executed.

The learned Munsif went into the questions raised and the nature of the questions which he had to determine will be seen from the issues which he framed. He set himself to decide whether a Muhammadan father or a Muhammadan son had died first? Whether certain shares had been transferred before the pre-emption by an award of arbitrators? Whether an application to have the award filed in Court was rejected? Whether the proportionate amounts of consideration which the decree-holder had to pay, were matters to be considered in execution proceedings?

After wading through these troubled waters he arrived at the conclusion that the plaintiff was entitled to a decree for possession over 125 *sihams* out of 1152 *sihams* of the whole property inherited by these ladies provided the pre-emptor deposited Rs. 84-10-2 within a certain time. One has only to contrast the decree passed by the Munsif of Allahabad on the 31st of January 1911 with the order passed by the Munsif of Allahabad on the 3rd October 1912, to see that the real decree in the suit was that passed on the 3rd of October 1912 and not that passed on the 31st January 1911. The decree passed in January 1911 was not an adjudication conclusively determining the rights of the parties with regard to matters in controversy between the parties in suit, it left many of those matters undecided and the decree-holder, armed with the decree of the 31st January, had a decree which the learned Subordinate Judge before whom the matter went in appeal afterwards found incapable of execution.

The appeal before me contests the finding of the Subordinate Judge, and says that that Court was in error when it held that the decree passed in January was a decree incapable of execution. The learned Counsel for the decree-holder in support of the first plea taken by him in appeal, *i.e.*, that the decree in question was a decree capable of execution, cited in support of his argument the case of *Pirbhu Narain Singh* v. *Rup Singh* (1). The decree before the Court in that case was a decree for sale of property in which the decree-holder and the Courts were at arm's length as to whether the decree gave or did not give the decree-holder interest after a certain date. This Court held that the decree was clear and unambiguous on this question and that the executing Court was bound to execute it according to its terms.

I was next referred to the case of *Liladhar* v. *Chaturbhuj* (2). That was a case in which the Court executing the decree took upon itself to decide whether the decree, as it stood, was or was not a valid decree, whether it was or was not rightly passed. In both cases the Courts had before them a decree and there can be no question that when a Court is asked to execute a decree, its business is to execute that decree according to the terms contained in the decree, and not to question

(1) 20 A. 397; A. W. N. (1898) 93.
(2) 21 A. 277; A. W. N. (1899) 64.

whether the decree was a decree passed by a Court having jurisdiction or whether some of the terms of the decree had not been erroneously entered in the decree. What the Court did in this case was to take up an incomplete decree, the terms of which were ambiguous, and to proceed to complete the decree and to give a definite expression to the ambiguity. I know of no provision of the Civil Procedure Code which allows the executing Court to do this.

The case before me seems to be in accord with the case of *Ram Lapit Ram* v. *Ohooaram* (3). That was a decree passed under a *sulehnama* and the Court passed its decree blindly on the *sulehnama* without ascertaining matters which had been left unascertained by the *sulahnama*. As the learned Judges pointed out, disputes naturally arose when the decree was put into execution, and they held that a Court executing the decree was bound by the terms of the decree and it was only in cases provided for by sections 211 and 212 of the Civil Procedure Code then in existence (now Order XX, rule 12) that the Court is at liberty to determine the rights of litigants in proceedings taken after decree. As regards those rights the Calcutta High Court held that they could not in execution go into the question at all. The result is that this appeal is dismissed with costs.

Appeal dismissed.

(3) 4 C. L. R. 97.

ALLAHABAD HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL No. 143 OF 1914.

May 7, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, Justice Sir P. C. Banerjee, KT., and Mr. Justice Tudball.

BIRJ KUMAR LAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

SHEO KUMAR MISSIR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Occupancy holding—Mortgage before Agra Tenancy Act (II of 1901)—Relinquishment after Act, effect of.

Where an occupancy holding was usufructuarily mortgaged for good consideration before the passing of the Agra Tenancy Act and where the mortgagor after passing of the Act relinquished the holding to defeat the mortgagee's rights:

Held, that the relinquishment was ineffectual against the mortgagee.

Jai Gopal Narain Singh v. *Uman Dat*, 10 Ind. Cas. 573; 8 A. L. J. 695, approved of.

Second appeal from the decision of the District Judge of Benares, dated the 18th September 1913.

Mr. *Gulzari Lal*, for the Appellants.

Mr. *A. P. Dube*, for the Respondents.

JUDGMENT.—The facts connected with this appeal are extremely simple. Prior to the passing of the Agra Tenancy Act an occupancy tenant purported to mortgage the occupancy tenancy. The term of the mortgage was 59 years. In the year 1911 the occupancy tenant entered into an arrangement with the *zemindar* to relinquish his rights. The Court below has found that the mortgage was for consideration and genuine. It has found that the object of relinquishment was to defeat the mortgagee's rights. The first Court dismissed the suit on the ground that the Civil Court had no jurisdiction. Mr. Dalal, District Judge, on appeal reversed the decree of the Court of first instance and granted the plaintiff a declaration that the relinquishment was ineffectual against him, and also granted an injunction restraining the *zemindar* from interfering with the plaintiffs' possession. In our opinion the decision of the Court below was correct. It is fully covered by the decision of this Court in the case of *Jai Gopal Narain Singh* v. *Uman Dat* (1), with which we still agree. We dismiss the appeal with costs including in this Court fees on the higher scale. The objection is disallowed with costs.

Appeal dismissed; Objection disallowed.

(1) 10 Ind. Cas. 573; 8 A. L. J. 695.

TEPU MAHAMMAD *v.* TEFAYIT MAHAMMAD.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3922 OF 1913.

February 10, 1915.

Present:—Mr. Justice Richardson and Mr. Justice Mullick.

TEPU MAHAMMAD—PLAINTIFF—APPELLANT

versus

TEFAYIT MAHAMMAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Issue, new, raising of, in Appellate Court—De facto *landlord, possession as*—*True owner, suit brought by, for ejectment*—*Encroachment of land by tenant*—*Presumption.*

It is always dangerous to allow a new issue to be raised at the appellate stage. [p 216, col. 2.]

Where a person has been in possession of a particular estate or a particular portion of an estate as *de facto* landlord, *raiyats* settled by him on the land would have a good answer to a suit for ejectment brought by the true owner. [p. 216, col. 2]

Where a tenant of *A* encroaches on the adjoining land of *B*, as between *A* and his tenant, there is a presumption that the encroachment enures to *A*'s benefit, and becomes an accretion to the tenant's holding under *A*. [p. 216, col. 2.]

A tenant will ordinarily hold the land upon which he has encroached as tenant of his landlord and in that case the landlord may perhaps be described as his *de facto* landlord. [p. 217, col. 1.]

Nuddyarchand Shaha v. *Meajan*, 10 C. 820, followed.

But that would not prevent the true owner of the land encroached upon from bringing a suit for the purpose of recovering his possession. [p. 217, col. 1.]

Appeal against the decree of the Subordinate Judge of Zillah Jalpaiguri, dated the 21st May 1913, reversing that of the Munsif at that place, dated the 19th December 1911.

Babu *Jogendra Nath Ghose*, for the Appellant.

Babu *Tarakeshwar Pal Chowdhury*, for the Respondents.

JUDGMENT.

RICHARDSON, J.—The suit relates to two plots of land. It has been found, and is not now disputed, that the plaintiff has a good title to the land as a lessee under the *zemindar*, the Maharaja of Cooch Behar. Defendants Nos. 2 to 4 are *jotedars* and their land adjoins the land in dispute. Defendant No. 1 is admittedly a tenant under defendants Nos. 2 to 4 in respect of the land comprised within their *jote*. The suit was brought by the plaintiff to eject defendant No. 1 from the disputed plots of which he is in possession. Defendants Nos. 2 to 4 do not contest the plaintiff's claim.

It appears that defendant No. 1 is *prima-facie* a trespasser and that the plaintiff is entitled to succeed, unless some such defence as adverse possession for the statutory period can be established. The first Court decided the suit upon the simple consideration that defendant No. 1, not having been in possession for more than five or six years, was a trespasser. The Munsif, therefore, decreed the plaintiff's claim. The learned Subordinate Judge in the Court of Appeal below took a different view. In the first place, he allowed defendant No 1 to raise a new issue. It is always dangerous to allow a new issue to be raised at the appellate stage, and the learned Subordinate Judge seems in this connection to have been betrayed into error. The new issue runs as follows: "Having *bona fide* held as tenant of persons who were their *de facto* proprietors, has the defendant acquired any right, occupancy or non-occupancy, in the disputed land"? The issue was apparently framed with reference to the decision of the Full Bench of this Court in the case of *Binad Lal Pakrashi* v. *Kalu Pramanik* (1). Some exception, however, may be taken to the mode in which the issue is worded. The question it was intended to raise was not whether the defendants Nos. 2 to 4 were the *de facto* landlords of the defendant No. 1, but whether they were the *de facto* proprietors of the disputed land and in that capacity settled it with that defendant. Where a person has been in possession of a particular estate or a particular portion of an estate as *de facto* landlord, it may be that *raiyats* settled by him on the land would have a good answer to a suit for ejectment brought by the true owner, but to carry the principle laid down by the Full Bench to the extent to which it has been carried in this case is to go much too far. There seems, indeed, to have been some confusion in the Subordinate Judge's mind between this principle and another principle on which the Courts have acted. Where a tenant of *A* encroaches on the adjoining land of *B*, no doubt as between *A* and his tenant there is a presumption that the encroachment enures to *A*'s benefit and becomes on

(1) 20 C. 708.

accretion to tenant's holding under *A* [*Nuddyarchand Shaha* v. *Meajan* (2)]. The tenant will ordinarily hold the land upon which he has encroached as tenant of *A* and in that case *A* may perhaps be described as his *de facto* landlord. But that is a very different thing from saying that the land was settled with the tenant by *A* as *de facto* proprietor and in such circumstances as those indicated, there would be nothing to prevent *B*, the true owner of the land encroached upon, from bringing a suit for the purpose of recovering possession from *A* and his tenant. Similarly in the case before us the learned Subordinate Judge has not found that the disputed land was in fact in the possession of defendants Nos. 2 to 4, nor has he found that the disputed land was included within the area settled with defendant No. 1 by defendants Nos. 2 to 4. No case is made, therefore, for the application of the principle of the Full Bench decision. That principle only applies where *raiyats* are settled upon land by a person in *de facto* possession as landlord, who is afterwards found to have no title. It is not applicable in every boundary dispute or in every case where a question of parcel or no parcel arises. It is obvious that the learned Subordinate Judge was wrong in allowing a new case to be made in appeal and that he had no clear conception of the limitations of the principle on which he founded his decision.

There remains the question of limitation. In the course of his judgment the learned Subordinate Judge says that the defendant No. 1 has been in possession for the last 10 or 15 years. This is an extremely vague finding upon an important question, which should have been the subject of precise decision. It is impossible for us to say upon the judgment, as it stands, whether the learned Subordinate Judge is of opinion that defendant No. 1 had or had not acquired any title upon the footing of adverse possession. This is the subject of the first two issues framed by the first Court and if the Subordinate Judge had confined himself to those two issues and had come to an express finding upon them, his judgment would probably have been more satisfactory. As the matter stands, in my opinion the judgment and decree appealed from must be set aside and the suit remanded to the lower Appellate Court in order that the appeal thereto may be re-heard upon the issues originally settled.

Costs will abide the result.

MULLICK, J.—I agree.

Decree set aside; Case remanded.

(2) 10 C. 820.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER NO. 146 OF 1914.

March 19, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Piggott.

PURAN NATH SADHAK—PETITIONER APPELLANT

versus

ATWARGIR—OPPOSITE PARTY—RESPONDENT.

Provincial Insolvency Act (III of 1907), s. 4 (b)—Collusive suit—Subsequent withdrawal—Act of insolvency.

A collusive suit and subsequent withdrawal from or compromising of the same, with the express object of putting another party in possession of immoveable property, amounts to a transfer of property by an insolvent within the meaning of clause (*b*) of section 4 of the Provincial Insolvency Act, 1907. [p. 218, col. 1.]

First appeal from an order of the District Judge of Saharanpur.

Mr. *Nihal Chand*, for the Appellant.

JUDGMENT.—This is an appeal arising out of the dismissal of an application in insolvency. The applicant was a creditor of the respondent, Atwargir. The applicant alleged that the said Atwargir was indebted to him in a sum far exceeding Rs. 500, and further, that Atwargir had committed an act of insolvency by transferring certain property with intent to defeat the applicant's claim. It was alleged that the transfer was effected in the following manner: that Atwargir brought a collusive suit claiming certain property from one *Musammat* Baldevi, which suit he proceeded to compromise in such a manner that a decree might be passed having the effect of leaving *Musammat* Baldevi in possession of the property and preventing Atwargir from ever claiming the same from her. On notice being issued to Atwargir, the latter presented an application admitting the debts

set forth by the applicant and asking for an enquiry by the Insolvency Court. The District Judge has dismissed the application, holding that there has been no act of insolvency on the part of the debtor, Atwargir. He has done this without any inquiry into the facts. He seems to have been of opinion that under no circumstances could the institution of a collusive suit and subsequent withdrawal from or compromising of the same, even though this transaction was carried out with the express object of putting another party in possession of immoveable property, amount to a transfer of property by an insolvent within the meaning of clause (*b*) of section 4 of the Provincial Insolvency Act, III of 1907. We do not accept this view of the law. In our opinion the Court below should have made an enquiry into the facts alleged by the petitioner and should have disposed of the application in accordance with the result of that enquiry.

We set aside the order complained of and remand the case to the Court below, with directions that it be re-admitted on to the file of pending applications and be disposed of on the merits. Costs of this appeal will be costs in the cause.

Order set aside; Case remanded.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1532 OF 1913.

March 24, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

Musammat LAKHPATI—DEFENDANT—APPELLANT

versus

RAMBODH SINGH—PLAINTIFF—RESPONDENT.

Hindu Law—Alienation by widow—Attestation of deed by reversioner, whether amounts to consent of reversioner—Attestation, when assent—Question of fact—Existence of daughter, whether bar to suit for declaration by reversioner.

The presence of a daughter is no bar to a suit for declaration, by a reversioner to the estate of a Hindu widow that an alienation made by her is void. [p. 219, col. 1.]

Mere attestation of an instrument by a reversioner does not necessarily import concurrence by him. It may, no doubt, be shown by other evidence that when the reversioner became an attesting witness, he fully understood what the transaction was and that he was a concurring party to it, but from the mere subscription of his name that inference does not necessarily arise. [p. 219, col. 1.]

Raj Lukhee Dabea v. *Gokool Chunder Chowdhry*, 13 M. I. A. 209; 12 W. R. (P. C.) 47; 3 B. L. R. (P. C.) 57; 2 Suth. P. C. J. 275; 2 Sar. P. C. J. 518; 20 Eng. Rep. 529, followed.

The question whether the attestation of a document should be held to be simply assent is a question of fact and must be determined with reference to the circumstances of each case. [p. 219, col. 2.]

Deno Nath Das v. *Kotiswar Bhattacharya*, 21 Ind Cas. 367; *Mewa Singh* v. *Bhagwant Singh*, 5 Ind. Cas. 252, followed.

Second appeal from the decision of the District Judge, Benares, dated the 17th May 1913.

Dr. *S. C. Banerji*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him. Dr. *S. N. Sen*), for the Respondent.

JUDGMENT.—The facts of this case are that *Musammat* Kulwanti, the widow of a separated Hindu, Jita, mortgaged her husband's property to the appellant by two deeds of January 28th, 1907, and August 7th, 1908. At the time of these transactions there were living Sarju Dei, who is said to be a daughter of Jita, Budhai, the son of a deceased brother of Jita, and Ram Raj and Ram Bodh, sons of another deceased brother of Jita. The three nephews were the sole presumptive reversionary heirs of Jita. Ram Bodh was a minor living in union with his brother, Ram Raj, who joined in executing both mortgages, and Budhai attested both as a witness Ram Bodh who is still a minor brought this suit in 1910 for a declaration that the mortgages were not binding upon him. The Subordinate Judge held that the earlier mortgage was not proved to have been made for lawful necessity at all, and that the later mortgage was proved to have been made for lawful necessity to the extent of Rs. 282 out of Rs. 800, but he held that Ram Bodh was bound by his elder brother's consent to the transactions, and that Budhai's consent to them was proved by the fact that he attested them. Therefore, the whole body of male reversioners must be taken to have consented to the transactions, and the plaintiff was not entitled to challenge them. On appeal the District Judge agreed with the first Court as to the extent to which the mortgages had been shown to be

supported by legal necessity, but he held that the attestation of the deeds by Budhai did not prove that he had consented to the mortgages and that the plaintiff was not bound by the elder brother's consent, because it had been neither alleged nor proved that he had acted for the benefit of the plaintiff. Both Courts below have held that the presence of a legitimate daughter of Jita, even if proved, did not prevent the plaintiff from maintaining the suit. The learned District Judge gave the plaintiff a declaration that the earlier deed was not binding upon him and that the later was binding only to the extent of Rs. 282. This is a second appeal by the mortgagee. On the authorities it is quite clear that the presence of the daughter, even if proved to be legitimate, is no bar to the maintenance of the suit by the plaintiff.

It appears to us that the only difficulty in the case arises from the finding of the District Judge that the attestation of the deeds by Budhai does not prove that he consented to the transactions. If Budhai consented to them, then we have the consent on the part of all the adult male reversioners, and it is clear that such consent is sufficient to raise the presumption that the mortgages were made for purposes binding upon the whole body of reversioners. It is contended on behalf of the plaintiff-respondent that the finding of the District Judge, that Budhai is not proved to have consented to the mortgages, is a finding of fact which cannot be disturbed in second appeal, while the appellant contends that it is not a finding of fact but that the question is, what is the true conclusion to be deduced from the fact that Bodhai attested the execution of the mortgages. In our opinion the finding of the learned Judge is one of fact which cannot be disturbed in second appeal. In a well-known case decided as long ago as 1869 their Lordships of the Privy Council said that mere attestation of an instrument by a person did not necessarily import concurrence by him. It might no doubt be shown by other evidence that when he became an attesting witness, he fully understood what the transaction was, and that he was a concurring party to it, but from the mere subscription of his name that inference did not necessarily arise [*Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (1)] and it has been held, in several cases by different Courts in India, that the question whether the attestation of a document should be held to simply assent is a question of fact, and must be determined with reference to the circumstances of each case, see for example *Deno Nath Das* v. *Kotiswar Bhattacharya* (2) and *Mewa Singh* v. *Bhagwant Singh* (3).

We must, therefore, accept the finding that Budhai is not proved to have assented to the transactions in question, and it follows that it is not proved that there was such assent on the part of the reversionary body as to raise a presumption that the mortgages were made for purposes binding on the reversioners. The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 13 M. I. A 209; 12 W. R. (P. C) 47; B. L. R. (P. C.) 157; 2 Suth. P. C. J. 275; 2 Sar. P. C. J. 518; 20 Eng. Rep. 529.

(2) 21 Ind. Cas. 367.

(3) 5 Ind. Cas. 252.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREES NOS. 1434 AND 1524 OF 1911.

January 4, 1915.

Present:—Mr. Justice Holmwood and Mr. Justice Mullick.

BAID NATH SAHAY—PLAINTIFF—APPELLANT (IN BOTH CASE)

versus

IN NO. 1434 OF 1911

NANKU MAHTON AND ANOTHER—DEFENDANTS—RESPONDENTS.

IN NO. 1524 OF 1911

DUBRI MAHTON AND ANOTHER—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 32 (2)—Relevant fact—Ordinary course of business—Appellate Court, powers of—Settlement papers, admission of, after first Court's decision.

There is nothing in section 32, clause 2, which requires any formal proof that certain papers were kept as a fact in the ordinary course of business. [p. 220, col. 1.]

Settlement papers cannot be admitted by the Appellate Court after the first Court's decision in the case. [p. 220, col. 1.]

Kessowji Issur v. *Great Indian Peninsular Railway Company*, 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 2 M. L. T. 435; 9 Bom. L. R. 671; 17 M. L. J. 347 ;34 I. A. 115; 31 B. 381 (P. C.), referred to and followed.

MacDonald v. *Babu Lal Purbi*, 4 C. L. J. 519, distinguished.

Appeals against the decrees of the Subordinate Judge, Patna, dated the 17th of February 1911, modifying that of the Munsif, Behar, dated the 29th of August 1910.

Dr. *Rash Behari Ghose*, Babus *Provash Chandra Mitter* and *Roy Guru Charan Prosad*, for the Appellant.

Babus *Karunamoy Bose* and *Kulwant Sahay*, for the Respondents.

JUDGMENT.—This second appeal arises out of a claim for recovery of arrears of rent and cesses. The only portion of the claim which is in dispute before us is the *bhowli* rent, and that is disputed both as regards the method of collection, namely, whether it is *bhowli danabandi* or *bhowli batai*, and as regards the share of the landlord.

With regard to the *first* point, it is urged before us in appeal that the lower Court was wrong in excluding the *dibi* papers, which were admitted in the first Court without objection and which were proved to be in the handwriting of the deceased *patwari*, whose duty it certainly was to keep the *dibi* papers. We think that the learned Subordinate Judge was wrong in excluding those papers. There is nothing in section 32, clause (2), which requires any formal proof that the papers are kept as a fact in the ordinary course of business. He appears to have confused section 32, clause (2), with section 34 with which we have nothing to do in this case. The case will, therefore, have to go back on this ground alone for the learned Judge to re-decide the question of *danabandi* or *batai* on a consideration of those *dibi* papers as evidence in the case.

Then, again, we are of opinion that he is wrong in having admitted the Settlement papers after the Munsif's decision in the case. His action appears to be contrary to the principle laid down by their Lordships of the Judicial Committee in the case of *Kessowji Issur* v. *Great Indian Peninsular Railway Company* (1) and the authority, which the learned Subordinate Judge cites, *MacDonald* v. *Babu Lal Purbi* (2), is clearly distinguishable, the record having there been filed after the institution of the suit but before the case had been decided in the first Court, while it was still open to the parties to use the record as evidence in the case. But it is obvious that such evidence cannot be admitted in appeal, so as to induce the learned Subordinate Judge to shift the onus in appeal to the plaintiff without remanding the case and to hold that the Munsif was wrong in not deciding the case differently upon evidence which was not before him. We, therefore, must direct that the Settlement record be excluded from the purview of the Judge in appeal.

As regards the question of the rate of division, we find that this is concluded by the finding of fact in the judgment with regard to Exhibit A. This is a finding which sets aside the Munsif's finding on a pure ground of fact and we cannot go behind it. It must be taken for the purpose of this case that the *hakimi* share is half the produce.

The result is that so much of the decree of the learned Subordinate Judge which decides the land as held *bhowli batai* must be set aside, and the case remanded to him for a fresh decision on the point in accordance with the directions contained in this judgment.

Costs will abide the result.

This judgment will also govern Second Appeal No. 1524 of 1911.

Case remanded.

(3) 4 C. L. J. 519.

(3) 31 B. 381 (P. C.); 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 2 M. L. T. 435; 9 Bom. L. R. 671; 17 M. L. J. 347; 34 I. A. 115.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 380 OF 1913.

March 23, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

THE COLLECTOR OF MEERUT—DEFENDANT—APPELLANT

versus

UMRAO SINGH—PLAINTIFF—RESPONDENT.

Guardian ad litem—*Mother acting as such—Decree*

COLLECTOR OF MEERUT *v.* UMRAO SINGH.

validity of—Mother not defending suit, if sufficient ground to set aside decree.

The father of the plaintiff was murdered leaving his widow and the plaintiff, a minor, him surviving. The motive of the murder was to take possession of property which belonged to the plaintiff's father. Suits had to be brought in the name of the minor. The mother of the minor borrowed on mortgages on behalf of the plaintiff as his guardian for the expenses of the suit. Suits were thereafter brought on these mortgages and decrees were obtained. The plaintiff sued to set aside these decrees:

Held, that the mother was a fit and proper person to be his guardian *ad litem* in the proceedings in the Civil Court and that if the decrees were fairly and properly obtained against the minor as represented by his mother, the decrees were binding and the Court could not go behind them. [p. 221, col. 2.]

Held, further, that the mere fact that the mother did not defend the suits on the mortgages would not make the decrees invalid. [p. 221, col. 2.]

First appeal from a decree of the Subordinate Judge of Moradabad.

Mr. *A. E. Ryves*, for the Appellant.

Mr. *D. C. Banerji*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff, Umrao Singh, for a declaration that certain decrees which had been obtained against his mother as his guardian were not binding upon him. The suit was instituted in April 1912. The estate of the defendants was taken over by the Court of Wards in February 1913. The Court below made a decree in part in the plaintiff's favour on the 13th of May 1913. The Collector was never made a party to this suit and it is doubtful perhaps whether the decree was quite regular. It is, however, unnecessary to consider this point, having regard to the position which Mr. Ryves has taken up in the present appeal on behalf of the Court of Wards. When the Collector came to know of the decree of the Court below, he filed the present appeal against the decree. Mr. Ryves has stated at the outset that he waives any irregularity and that he is willing to argue the case on the merits, just as he would have done had the Collector been made a party and the decree had been regularly made against him. It appears clearly from the evidence and admitted facts that the father of the plaintiff, one Bahal Singh, was murdered leaving his widow and the plaintiff him surviving. One Parsa helped the widow against her adversaries. The supposed motive of the murder was to take possession of property which belonged to Bahal Singh. After the murder of Bahal Singh a suit had to be brought in the name of his minor son, which was fought right up to the High Court. The costs, which were allowed under the decree of the High Court, amounted to Rs. 793. It is clear that this does not at all represent the actual money that had to be expended in the course of that litigation alone. Besides this, however, there were mutation proceedings in the Revenue Court which were, apparently, contested. There was also a riot case in which undoubtedly money was expended. We have no doubt that money was also expended in connection with the prosecution of the murderer of Bahal Singh. It is in connection with these expenses that the money was borrowed on mortgages executed by the mother on behalf of the plaintiff as his guardian. Suits were brought on foot of these mortgages and decrees were obtained in 1909 and 1910. It is to set aside these decrees that the present suit is brought.

There are two aspects of the case. *First* as to whether the decrees obtained against the plaintiff with the widow as his guardian do not bind him. The widow was his natural and *de facto* guardian. *Prima facie* she was a fit and proper person to be his guardian *ad litem* in the proceedings in the Civil Court. She had no interest adverse to him. So far as the evidence goes, she had been most active in taking steps to protect the minor's property. If the decrees were fairly and properly obtained against the minor, as represented by his mother, then the decrees are binding and the Court ought not to go behind them. The only suggestion of the decrees being improper is that the widow did not defend the suits. The total amount borrowed was a sum of Rs. 2,100. The expenditure upon the matters to which we have already referred must have been very considerable. It is possible that if the widow had defended the suits brought on foot of the mortgages and put the plaintiff to strict proof of legal necessity for each and every item, she might, possibly, have succeeded in having some small item struck out. Defending the suits would probably have cost much more than the item disallowed. In our opinion it is impossible to hold, under the circumstances of the present case, that the decrees, even though *ex parte*, were in any

way improperly obtained. If this be so, it is quite unnecessary to go into the other matters and to consider whether the defendants have been able to show that there was legal necessity for every part of the consideration for the bonds. In our opinion the decree of the Court belo v was erroneous and must be set aside.

We accordingly allow the appeal, set aside the decree of the Court below and dismiss the plaintiff's suit with costs in both Courts.

Appeal decreed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 578 OF 1914.

April 16, 1915.

Present:—Mr. Justice Chamier.

RAGHUBIR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

TULSHI RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901), *ss.* 106, 110, 111, 112, *applicability of—Imperfect partition—Proprietary title—Civil Court, jurisdiction of.*

Sections 110, 111, 112 of the Land Revenue Act do apply to imperfect partitions and, therefore, the rule to the effect that a party to a partition proceeding who has had the opportunity of pleading a question of title and has not availed himself of that opportunity, cannot maintain a suit in the Civil Court for the relief which he might have claimed in the partition proceedings, does apply to proceedings taken for imperfect partition. [p. 223, col. 1.]

Nathi Mal v. *Tej Singh*, 29 A. 604; A. W. N. (1907) 190; 4 A. L. J. 578, referred to.

Aisha Begam v. *Abdullah Khan*, A. W. N. (1899) 190, distinguished.

Second appeal from the decision of the Subordinate Judge of Farrukhabad, dated the 2nd February 1914.

Mr. *B. N. Vyas*, for the Appellants.

Mr. *A. P. Dube*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the appellants for a declaration, that they are entitled to a one-sixth share in a certain *patti*. The prayer for relief is not worded in this way but this is the meaning of it. The lower Appellate Court has declined to make such a declaration, but has made a declaration of another description intended to limit the rights of the respondents in a certain way. On the facts as found by the lower Appellate Court the appellants are entitled to the share which they claimed and the only question is whether they are entitled to obtain a declaration to that effect in the Civil Court. It appears that in the *khewat* of 1305 *Fasli* the plaintiffs were shown as entitled to a three-eighteenths share and the respondent Tulshi Ram was shown as entitled to an eight-eithteenths share. At the recent Settlement by some mistake a record was prepared showing that the appellants are entitled to no more than a one-sixteenth share while the respondent Tulshi Ram is shown as entitled to an eight-sixteenths share. Thus the appellants' share has been reduced and the respondent Tulshi Ram's share has been increased. The only defence with which I am concerned now is that the appellants might and ought to have put forward their claim in certain partition proceedings and as they did not do so, they are not entitled to maintain the present suit. It is a fact that partition proceedings were instituted to which the appellants were made parties, the usual proclamation was issued and a date was fixed by which those concerned were required to state their objections, if any, to the partition. The appellants had an opportunity of putting forward their objections, but did not do so. They may have been misled by an order of another Revenue Court passed on an application for the correction of the *khewat*. That Court was not satisfied that the record was incorrect and rejected the present appellants' application to have it altered, saying that their remedy lay in the Civil Court. The fact that another Revenue Court in another proceeding suggested that the appellants should proceed by way of a suit in a Civil Court, did not relieve the appellants from the necessity of putting forward their claim in the partition proceeding. It was contended in the lower Appellate Court, and it has been contended before me, that the rule laid down in a number of cases in this Court, including that of *Nathi Mal* v. *Tej Singh* (1), to the effect that a party to a partition proceeding, who has had the opportunity of pleading a

(1) 29 A. 604; A. W. N. (1907) 190; 4 A. L. J. 578.

question of title and has not availed himself of that opportunity, cannot maintain a suit in the Civil Court for the relief which he might have claimed in the partition proceedings, does not apply to the case of an application for imperfect partition. Reliance is placed on the decision of this Court in *Aisha Begam* v. *Abdullah Khan* (2). In that case Knox and Aikman, JJ., dealing with a plea similar to that put forward by the respondent Tulshi Ram in the present case, said "the answer to this plea is that while it is true that on an application for perfect partition a case may arise on which, under sections 112 and 113 of the N.-W. P. Land Revenue Act, there can be a decision which would have the effect of finally determining the conflicting claims, the same result cannot take place in a case of imperfect partition. In the case of an imperfect partition any objection, would, with reference to the last clause of section 134 of the N.-W. P. Land Revenue Act. put the applicant for partition out of Court". Without expressing any opinion as to the correctness of the construction placed in that case on the proviso to section 134 of the Act of 1873, I think it is sufficient to say that that proviso finds no place in the present Land Revenue Act (Local Act III of 1901). Section 106 of the present Act provides that the procedure prescribed in Chapter VII of the Act shall be followed in all partitions, whether perfect or imperfect, except where it is otherwise expressly declared. The sections with which we are concerned in the present case are sections 110, 111 and 112. It is not declared that these sections do not apply to imperfect partitions. I must, therefore, hold that they do apply to imperfect partitions and that the rule laid down by so many decisions of this Court, with reference to objections which might have but have not been put forward in the partition proceedings, applies under the present Act to proceedings taken for imperfect partition as well as to proceedings taken for perfect partition. For these reasons I am of opinion that the first relief claimed by the appellants in the present suit cannot be granted to them by the Civil Court, I, therefore, dismiss this appeal with costs.

Appeal dismissed

(2) A.-W. N. (1899) 190.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

February 25, 1915.

Present:—Lord Dunedin, Lord Shaw, Sir George Farwell, Sir John Edge and Mr. Ameer Ali.

MOTABHOY MULLA ESSABHOY—DEFENDANT—APPELLANT

versus

MULJI HARIDAS—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 92, proviso 2—Suit on promissory note—Written contract—Oral agreement—Burden of proof—Conditional admission in pleadings—Objection under the section taken for first time in Court of Appeal—Pleadings, amendment of.

It is allowable under section 92 of the Evidence Act, 1872, to urge an oral agreement which will have the effect of leaving matters otherwise than if they had depended on the written agreement alone, but such oral agreement must be clearly proved and the onus lies on him who sets it up. [p. 227, col. 1.]

If an admission in pleading is made subject to a condition, it must either be accepted subject to the condition or not accepted at all. [p. 227, col. 2.]

The plaintiff sued the defendant upon a promissory note, jointly executed by the defendant and one *H*, for Rs. 50,000 payable on demand, alleging that under a certain agreement the plaintiff was bound to pay *H* Rs. 50,000 on 30th January 1908, but he agreed to prepay that amount on being given the joint promissory note in question of date 23rd December 1907, and the money was handed over to the defendant; that the plaintiff agreed that he would surrender the note if on 30th January 1908 *H*, who was largely indebted to him, had given sufficient security for the whole debt as then due by him: that on the 30th January no such sufficient security was given that accordingly he was entitled to maintain defendant's liability under the note. The defendant admitted the execution of the note, but pleaded that it was verbally agreed that his liability on it should cease on the 30th January 1908. The trial Judge allowed the parties to go to trial and examine witnesses. At the trial the defendant's true contention was that it was agreed that upon the arrival of the 30th January 1908 the advance made under the promissory note should be held as the advance of the amount to be paid by the plaintiff to *H* on that date, and that the note should be re-placed by a single acknowledgment on the part of *H*. The trial judge, coming to the conclusion that it had not been proved that any

agreement had been made for the giving of security by *H*, gave judgment in favour of the defendant. The Court of Appeal took the view that no witnesses should have been examined and that the testimony could not be looked at, because the promissory note constituted a written contract binding the defendant to pay on demand and section 92 of the Evidence Act, 1872, prevented any oral agreement being set up to contradict that written agreement:

Held, that if the defendant's pleading was to be dealt with in absolute strictness, the view of the Court of Appeal was right; but that his true contention, when put in the form of averment, would be an oral agreement in terms of proviso 2 to section 92, which would allow it to be proved. [p. 227, col. 1.]

Held, also, that inasmuch as the view of the Court of Appeal might have been obviated by a mere amendment of the pleadings and as the parties had been allowed to go to proof, the evidence led should be considered: and that as the defendant failed to discharge the onus that lay on him of proving the oral agreement set up by him, the suit must be decreed. [p. 227, cols. 1 & 2.]

Appeal from a decree of the High Court at Bombay in its Appellate Civil Jurisdiction (October 8th, 1912), reversing a decree of the same High Court in its Original Civil Jurisdiction (April 11th, 1912).

FACTS.—The suit was instituted by the plaintiff-respondent on the 15th December 1910 to recover from the defendant-appellant the sum of Rs. 50,000 with interest from the date of the suit, upon a promissory note which was in terms the following:—

"*Bombay, 23rd December* 1907.

On demand we M. M. Essabhoy & Hyderally Cassumji Sons & Co. jointly and severally promise to pay to Mulji Haridas or order the sum of Rs. fifty thousand (50,000) for value received.

M. M. Essabhoy.

Hyderally Cassumji Sons & Co."

The circumstances under which the said note was executed are stated in their Lordships' judgment. The plaintiff in his plaint, after setting out those circumstances, alleged that he agreed to prepay Rs. 50,000 which was due from him on the 30th January 1908, on being given the said promissory note, and the money was handed to the defendant, and that he (the plaintiff) had also agreed that if full security for the whole of the debt then due to him was furnished by the said Hyderrally Cassumji Sons & Co. before the end of January 1908, the defendant should be discharged from all liability from the said note; but that inasmuch as that condition had not been complied with, the defendant's liability under it continued. The defendant admitted the execution of the note and the consideration therefor, but pleaded that it was verbally agreed that his liability thereunder was automatically to cease on the 30th January 1908.

On these pleadings the learned trial Judge (Davar, J.,) allowed the parties to go to trial and examine witnesses. It then appeared that defendant's true case was that it was agreed that upon the arrival of the 30th January 1908 the advance made under the promissory note should be held as the advance of Rs. 50,000 to be paid by the plaintiff to Hyderally Cassumji Sons & Co. on that date, and that the note should be re-placed by a single acknowledgment on the part of the said Hyderally Cassumji.

The learned Judge accepted the defendant's story and dismissed the suit with costs. The material passages from his judgment are the following:—

"I have no doubt that before he (plaintiff) gave his Rs. 50,000 on the 23rd of December 1907, he did complain that his securities were not sufficient and he was unwilling to pay on that day, but he allowed the importunities of Cullianji * and Abdool Hoosein † to prevail and eventually agreed and did make the payment. I have no doubt that he then complained that Abdool Hoosein had not kept his promise of securing him and equally I have no doubt that Abdool Hoosein gave him assurance that within a few days or weeks he would have more title deeds or make some payment. But it is quite clear to my mind that the defendant Essabhoy was no party whatever to any of these assurances or promises. f Cullianji, in his anxiety to secure his brokerage and oblige Abdool Hoosein at the same time, did make any false representations to Mulji about the defendant agreeing to any conditions such as are sought to fasten on him, the defendant is in no way responsible for them. Abdool Hoosein appeared to me on the

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* A broker employed by Hyderally Cassumji Sons & Co.

† An active partner of Hyderally Cassumji Sons & Co.

whole to be a truthful witness and I do not think he would have been a party to any such representation so far as the defendant is concerned. But it is possible that Cullianji may have made statements to Mulji and to Mr. Devidas* about the defendant agreeing to extend his liability till such time as more title-deeds were deposited, in order to allay Devidas's apprehensions and silence any objection on his part. So far as the defendant is concerned I have come to an unhesitating conclusion, that in signing this promissory note he merely acknowledged receipt of payment to him of moneys which were rightfully his but which were paid a few weeks in advance of the day on which they should have been paid, and that he signed that promissory note in question on the distinct understanding that his liability would terminate on the 31st January 1908, when he was unquestionably entitled to claim payment from Hyderally Cassumji Sons & Co. and when Mulji under his agreement was bound to pay that identical sum to Hyderally Cassumji Sons & Co., for the purpose of paying over the sum to the defendant..... I have tested the evidence with the fact before my mind that the plaintiff was the holder of a promissory note duly signed by the defendant and that,* therefore, *prima facie* he was entitled to recover from the defendant unless the defendant proved the existence of circumstances which absolved him from his liability. This onus has been fully discharged by the defendant and discharged to my entire satisfaction..... I find that the defendant's liability on the promissory note in the plaint mentioned ceased and terminated on the 31st of January 1908 and that he is not liable to pay the sum of Rs. 50,000 claimed in this suit to the plaintiff."

On plaintiff's appeal (Scott, C. J., and Chandavarkar, J.) held that as the suit was a suit on a promissory note, section 92 of the Evidence Act, 1872, precluded the defendant from proving his defence, which was based on a contemporaneous oral agreement inconsistent with the promissory note. The decree of the Court below was accordingly set aside and the suit was decreed with costs. The reasons for their judgment were as follows :—

"The plaint in the suit stated certain circumstances under which the promissory note had been passed and in effect alleged an agreement between the parties under which, if a certain condition was performed by Hyderally Cassumji Sons & Co., the liability on the note would cease.

"The defendant put in a written statement denying the allegation of the plaintiff as to the contemporaneous agreement. He alleged certain other circumstances under which the note had been issued, and stated in paragraph 6 that it was agreed that the liability of the defendant on the said note should cease on the day on which the last of certain payments for Rs. 50,000 previously mentioned became due, that is, on the 30th January 1908, the plaintiff, as above stated, having agreed to advance the money to pay the amount of the said instalment to the defendant on that day. That is an allegation of a contemporaneous oral agreement inconsistent with the promissory note, being an allegation of an agreement that although the note purports to be a note without any limitations payable upon demand, it is in effect a note the liability on which is to cease on a particular date, the 30th January 1908, not subject to any condition depending upon human agency, but merely on the expiration of a certain limited period of time which is not mentioned in the promissory note. That, it appears to us, is an agreement which cannot be proved having regard to the terms of section 92 of the Evidence Act, and it is the only defence to the claim on the promissory note which is before the Court in this appeal.....In our opinion any discussion of the evidence is unnecessary, because upon the face of the pleadings in support of which the evidence was adduced, no legal defence is forthcoming to the claim on the promissory note.

"We, therefore, reverse the decree of the lower Court and pass a decree for the plaintiff for Rs. 50,000 with interest at 6 per cent. per annum from the date of the suit and costs throughout. Interest on judgment at 6 per cent per annum."

The defendant, thereupon, appealed to His Majesty in Council.

Messrs. *Upjohn, K. C.* and *E. B. Raikes*, for the Appellant:—Section 92 of the Evidence Act, 1872, applies only when the whole of the agreement is reduced to writing. But here

*Plaintiff's solicitor.

the parties admittedly did not reduce the whole of the contract to writing, and the case, therefore, falls within the second proviso to the section.

[Mr. AMEER ALI referred to *Bholanath Khettri* v. *Kaliprasad Agarwalla* (1).]

It is submitted that the learned Judge was right in allowing the case to go to trial. He disbelieved the plaintiff's story, and was, therefore, right in dismissing the suit.

Reference was also made to section 91 of the Evidence Act.

Sir *Robert Finlay, K. C., and Mr Lowndes*, for the Respondent, referred to *Pym* v. *Campbell* (2); *Wallis* v. *Littell* (3), and Taylor on Evidence, 10th Edition, paragraphs 1132 and 1135, and submitted that the Court of Appeal came to the right conclusion in deciding that the appellant was prevented under section 92 of the Evidence Act from setting up an oral agreement. They also submitted that even if the appellant could set up an oral agreement, the burden of proving it was on him, and that he had failed to discharge that onus.

Mr. *Upjohn, K. C.*, in reply, referred to *Holt* v. *Miers* (4), *Lindley* v. *Lacey* (5) and *Khoo Sit Hoh* v. *Lim Thean Tong* (6).

JUDGMENT.

LORD DUNEDIN.—The plaintiff-respondent, Mulji Haridas, sues the defendant-appellant, Motabhoy Mulla Essabhoy, upon a promissoy note jointly executed by the defendant and the firm of Hyderally Cassumji Sons & Co., hereinafter called Hyderally, for Rs. 50,000. The note was made in the following circumstances. Mulji, before July 1907, had made advances to Hyderally amounting in all to Rs. 4,00,000, the consideration for making such advances being certain shares in an agency commission in a certain Company. The advances were partially but not wholly covered by security. In July 1907, Hyderally applied for a futher advance of Rs. 1,50,000 in order to pay off Motabhoy a debt of that amount due to him. Mulji agreed to make the loan, a condition being an increased share in the commission agency, and to make it in three equal instalments. Two of these instalments were paid and the money handed on by Hyderally to Motabhoy and the third instalment fell to be paid on 30th January 1908.

At the end of December 1907 Motabhoy was in want of money to meet a bill. He accordingly applied to Hyderally to ask if the balance of the debt, namely, Rs. 50,000, could be paid immediately. Hyderally then approached Mulji to see if he would prepay his instalment due on the ensuing 30th January. He consented to do so, on being given the joint promissory note in question of date 23rd December 1907, and the money was handed to Motabhoy. So far there is no discrepancy between the view of the parties, but now arises the difficulty. The defendant Motabhoy alleges that it was agreed that upon the arrival of the 30th January 1908 the advance made under the promissory note should be held as the advance of the instalment promised to be paid by Mulji to Hyderally on that date and that the note should be replaced by a single acknowledgment on the part of Hyderally. The plaintiff Mulji says that all he agreed to was that he would surrender the note if at 30th January 1908 Hyderally had given sufficient security for the whole debt as then due by him, that on the 30th January no such sufficient security was given, that accordingly he is entitled to maintain Motabhoy's liability under the note.

The learned Judge of first instance allowed the parties to go to trial and examine witnesses; and coming to the conclusion that it had not been proved that any arrangement had been made for the giving of security by Hyderally, gave judgment in favour of the defendant. The Court of Appeal took the view that no witnesses should have been examined and that the testimony could not be looked at, because in their view the promissory note constituted a written contract binding the defendant to pay on demand, and section 92 of the Evidence Act, 1872, prevented any oral agreement being set up to contradict that written agreement.

(1) 8 B. L. R. 89 at p. 92.
(2) (1856) 6 El. & Bl. 370; 25 L. J. Q. B. 277; 2 Jur. (N. S.) 641; 4 W. R. 528; 119 E. R. 903; 106 R. R. 622.
(3) (1861) 11 C. B. (N. S.) 369; 31 L. J. C. P. 100; 8 Jur. (N. S.) 745; 5 L. T. 487; 10 W. R. 192; 132 R. R. 591; 142 E. R. 840.
(4) (1839) 9 Car. & P. 191.
(5) (1864) 34 L. J. C. P. 7; 17 C. B. (N. S.) 578; 10 Jur. (N. S.) 1108; 11 L. T. 273; 13 W. R. 80; 142 R. R. 525; 144 E. R. 232.
(6) (1912) A. C. 323; 81 L. J. P. C. 176; 136 L. T. 470.

Now if the defendant's pleading is to be dealt with in absolute strictness that view is right, for what the defendant says is this: he admits the execution of the note, and then he says that it was verbally agreed that his liability on it should cease on the 30th January 1908. That is a bald averment of a verbal contract contradicting the written contract and would be inadmissible under section 92. But this bald averment does not represent the defendant's true case. His true contention has been already stated, and in the form of averment it might be put thus: "It was agreed that on 30th January 1908 the advance then to become due by Mulji to Hyderally should be held as made by the moneys paid on 23rd December 1907, and that the liability under the note should be held as satisfied by a fresh note to be granted by Hyderally for the advance of 30th January 1908." That would be an agreement in terms of proviso 2 to section 92 which allows to be proved "the existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms."

Their Lordships have felt that it would not be satisfactory to decide against the defendant on a view which might have been obviated by a mere amendment of the pleadings, and that in a case where the parties had been allowed to go to proof. They have, therefore, felt themselves entitled to consider the evidence led.

Although, however, there are cases, of which this is one, where it is allowable to urge an oral agreement which will have the effect of leaving matters otherwise than if they had depended on the written agreement alone, it is obvious that such oral agreement must be clearly proved and that the onus lies on him who sets it up. Their Lordships are of opinion that this has not been sufficiently realised by the learned Judge of first instance. Coming to the conclusion that the plaintiff had failed to prove that he had stipulated for security being given for the whole debt by Hyderally by the 30th January, the learned Judge takes it as a necessary *sequitur* that the defendant's case is established. But the agreement alleged by the defendant must be substantively proved, and it is here, in their Lordships' judgment, that the defendant fails. The agreement must be an agreement to which the plaintiff Mulji is shown to have assented, either himself or by an agent with power to bind him. Now there was no one who had power to bind Mulji. Further, Motabhoy and Mulji never met at the time at which the alleged agreement was concluded and there is absolutely no evidence which shows that Mulji ever consented to anything except to advance the money if he got the promissory note. In the argument the defendant's Counsel sought to put his case thus: He said that Mulji himself admitted in his pleading that the promissory note was not to represent the true state of matters after 30th January, that no doubt he adhibited the condition that security was by that date to be given, but that as the Judge of first instance disbelieved the story that any such condition was made, the matter rested on his own confession that the promissory note lost its efficacy after 30th January. The fallacy here consists in so treating an admission. It is permissible for a tribunal to accept part and reject the rest of any witness's testimony. But an admission in pleading cannot be so dissected, and if it is made subject to a condition it must either be accepted subject to the condition or not accepted at all. Therefore, the admission that the promissory note was to be held as satisfied on 30th January by a new debt on the part of Hyderally, provided that security was found for the whole debt by that date, cannot be treated as an admission that in any case the promissory note was to be held as satisfied by 30th January.

Their Lordships are, therefore, of opinion that the decree of the Court of appeal was right, although to be supported on other grounds than those stated in the judgment of that Court, and they will humbly advise His Majesty to dismiss the appeal with costs.

Appeal dismissed.

Solicitors for the Appellant:—Messrs. *Ranken Ford, Ford and Chester.*

Solicitors for the Respondent: Messrs. *T. L Wilson & Co.*

RANGAMMAL *v.* SEVAUGAN CHETTI.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 531 OF 1912.

December 1, 1914.

Present:—Mr. Justice Sankaran Nair.

RANGAMMAL—CLAIMANT—PETITIONER

versus

SEVAUGAN CHETTI MINOR, BY HIS GUARDIAN, CHOCKALINGAM CHETTI—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908) s. 115—Attachment—Claim to attached property—Question of possession not decided—Power of High Court to interfere—Possession in one's own right—Release from attachment.

Where a Court has disposed of a case without deciding a question (*e. g.*, the question of possession in a claim case) which under the Code of Civil Procedure it is bound to decide for a proper disposal of the case, the High Court will interfere under section 115 of the Code. [p. 228, col. 2.]

Where it was found that the properties attached were purchased in the names of the judgment-debtor and the claimant, that the entire purchase-money was paid by the claimant only, and that he had been in sole possession of the properties for the last ten years or more:

Held, that the claimant was entitled to get the properties released from attachment. [p. 228, col. 2.]

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Namakal, in Execution Appeal No. 482 of 1912 (Execution Petition No. 343 of 1912, in Original Suit No. 480 of 1909).

Mr. *T. Narasimha Aiyangar*, for the Petitioner.

Mr. *K. R. Subramania Sastri*, for the Respondent.

JUDGMENT.—The District Munsif has not found who is in possession of the property. He only assumes that the petitioner's husband was in possession. Without a finding as to who is in possession this matter cannot be disposed of. If the petitioner is in exclusive possession of the property in her own right, she is entitled to get the properties released from attachment. If she is in possession of the property only as a joint tenant or a tenant-in-common, *i.e.*, on her own behalf and on behalf of the judgment-debtor, the decree-holder is entitled to attach and sell the judgment-debtor's interest in the property. With reference to the above observations, the Munsif will return a finding after taking evidence on the question of possession. Mr. K. R. Subramania Sastri argues that the matter is not one for interference under section 115 of the Civil Procedure Code. Where the District Munsif has disposed of a case without deciding a question which under the Code of Civil Procedure he is bound to decide for a proper disposal of the case, this Court ought to interfere under section 115 of the Civil Procedure Code. The finding should be submitted within six weeks and seven days will be allowed for filing objections.

FINDING.—The High Court has directed me to submit a finding in this matter on the following question:—

Who is in possession of the attached property, and if the petitioner, whether she is in exclusive possession in her own right, "Or only as a joint tenant or a tenant-in-common."

Evidence was recorded on both sides and on giving it the best consideration I could, I come to the conclusion that the attached properties were in the possession of the petitioner on the date of attachment and that such possession was not exclusive possession in her own right but only a possession, which, in the circumstances to be referred to below, can amount to one on behalf of the judgment-debtor and as a tenant-in-common with him.

* * * * * * *

JUDGMENT.—The properties were originally purchased in the name of the judgment-debtor, Dorasami Aiyangar, and his nephew, Rajam Aiyangar, the claimant's husband, by a sale-deed, Exhibit H, dated 13th October 1900. A decree-holder of the uncle, Dorasami Aiyangar, attached his interest in April 1912. The claimant seeks to get the properties released from attachment. The District Munsif finds that from a date subsequent to May 1902 and prior to 1903-1904, Rajam Aiyangar, claimant's husband, should have obtained possession and ever since, Rajam Aiyangar and his widow, the claimant, have been in possession. He also finds that the entire purchase-money payable under Exhibit H was paid by Rajam Aiyangar only. But he holds that as there was no registered instrument of sale by Dorasami Aiyangar in favour of the husband, she should, be held to be only a tenant-in-common with Dorasami Aiyangar though in possession of the entire properties. On the facts found by the District Munsif the claimant is entitled to have the properties released from attachment. She is as a fact in sole possession in her own right. I accord-

ingly reverse the order of the lower Court, direct the attachment to be raised and the properties released from attachment. The petitioner is entitled to the costs in this Court, including the costs of the fresh inquiry. The parties will bear their own costs in the lower Court.

Appeal allowed.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

February 25, 1915.

Present:—Lord Dunedin, Lord Shaw, Sir George Farwell, Sir John Edge and Mr. Ameer Ali.

THE BOMBAY COTTON MANUFACTURING COMPANY, LTD.—DEFENDANTS—APPELLANTS

versus

Raja Bahadur MOTILAL SHIVLAL—PLAINTIFF—RESPONDENT.

Evidence—Oral—Weight to be given to opinion of trial Judge—Duty of Court of Appeal—Cross-examination to credit—Relevancy—Credibility of witness.

On appeal the whole case, including the facts, are within the jurisdiction of the Appellate Court: but generally speaking it is undesirable to interfere with the findings of fact of the trial Judge who sees and hears the witnesses and has an opportunity of noting their demeanour especially in cases where the issue is simple and depends on the credit attached to one or the other of conflicting witnesses. Nor should his pronouncement with respect to their credibility be put aside on a mere calculation of probabilities by the Court of Appeal. [p. 230, col. 2.]

Where the issue is simple and the only question is which set of witnesses is to be believed the verdict of the Judge trying the case should not be lightly disregarded. [p. 231, col. 1.]

Cross-examination to credit is necessarily irrelevant to any issue in an action, its relevancy consists in being addressed to the credit or discredit of the witness in the box so as to show that his evidence for or against the relevant issue is untrustworthy; it is most relevant in a case where everything depends on the Judge's belief or disbelief in the witness's story. [p. 231, col. 1.]

Where the Judge who heard the evidence rejected the story of a witness declaring that he had seldom seen in the box a more "thoroughly unscrupulous, untrustworthy, untruthful man" than the witness, but the Court of Appeal accepted the witness's story saying that the cross-examination of the witness which convicted him of being a party to a false and fraudulent balance sheet, was "not a very relevant point," and that witness was prejudiced thereby by being placed "in an uncomfortable position and reduced to shuffling answers".

Held, that the Court of Appeal ought not to have excused the witness and actually accepted his story on the ground that he was uncomfortable when he was shown to be a fraudulent falsifier of accounts. [p. 231, col. 1.]

Appeal from a judgment and decree of the High Court of Bombay in its Appellate Jurisdiction (February 5th, 1912), reversing those of the same Court in its Ordinary Original Civil Jurisdiction (July 24th, 1911.)

FACTS.—The plaintiff-respondent instituted the suit on the 6th April 1910 to recover from the defendants-appellants two lacs of rupees, lent on deposit for a fixed period which expired in September 1909, with interest. He claimed to set off a sum of Rs. 93,139-11-10, the sale-proceeds of certain cotton in the hands of the plaintiffs. The amount claimed was Rs. 1,23,769-11-3 and further interest. The defendant Company admitted the loan, but counter-claimed in respect of two lacs of rupees repaid to the plaintiff on May 27th, 1909, for a subsequent loan on deposit of that sum made on December 28th, 1908. The defendants contended that the subsequent loan was not a genuine transaction, but that it was a fraud upon the defendant Company contrived between the plaintiff by his manager one Dwarkadas Dharamsey, at that time agent for the said Company. They also contended that upon the accounts being properly taken there was a balance due to them, together with the value of 125 bales of cotton deposited with the plaintiffs, and counter-claimed in respect thereof.

Beaman, J., who tried the case, gave judgment in favour of the defendant Company, and after the accounts were taken, made a decree in its favour directing the plaintiff to pay to it the sum of Rs. 1,17,633 with interest and costs. But the Court of Appeal (Scott, C. J., and Russell, J.) reversed the judgment and decree of the Court below, gave judgment in favour of the plaintiff, and made a decree directing the defendant Company to pay to the plaintiff Rs. 1,01,295 with interest and costs of the suit and appeal. The defendant Company thereupon preferred the present appeal.

Messrs. *Upjohn*, *K. C.*, and *Dunne*, for the Appellants, on the question of the weight to be attached to opinion of the trial Judge as regards the credibility of witness, referred to *Khoo Sit Hoh* v. *Lim Thean Tong* (1), *Alice* v. *Princess Alice* (2) and *Montgomerie & Co.*, v. *Wallace-James* (3); and submitted that the judgment of the Court of first instance should be restored.

Sir *Robert Finlay*, *K. C.*, and Messrs. *Brown* and *Rakes*, for the Respondent, referred to sections 157 and 159 of the Evidence Act, 1872, and submitted that the judgment appealed from was right.

The appellants were not called upon to reply.

JUDGMENT.

SIR GEORGE FARWELL.—This is an appeal from a judgment and decree of the High Court of Bombay in its appellate jurisdiction reversing a judgment of the High Court in its original jurisdiction. The question at issue is one of fact. The respondent is a banker and money-lender against whom personally no imputation is made; his manager was one Dani. Dani was on intimate terms with one Dwarkadas, and Dwarkadas was for some years, until his death in August 1909, agent and Managing Director of the appellant Company, and of two other Companies, the Tricumdas and the Lakhmidas; in 1908 the appellant was a flourishing and solvent Company, and the two other Companies were largely insolvent and both were heavily indebted to the respondent for advances to the amount of about 5½ lacs. The respondent was pressing Dwarkadas for further and better security in respect of these sums, and also of other moneys advanced by the respondent to Dwarkadas personally; and Dani and Dwarkadas accordingly arranged to shift part of the indebtedness of the Tricumdas and Lakhmidas Companies on to the appellant Company. This arrangement was carried out by entries which can only be characterised as a barefaced swindle. Dani procured two cheques, one from the Tricumdas Company for Rs. 85,000 and one from the Lakhmidas Company for one lac and Rs. 15,000 and, sent them over by his son to the office of the appellant Company to be placed to their credit, but simultaneously Dwarkadas through his son Devji Damodar telephoned to the cashier of that Company not to present the cheques, but to await further instructions; the two amounts were entered in the appellants' books to their credit and appear as:—"Rs. 85,000 cheque 1 in number drawn on the Bank of Bombay (bearing) No. 95,500 S.S., and 1. 15,000 cheque drawn on the Bank of Bombay bearing No 7. 94950 S. S. No. 2." The two cheques were then destroyed by Dani's orders. It is difficult to suggest any object for this transaction of drawing and paying in cheques for the purpose of being entered with every circumstance of identification and reality, and then of immediate destruction without presentation except fraud. The transaction was merely a paper one for the purpose of shifting the respondent's security from the two insolvent to the one solvent Company. The Judge of first instance has heard the evidence, which depends on the credit to be attached to the two sons of Dwarkadas on the appellants' side, and to Dani on the respondent's; he has stated that he has seldom seen in the box "such serviceable, clear-headed and absolutely truthful witnesses" as the two sons or a more 'thoroughly unscrupulous, untrustworthy and untruthful man" than Dani, and he finds that the transaction was a deliberate fraud on the appellants. The Appellate Court refused to accept as conclusive the judgment of the lower Court as to the veracity of the witnesses. It is doubtless true that on appeal the whole case, including the facts, are within the jurisdiction of the Appeal Court. But generally speaking, it is undesirable to interfere with the findings of the trial Judge, who sees and hears the witnesses and has an opportunity of noting their demeanour, especially in cases where the issue is simple and depends on the credit which attached to one or other of conflicting witnesses. Nor should his pronouncement with respect to their credibility be put aside on a mere calculation of probabilities by the Court of Appeal. In making these

(1) (1912) A. C. 323 at p. 325; 81 L. J. P. C. 176; 106 L. T. 470.

(2) (1868) 2 P. C. 245 at p. 247; 38 L. J. Adm. 5; 19 L. T. 678; 17 W. R. 109.

(3) (1904) A. C. 73 at pp. 75, 83; 73 L. J. P. C. 25; 90 L. T. 1.

observations their Lordships have no desire to restrict the discretion of the Appellate Courts in India in the consideration of evidence. They only wish to point out that where the issue is simple and straightforward and the only question is which set of witnesses is to be believed, the verdict of a Judge trying the case should not be lightly disregarded.

With all respect to the Appeal Tribunal, their Lordships cannot accept their reading of the facts and inferences. They find no such contradictions or impossibilities in the evidence of the two witnesses, whom the trial Judge in this case has believed, to justify their preferring the opinion of the Appellate Court formed on the written record to his deliberate conclusions after hearing it in Court. Again, several of the conclusions of fact adopted by the Appeal Court appear to their Lordships to be quite mistaken, *e.g.*, that Dani had no reason to fear and did not fear that the respondent would lose the money owing to him by the Tricumdas Company. It would serve no useful purpose to comment in detail on the judgment of the Appeal Court, but their Lordships feel bound to take exception to the Chief Justice's statement that the cross-examination of Dani, which convicted him of being party to a false and fraudulent balance sheet of the Tricumdas Company, was "not a very relevant point," and that Dani was prejudiced thereby by being placed "in an uncomfortable position and reduced to shuffling answers." The observation might be of disastrous effect, if accepted. Cross-examination to credit is necessarily irrelevant to any issue in the action, its relevancy consists in being addressed to the credit or discredit of the witness in the box so as to show that his evidence for or against the relevant issue is untrustworthy; it is most relevant in a case like the present where everything depends on the Judge's belief or disbelief in the witness's story: and to excuse him and actually accept his story on the ground that he was uncomfortable when he was shown to be a fraudulent falsifier of accounts is to adopt a course which their Lordships cannot follow.

Their Lordships will humbly advise His Majesty that the judgment of the Appeal Court be set aside and that of the High Court in its original jurisdiction be restored and that the respondent do pay the costs of this appeal.

Appeal allowed.

Solicitors for the Appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondent: Mr. *Latteys & Hart.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDERS NOS. 286 TO 290 OF 1913.

April 1, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

VENKATAPERUMAL RAJU BAHADUR VARU, RAJA OF KARVETNAGAR, MINOR, BY GUARDIAN, W. A. VARADACHARIAR—PETITIONER—APPELLANT

versus

VENKATA REDDI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908, ss. 47, 73, 104—Mortgage-decree making judgment-debtor personally liable for deficiency—Sale of other properties belonging to him—Application by decree-holders for rateable distribution—Order, whether appealable—Execution application praying for specific reliefs—No final orders passed—Madras Civil Rules of Practice, r. 167.

A party to whom a right of appeal is given, if he comes under section 47 of the Code of Civil Procedure, should not be deprived of it unless the Civil Procedure Code expressly denies it to him. [p. 233, col. 1.]

Orders passed under section 73 of the Code of Civil Procedure are appealable if they affect parties to the suit especially when the appeal is by the judgment-debtor who cannot avail himself of the right of suit given by clause (2) of section 73. [p. 232, col. 2.]

Sundar Singh v. *Ghasi*, 18 A. 410; A. W. N. (1896) 126; *Krishnabhupati Deva* v. *Vikrama Deva*, 18 M. 13 at p. 17; *Vengappayyan* v. *Karimpanakal Parvati*, 26 M. 501; *Kali Prosanna Ghosh* v. *Golam Rahman*, 20 Ind. Cas. 790; 18 C. W. N. 910, followed.

Jagadish Chandra Shaha v. *Kirpa Nath Shaha*, 1 Ind. Cas. 783; 36 C. 130; *Kashi Ram* v. *Mani Ram* 14 A. 210; A. W. N. (1892) 56; *Balmer Lawrie & Co.* v. *Jadu Nath Banerjee*, 27 Ind. Cas. 644; 42 C. 1; *Pungalur Chennamma* v. *Raja of Karvetinagar*, 23 Ind. Cas. 422; 1 L. W. 234, distinguished.

Mortgage decrees which provide for recovery of the deficiency of the decree after sale of hypotheca from the person and other properties of the mortgagor, are decrees "*for the payment of money*" within the meaning of section 73 of the Code and entitle the mortgagee to apply for rateable distribution under that section. [p. 233, col. 2.]

VENKATAPERUMAL *v.* VENKATA REDDI.

Abdulla Sahib v. *Doctor Oosman Sahib*, 28 M. 224; *Gatti Lal* v. *Bir Bahadur Singh*, 27 A. 158; A. W. N. (1904) 200; 1 A. L. J. 562, followed.

Execution applications praying for specific reliefs which were all granted several years before assets were realised and on which no further reliefs could be asked or granted, are still on the file and undisposed of if no final orders have been passed taking them off the file of pending applications. [p. 234, col 1.]

Rule 167 of the Civil Rules of Practice, Madras, contemplates final orders being passed by the Court on a petition after the sale has been confirmed. [p. 234, col. 1.]

An objection that the decrees passed are not in accordance with law, cannot be raised in execution proceedings. [p. 233, col. 2.]

Appeals against the orders, dated 25th January 1913, of the District Court of North Arcot, in Civil Miscellaneous Petitions Nos. 898 to 901 and 904 of 1912 (Execution Petitions Nos. 124, 88, 133, 135 and 82 of 1905, in Original Suits No. 5 of 1897, No. 22 of 1889, No. 11 of 1889, No. 24 of 1889 and No. 11 of 1886), respectively.

Mr. *L. A. Govindaraghava Aiyar*, for the Appellant.

Messrs. *M. Krishnamachariar*, *V. Parthasarathy Aiyangar* and *P. Venkataramana Rao*, for the Respondents.

These appeals coming on for hearing on the 19th March 1915, and a preliminary objection having been taken that the appeals do not lie the Court (Sheshagiri Aiyar and Kumaraswami Sastri, JJ.) delivered on the said preliminary objection the following

JUDGMENT.—The respondents in these connected appeals obtained mortgage decrees against the appellant. These decrees provided for the recovery of the balance from the person and the other properties of the judgment-debtor. Certain properties, not included in the mortgage to the respondents, were attached in execution of two other decrees against the same judgment-debtor; the realised assets were paid into Court. The present respondents applied for rateable distribution; notwithstanding the objection of the judgment-debtor, the applications were granted. The judgment-debtor has appealed. A preliminary objection is taken that as the order was passed under section 73 of the Code of Civil Procedure, against which no appeal is provided by section 104 of the Code, no appeal should be entertained. It is conceded that the question agitated in those applications *relates* to the execution of the decrees between the parties to the suits in which the decrees were passed. *Prima facie*, therefore, the order is appealable as falling under section 47 of the Code of Civil Procedure. Has that right of appeal been taken away in the present case by section 73? That section does not say that no appeal shall lie against orders passed under it. It is by the omission to provide for an appeal in section 104 that it is argued that an appeal is not given against the order. It has been held with reference to orders passed under Order XXI, rule 63, that if the adjudication was between the parties to the suit, although the matter may arise in a claim petition, an appeal will lie under section 47 of the Code of Civil Procedure. This principle was recognised both under the old and the new Codes: See *Sundar Singh* v. *Ghasi* (1), *Krishnabhupati Devu* v. *Vikrama Devu* (2), *Vengappayyan* v. *Karimpanakal Parvati* (3) and *Kali Prosanna Ghosh* v. *Golim Rahman* (4). On the analogy of these decisions, we are of opinion that orders passed under section 73 of the Code of Civil Procedure are appealable, if they affect parties to the suit. In *Jagadish Chandra Shaha* v. *Kirpa Nath Shaha* (5), *Kashi Ram* v. *Mani Ram* (6), the contest was between rival decree-holders. They are not governed by section 47 of the Code of Civil Procedure. This distinction was pointedly referred to in *Balmer Lawrie & Co.* v. *Jadu Nath Banerjee* (7).

But our attention was drawn to the judgment of Sankaran Nair and Ayling, JJ., in *Pungalur Chennamma* v. *Raja of Karvetinagar* (8), which at first sight appeared to be a direct authority in favour of the respondents. In that case, the appellant was one of the decree-holders. To him the provision of clause (2) of section 73 of the Code of Civil Procedure will apply, and he can have his remedy by way of suit if the order goes

(1) 18 A. 410; A. W. N. (1896) 126.
(2) 18 M. 13 at p. 17.
(3) 26 M. 501.
(4) 20 Ind. Cas. 790; 18 C. W. N. 910.
(5) 1 Ind. Cas. 783; 36 C. 180.
(6) 14 A. 210; A. W. N. (1892) 56.
(7) 27 Ind. Cas. 644; 42 C. 1.
(8) 23 Ind. Cas. 422; 1 L. W. 234.

against him. The judgment-debtor cannot avail himself of the right of suit which that sub-clause provides. The present case may be distinguished from the case in *Rungalur Chennamma* v. *Raja of Karvetinagar* (8) on that ground. We think that a party to whom a right of appeal is given, if he comes under section 47 of the Code of Civil Procedure, should not be deprived of it, unless the Civil Procedure Code expressly denies it to him. As we find no such denial in section 73 of the Civil Procedure Code, we must hold that an appeal lies. We overrule—the preliminary objection.

The appeals then coming on for hearing on merits on the same day (19th March 1915) and having stood over for consideration till this day (1st April 1915), the Court delivered the following

JUDGMENT.

SESHAGIRI AIYAR, J.—I have had the advantage of reading the judgment which my learned brother is about to deliver. I entirely agree with his conclusions. The respondents are entitled to rateable distribution even though their decrees are on mortgages. The order for payment of the amount from the person and the other properties of the judgment-debtor was also obtained in these cases. See *Abdulla Sahib* v. *Doctor Oosman Sahib* (9) and *Gatti Lal* v. *Bir Bahadur Sahi* (10). It is not disputed that no formal order was passed disposing of their execution applications. Under the old Code of Civil Procedure, it was held that even when an application was "struck off", it must be taken to be still pending, as the law provided no procedure for taking such a step *Sasivarna Tevar* v. *Arulanandam Pillai* (11). In the present Code, there is an express provision for dismissing an execution application where no further step is taken by the decree-holder. It is clear, therefore, that until that step is taken under the new Code, the application is on the file of the Court. The fact that the decree-holder moved the Court only for a particular remedy open to him, cannot lead to the inference that he was not entitled to ask that his decree be satisfied by other means which the law enables him to adopt. The District Judge is right in treating the applications of the respondents as pending at the time that the claim for rateable distribution arose. These appeals must be dismissed with costs : There will be no costs in Civil Miscellaneous Application No. 289.

KUMARASWAMI SASTRI, J.—These are appeals against the orders of the District Judge of North Arcot declaring that the respondents are entitled to rateable distribution out of the sale-proceeds realized in Execution Petitions Nos. 78 of 1905 and 108 of 1906. The respondents obtained mortgage-decrees against the appellant, which directed that the judgment-debtors should be personally liable for any deficiency that may arise after the sale of the mortgaged properties and the application of the sale-proceeds towards the amount due on the decrees. Though the decrees were not in accordance with the provisions of the Transfer of Property Act, the irregularity cannot be questioned in execution proceedings. *Raja of Kalahasti* v. *Venkata Perumal Raja* (12). The respondents had, therefore, decrees for money and would be entitled to rateable distribution, if they had applied for execution and their applications were still undisposed of and on the file at the date when assets were realized in execution of the decrees in Execution Petitions Nos. 78 of 1905 and 108 of 1906. *Tiruchittambala Chetti* v. *Seshayyangar* (13).

The respondents in 1905 filed execution applications on the decrees obtained by them, which prayed for (1) issue of notices to the judgment-debtors under section 248 of the old Civil Procedure Code, and (2) sale of the mortgaged properties, leave being given to the decree-holders to bid. Orders were passed granting the reliefs, and it is admitted that the decree-holders obtained all the reliefs they had prayed for. For some reason or other (not explained) no formal orders were passed taking the petitions off the file of pending execution applications and the District Judge, treating the applications as pending, ordered rateable distribution on the applications of the decree-holders.

(9) 28 M. 224.
(10) 27 A. 158; A. W. N. (1904) 200; 1 A. L. J. 562.
(11) 21 M. 201; 8 M. L. J. 18.

(12) 12 Ind. Cas. 689; 21 M. L. J. 1036; (1911) 2 M. W. N. 458; 10 M. L. I. 429.
(13) 4 M. 383.

The question for decision is whether execution applications praying for specific reliefs, which were all granted several years before assets were realized and on which no further reliefs could be asked or granted, can be said to be still on the file and undisposed of, because no final orders have been passed taking them off the file of pending applications.

The point is not free from difficulty. When an execution petition is filed, and the Court either rejects all or some of the prayers, it has to pass final orders to that effect. If all or any of the prayers are granted, the decree-holder has to obtain the appropriate reliefs by taking further steps, either on the execution petition or in interlocutory application on the execution petition. When he has obtained all the reliefs he asks for, all that remains to be done on the execution petition is to record the fact that the petition has been disposed of. The Court cannot do anything further. It is argued by Mr. Govindaraghava Aiyar that anything that the Court might do, after all the prayers have been granted and reliefs sought obtained by the decree-holder, will only be purely ministerial and for statistical and not judicial purposes.

There can be little doubt that only a formal order can be passed on the petition after all the reliefs prayed for have been granted and obtained by the decree-holder; but it does not follow that the order is not a judicial order simply because it records that the execution petition has been disposed of. Many purely formal orders are still judicial and not ministerial. The Madras Civil Rules of Practice contemplate final orders being passed on execution petitions. Rule 167 of the Civil Rules of Practice requires that, when orders for sale are passed, the execution petition shall be adjourned to a fixed date and clearly contemplates final orders being passed by the Court on the petition after the sale has been confirmed.

It was the duty of the Court to have fixed a date for the final disposal of the execution petitions, and the fact that it did not do so has the effect of keeping the applications pending till final orders are passed.

I am of opinion that the District Judge was right in treating the execution petitions as pending, and dismiss the appeals (except Civil Miscellaneous Appeal No. 289) with costs.

Appeals dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 346 OF 1914.

February 26, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

AMMASI KUTTI GOUNDEN—PLAINTIFF—PETITIONER

versus

APPALU *alias* KRISHNASWAMI NAICKEN—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115—Patent error of procedure—Interference in revision—Suit on promissory note assigned by undivided son—Succession certificate, whether necessary—Question of want of certificate raised for the first time in appeal—Appellate Court's duty to give plaintiff an opportunity of producing certificate.

When a subordinate Court dealing with a suit of a small cause nature commits an error of procedure patent on the face of the record, the High Court will interfere in revision. [p. 235, col. 1.]

Subramania Pattar v. *Narayana Pattar*, 28 Ind. Cas. 189; 2 L. W. 230, followed.

Where an objection is taken for the first time in appeal that the suit on a promissory note should not have been decreed inasmuch as the plaintiff had not produced the succession certificate, the suit should not be dismissed but opportunity should be given to the plaintiff to produce the certificate. [p. 235, col. 1.]

Where an assignment is from an undivided son, no succession certificate is necessary, nor when the plaintiff sues on the ground that he is a holder in due course and not that a debt did really exist. [p. 235, col. 2.]

Petition, under section 115 of Act V of 1908, praying the High Court to revise the decree of the Court of the Temporary Subordinate Judge, Coimbatore, in Appeal Suit No. 228 of 1913, preferred against that of the District Munsif of Coimbatore, in Original Suit No. 172 of 1912.

Mr. *S. Muthiah Mudaliar*, for the Petitioner.

Mr. *V. C. Seshachariar*, for the Respondent.

JUDGMENT.

SPENCER, J.—An objection has been taken that this is not a case in which we can interfere in the exercise of our revisional

powers under section 115 of the Code of Civil Procedure.

An objection was taken only at the hearing of the appeal in the lower Court that no decree should have been passed when the plaintiff had not produced a succession certificate.

The Subordinate Judge thereon decided that there was no necessity to send the case back to the lower Court and proceeded to set aside the District Munsif's decree and to dismiss the plaintiff's suit.

In doing so the Subordinate Judge committed, in my opinion, an obvious error of procedure.

The objection having been taken at that late stage he should in fairness to the plaintiff have given him an opportunity of making good the defect brought to notice in the appeal. The matter does not stop there. Both the lower Courts having found that there was no debt, section 4 of the Succession Certificate Act does not apply to the facts of this case at all. Again both Courts having found that plaintiff was a holder in due course, having obtained a transfer of the suit promissory note from the undivided minor son of the promisee, represented by his mother and guardian, no succession certificate could have been granted to the plaintiff. The judgment of the Subordinate Judge is most unsatisfactory and he committed a clear error of procedure in dismissing the suit on his findings of fact.

As to the power of this Court to interfere when a subordinate Court dealing with a suit of a small cause nature commits an error of procedure patent on the face of the record, I am in accord with the views expressed by my learned brother in *Subramania Pattar* v. *Narayana Pattar* (1), which has the support of Full Benches of this Court in *Manisha Eradi* v. *Siyali Koya* (2) and *Vuppuluri Atchayya* v. *Sir Kanchumarti Venkata Seetarama Chandra Rao* (3) and of another Bench in *Anantha Lakshmi Ammal* v. *Kunnanchankarath Sankaran Nair* (4).

We set aside the lower Appellate Court's decree and remand the appeal for disposal in the light of the above observations. The petitioner will have his costs in this Court. The costs in the Courts below will be provided for in the revised decree.

SESHAGIRI AIYAR, J.—I entirely agree. The facts are these. The plaintiff claims to recover a sum of money by virtue of an assignment from the undivided son of the payee of a promissory note. It was found by both the lower Courts that no debt was due to the original payee; the Munsif gave a decree on the ground that as the plaintiff was a holder in due course, the fact that the defendant was not really indebted to the assignor's father, was no bar to the plaintiff recovering. In this view, there is no debt due to the father for which a certificate could have been obtained. If by a fiction of law, as argued by Mr. Seshachari, the claim is to recover the original debt, even then, the assignment being from the undivided son no certificate is necessary. In either view, the applicability of section 4 of the Succession Certificate Act does not arise, and the lower Appellate Court acted with material irregularity in the exercise of its jurisdiction. I must point out that this is a most irregular exercise of jurisdiction. The point was not raised by the appellant before the Sub-Judge. The question whether the promissory note was given for a family debt or the separate asset of the father would have to be determined before it can be ruled that a certificate is necessary. The further question whether, when by a fiction of law the claim relates back to the original debt, a certificate should be produced had to be determined. In the face of these difficulties and without giving the parties an opportunity of adducing evidence, the Sub-Judge reverses the decision given on the merits on a highly technical and by no means an undisputed legal point. I have no hesitation in saying that if ever a Court's corrective jurisdiction is to be called in aid to protect parties the present one is an eminently fit one for the exercise of that jurisdiction.

I agree in the order proposed.

Petition allowed.

(1) 28 Ind. Cas. 189; 2 L. W. 230.
(2) 11 M. 220; 12 Ind. Jur. 49.
(3) 18 Ind. Cas. 555; 24 M. L. J. 112; 13 M. L. T. 60.
(4) 18 Ind. Cas. 579; (1913) M. W. N. 101; 13 M. L. T. 123; 24 M. L. J. 205.

KRISHNA SAHAI *v.* PALAKDHARI RAUT.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 1558 TO 1586 OF 1911.

January 28, 1915.

Present:—Mr. Justice Holmwood and Mr. Justice Walmsley.

KRISHNA SAHAI AND OTHERS—DEFENDANTS APPELLANTS

versus

PALAKDHARI RAUT AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 38—Abatement of rent—Existing conditions—"Permanent," interpretation of—Deterioration—Land covered with sand, whether permanent deterioration.

A more liberal interpretation must be put on the word "permanent" in section 38 of the Bengal Tenancy Act and it must be construed with reference to existing conditions. [p. 236, col. 2.]

Thus where a land is covered with sand the deterioration is permanent with reference to existing conditions. [p. 236, col. 2.]

Gouri Pattra v. *Reily*, 20 C. 579at p. 586, followed.

Appeals against the decrees of the Subordinate Judge, third Court, Patna, dated the 23rd of December 1910, affirming those of the Munsif, second Court at that place, dated the 12th of September 1908.

Dr. *Rash Behary Ghose* and Babus *Lakhsmi Narain Singh* and *Chandra Sekhar Prosad Singh*, for the Appellants.

Babus *Umakali Mukherjee* and *Biraj Mohan Mazumdar*, for the Respondents.

JUDGMENT.

HOLMWOOD, J.—These second appeals raise the question, whether or not the respondents are entitled to abatement of rent under section 38 of the Bengal Tenancy Act on a finding by the Courts below that the respondents will have to pay rent as fixed by the Settlement for *karary* land, if the land re-appears or gets covered with earth. There were two descriptions of land in suit, and it is admitted that as far as the land that has been washed away is concerned, the abatement is permanent but it should have been made under section 52, and not under section 38. Still the fact remains that even this land, as the Subordinate Judge points out, may come back again. We are, therefore, met with the proposition that nothing in this world can be said to be permanent.

As regards the question of the sandy land, which is the point really argued before us, it is contended that there ought to be a remand for a proper finding whether the deterioration is permanent or not. But both the lower Courts have said, and in our opinion erroneously said, not as a point of fact but as a matter of interpretation of the section, that the deterioration is not permanent inasmuch as, they both say that, when the previous state of things is restored the rent will have to be restored also. To give effect to any such interpretation of the word 'permanent' would be to do away with the effect of section 38 altogether, and this was clearly pointed out in the case of *Gouri Pattra* v. *Reily* (1). The learned Judges, say: "We think the Judge is wrong: He seems to think that a deterioration ought not to be held to be permanent if by the application of capital and skill the cause of the deterioration might be removed. We are of opinion that a more liberal interpretation must be put on the word and it must be construed with reference to existing conditions." Now we think that this is a very sound legal proposition that the word 'permanent' in section 38 must in every case be construed with reference to existing conditions; and when a piece of land gets covered with sand, the deterioration is permanent with reference to existing conditions, for no human being can tell when it may please a Higher Power to cause the river to wash away the sand again or to deposit fresh earth upon it, and the case of an absolutely vague and uncertain event like this is even stronger than the example given in *Gouri Pattra's* case (1) of the application of human capital and skill. The more uncertain the result is, the more it must be held to come within the meaning of the word 'permanent' as construed with reference to existing conditions.

Both the Courts below have given the decree for abatement as asked for, and it is not necessary to vary the decree in any way merely because we consider that the passage in both the judgments stating what will be the rent in some future contingency, which has not arisen, must be expunged.

(1) 20 C. 579 at p. 586.

The result is that the appeals are dismissed. But as the point was one which could fairly be raised, each party will bear his own costs in this Court.

WALMSLEY, J.—I agree that the appeals should be dismissed.

Appeals dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 75 OF 1914.

March 19, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

MAHAMMAD HUSAIN SAIB AND ANOTHER —DEFENDANTS—APPELLANTS

versus

ABDUL KAREEM SAIB—PLAINTIFF No. 2 —RESPONDENTS.

Mortgage—Transfer of Property Act (IV of 1882), ss. 88, 89—Application for order absolute—Application in execution—Limitation—Limitation Act (IX of 1908), Sch. I, Arts. 182, 183—Civil Procedure Code (Act V of 1908), s. 48—Order absolute—Fresh starting point of limitation.

A preliminary decree in a mortgage suit passed under section 88 of the Transfer of Property Act is executable and in order to obtain an order absolute under section 89 steps have to be taken in execution; and Article 182 or 183 of the Limitation Act will apply to such applications if the decree happens to be passed by a Mofussil Court or by the original side of the High Court. [p. 238, col. 2.]

A decree-holder will have 12 years under section 48 of the Civil Procedure Code to perfect the preliminary decree and another 12 years under the same section if he gets an order absolute within the first 12 years. [p. 238, col. 2.]

Where a preliminary decree in a mortgage suit was passed on the 7th October 1901 and the first application to obtain an order absolute was made on 6th April 1904 and subsequent applications were made in 1907, 1910 and 1912 all within the three years of the immediately preceding application and all the applications were dismissed without granting the relief prayed for, and the present application was made on the 15th April 1912:

Held, that the application was not barred by limitation. [p. 239, col. 1.]

Malikarjunadu Setti v. *Lingamurti Pantulu*, 25 M. 244; 12 M. L. J. 279, *Rungiah Goundan & Co.* v. *Nanjappa Row*, 26 M. 780; 13 M. L. J. 412, *Haji Ashfaq Husain* v. *Lala Gauri Sahai*, 9 Ind. Cas. 975; 15 C. W. N. 370 (P. C.); 8 A. L. J. 332; 9 M. L. T. 380; 13 C. L. J. 351; 13 Bom. L. R. 367; 33 A. 264; 4 Bur. L. T. 121; 21 M. L. J. 1140, *Epoor Ramasamy Reddy* v. *Kandadai Rangamannar Iyengar*, 23 Ind. Cas. 390; 15 M. L. T. 246; (1914) M. W. N. 622; 26 M. L. J. 255; *Abdul Majid* v. *Jawahir Lal*, 23 Ind. Cas. 649; 12 A. L. J. 624; 16 Bom. L. R. 395; 18 C. W. N. 963; 19 C. L. J. 626; 27 M. L. J. 17; (1914) M. W. N. 485; 16 M. L. T. 44; 1 L. W. 483; 36 A. 350, *Munna Lal Parruck* v. *Sarat Chunder Mukerji*, 27 Ind. Cas. 683; 17 M. L. T. 120; 2 L. W. 282; 19 C. W. N. 561; 21 C. L. J. 118; 17 Bom. L. R. 408, referred to.

Appeal against an order of the District Court of Salem, in Appeal Suit No. 118 of 1912, preferred against that of the District Munsif of Dharmapuri, in Original Petition No. 435 of 1912, in Original Suit No. 452 of 1901 on the file of the Court of the District Munsif of Krishnagiri.

Mr. *S. Doraisami Iyer*, for the Appellants.

Messrs. *M. O. Parthasarathy Iyengar* and *M. C. Krishnamachariar*, for the Respondent.

JUDGMENT.—This appeal raises an important question of limitation. A preliminary decree in a mortgage suit was passed on the 7th October 1901. On the 6th April 1904, the first application was presented to obtain the order absolute. This apparently was filed as an application for the execution of the preliminary decree. Subsequent applications were made in 1907, 1910 and 1912, all within three years of the immediately preceding application. Notices were sent in most of the applications. They were all dismissed without granting the relief prayed for. The present application is dated the 15th April 1912. It was objected to in the Court of first instance that as more than three years had elapsed from the date of the preliminary decree, the application was barred. The District Munsif held that there was no bar of limitation for such applications. On appeal, the District Judge held that the present application must be treated as one in execution of the decree and that Article 181 of the Limitation Act applied to it.

Mr. S. Doraiswami Iyer has cited before us a large number of authorities to show that the preliminary decree is not executable and that Article 180 applies to the application. There have been conflicting decisions regarding the executability of the preliminary decree. Different High Courts have taken different views. We wish to confine ourselves to a consideration of the decisions of this Court and of the Judicial Committee of the Privy Council.

In *Malikarjunadu Setti* v. *Lingamurti Pantulu* (1), the majority of the Full Bench came

(1) 25 M. 244; 12 M. L. J. 279.

to the conclusion that the preliminary decree in a mortgage suit was executable, and that the process for obtaining the order absolute was by way of execution. In arriving at this result the learned Judges were largely influenced by the language of sections 88 and 89 of the Transfer of Property Act. The first section speaks of the *preliminary decree* and the second section of applying for an *order* absolute. Even after the pronouncement in the Full Bench case, doubts arose regarding the applicability of Article 179 of the Limitation Act —(Act XV of 1877). As was pointed out by Mr. M. O. Parthasarathy Iyengar, the learned Counsel for the respondent, the import of the Full Bench ruling was explained in *Rungiah Goundan & Co.* v. *Nanjappa Row* (2). It was suggested in that case that ordinarily an application for an order absolute will be one to which Article 179 would apply. In certain cases Article 178 may also apply. This view was acted on in this Presidency for a long time until the decision of the Judicial Committee was reported in *Haji Ashfaq Husain* v. *Lal Gauri Sahai* (3). That decision, as we shall show presently, does not affect the conclusion stated in *Rungiah Goundan & Co.* v. *Nanjappa Row* (2). All that was laid down in *Haji Ashfaq Husain* v. *Gauri Sahai* (3), was that time began to run against the decree-holder after the passing of the final decree, that is, "from the date when it was made absolute." It did not say that the preliminary decree was not executable. But it was so understood in some of the cases decided in Madras. It is not necessary to refer to all the decisions. They are all mentioned in *Epoor Ramasamy Reddy* v. *Kandadai Rangamannar Iyengar* (4). In that case Sankaran Nair and Ayling, JJ., without expressing their opinion regarding the correctness of the decisions they quoted, held that the judgment-debtor was barred by *res judicata* from raising the plea that the preliminary decree was not executable. All these decisions were passed before the Judicial Committee's decision in *Abdul Majid* v. *Jawahir Lal* (5) was published. That case lays down distinctly that the Article applicable to an application for obtaining an order absolute is 179 of the Limitation Act.

This pronouncement must be taken to overrule the decisions of this High Court which held that the preliminary decree was not executable. Another decision of the Judicial Committee strengthens this view. In *Muna Lal Paruck* v. *Sarat Chunder Mukerji* (6), their Lordships held that an application for an order absolute regarding a preliminary decree passed on the original side of the High Court was governed by Article 183 of the Limitation Act. Although the third column of that Article speaks of the "enforcement" of a judgment, decree or order, there can be no doubt that it is a provision for the execution of decrees passed on the original side, corresponding to Article 182 which deals with the Mofussil decrees. This view makes it clear that the process by which a preliminary decree is to be made the final decree is by way of execution.

The result of these decisions of the Judicial Committee may be thus summed up: (1) The preliminary decree passed under section 88 of the Transfer of Property Act is executable. (2) In order to obtain the order absolute under section 89, steps have to be taken in execution. (3) To such applications Article 182 or 183 will apply, as the decree happens to be for the Moffusil or for the original side of the High Court. (4) There is a fresh starting point given to the decree-holder after the preliminary decree ripens into a final decree. (5) It would follow from the above that a decree-holder will have 12 years under section 48 of the Code of Civil Procedure to perfect the preliminary decree, and another 12 years under the same section if he gets the order absolute within the first 12 years. This view is in consonance with the earlier Madras view in *Mallikarjunadu Seth* v. *Lingamurti Pantulu* (1) and in

(2) 26 M. 780; 13 M. L. J. 412.

(3) 9 Ind. Cas. 975; 33 A. 264; 15 C. W. N. 370 (P. C.); 8 A. L. J. 332; 9 M. L. T. 380; 13 C. L. J. 351; 13 Bom. L. R. 367; 4 Bur. L. T. 121; 21 M. L. J. 1140.

(4) 23 Ind. Cas. 390; 26 M. L. J. 255; 15 M. L. T. 246; (1914) M. W. N. 622.

(5) 23 Ind Cas. 649; 36 A. 350; 12 A. L. J. 624; 16 Bom. L. R. 395; 18 C. W. N. 963; 19 C. L. J. 626; 27 M. L. J. 17; (1914) M. W. N. 485; 16 M. L. T. 44; 1 L. W. 483.

(6) 27 Ind. Cas. 683; 21 C. L. J. 118; 17 M. L. T. 120; 2 L. W. 282; 19 C. W. N. 561; 17 Bom. L. R. 408.

Rangiah Goundan & Co. v. *Nanjappa Row* (2).

All these difficulties are now avoided by the enactment of Order XXXIV in the Code of Civil Procedure.

For these reasons we hold that as the application for an order absolute was made within 12 years of the passing of the preliminary decree and as the decree has been kept alive by the steps taken under Article 179, this application is not barred by limitation.

We dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL SUIT No. 237 OF 1908.

February 4, 1913.

Present:—Mr. Justice Bakewell.

SUIKEENA KATUM SAHIBA—PLAINTIFF

versus

Hajee MAHOMED ABDUL AZIZ BADSHA SAHIB BAHADUR—DEFENDANT.

Civil Procedure Code (Act V of 1908), ss. 47, 73, O. XXI, r. 52—Decree obtained by fraud or collusion, question of, whether relates to execution of decree—Attachment, whether gives any priority—Rateable distribution.

The question whether a decree was obtained by fraud or collusion is not one which relates to the execution of the decree and can only be raised by a separate suit. [p. 239, col. 2; p. 240, col. 1.]

Sudindra v. *Budan*, 9 M. 80, followed.

Section 73 of the Civil Procedure Code applies where a judgment-creditor makes application in the prescribed form under Order XXI, rule 10, Civil Procedure Code, to the Court by which assets of the judgment-debtor are held, for the execution of his decree before the receipt of those assets by the Court. [p. 240, col. 1.]

An applicant for execution of his decree does not acquire any priority by virtue of his attachment and the fund in Court must be distributed on the principle followed by the Court in the administration of the assets of a deceased person or an insolvent, that is, rateably amongst the creditors who have put in claims thereto. [p. 241, col. 1.]

Mr. *S. Guruswami Chetti*, for the Plaintiff.

Mr. *A. E. Rencontre*, for the Defendant.

JUDGMENT.—Four applications have been made by four judgment-creditors of the plaintiff in this suit for payment to them of a fund to the credit of the suit, which was paid into Court by the defendant in satisfaction of the decree.

The dates of the decrees of the several creditors and of attachments of the fund are as follows:—

26th October 1911, attachment before judgment in Suit No. 315 of 1911;

15th October 1912, decree;

6th November 1912, decree in Suit No. 381 of 1912;

9th November 1912, attachment;

30th August 1912, decree in Suit No. 11931 of 1912 on the file of Court of Small Causes of Madras;

12th September 1912, attachment;

16th September 1912, decree in Suit No. 12787 of 1912 of the same Court;

27th September 1912, attachment.

It has been argued, *firstly*, that the applicants are entitled to adduce evidence that the decrees obtained by their rivals are fraudulent and void, and *secondly*, that their respective attachments are entitled to priority.

On the *first* point, two decisions *In re Sunder Das* (1) and *Chhaganlal* v. *Fazarali* (2) and an unreported judgment of Spencer, J., in *Narayanan* v. *Karuppan Chetty* (3) were cited. In the first case, the Calcutta High Court held that the lower Court rightly directed an inquiry whether the assignee of a decree held it *benami* for the judgment-debtor, and was, therefore, not entitled to share in the distribution of assets under section 295 of the Code of Civil Procedure, 1882. This is entirely different from an inquiry whether the decree itself is fraudulent and void as against creditors, but undoubtedly the learned Judges held that the Court was bound to see whether the claimants under that section were *bond fide* or merely *sham* decree-holders; and this ruling was followed by the Bombay High Court in the second case where the decree itself was alleged to be fraudulent.

It has, however, been already laid down by this Court in *Sudindra* v. *Budan* (4) that the question whether a decree was obtained by fraud or collusion, is not one which relates to

(1) 11 C. 42.
(2) 13 B. 154.
(3) C. R. P. No. 727 of 1910.
(4) 9 M. 80.

the execution of the decree and can only be raised by a separate suit; and this decision was not apparently referred to in the case before Spencer, J., who merely followed the cases already mentioned.

In the present case, this Court is not executing the two decrees of the Court of Small Causes, which have not been transferred to this Court for execution, and for this reason they do not fall within section 47 of the Code. None of the applicants is party to the suits in which the decrees which they impugn were passed, nor to the suit to the credit of which the fund in question stands; nor can any of them be said to be the representative of the judgment-debtor in these suits, unless an unsecured creditor can be said to be the representative of his debtor in any matter which may affect the ability of the latter to pay his debts.

I think it is clear that the question now sought to be raised does not fall within section 47, and that, if the applicants desire to set aside any of these decrees, they must institute proceedings for that purpose.

I have also come to the conclusion that section 73 of the Code, corresponding to section 295 of the Code of 1882, under which the cases cited were decided, does not apply to the present case ; but I may point out that their Lordships of the Privy Council, in *Shankar Sarup* v. *Mejo Mal* (5), appear to regard an order under that section as an order of course, and the appropriate method of adjudication upon the rights of the parties to be a suit under sub-section (2).

It is also obvious that various difficulties of jurisdiction and otherwise might arise if the decrees of other Courts were allowed to be challenged in informal proceedings of this kind, in which those decrees cannot be actually set aside.

In order to take advantage of the provisions of section 73 of the Code, a judgment-creditor must have made application to the Court by which assets of the judgment-debtor are held for the execution of his decree, and under Order XXI, rule 10, such an application must be in the prescribed form. Secondly, the application must have been made before the receipt of those assets by the Court. Now it is clear that the holders of the decrees of the Court of Small Causes have not strictly complied with the first condition, because their applications are by Judge's summons for payment out of Court, nor has any of the applicants complied with the second condition, because the assets in question were received by the Court before any of them applied for execution. The employment in section 73 of the word "assets" instead of property of the debtor, and the references to the costs of realisation and to the sale of property subject to an incumbrance, appear to me to show that the section contemplates the case where property of a judgment-debtor has been realised in execution, and that it is not, therefore, applicable to the present case.

For these reasons, I think that the provisions applicable to this case are contained in Order XXI, rule 52, which deals with the attachment of a fund in the custody of a Court, and the determination of the rights of rival claimants thereto.

This procedure is analogous to the English practice, under which a charging order upon a fund in Court can be obtained by a judgment-creditor, together with a stop order restraining any dealing with the fund without notice to him (Rules of the Supreme Court, Order XLVI). By Statute, the creditor is then entitled to the same remedies as if a charge had been made in his favour by the judgment-debtor; and where there are several creditors, they will rank in the same manner as any other incumbrancers of a fund. (See Edwards on Execution, pages 345-46.)

Under the English Common Law, as modified by section 16 of the Statute of Frauds, a judgment-debtor's goods are bound from the time the writ of *fi fa* is delivered to the Sheriff; accordingly, the Sheriff is bound to give priority to each writ, and must apply the proceeds of the debtor's goods in the order in which the writs come to his hands. (See Edwards on Execution, pages 113—117.) This principle was followed in the Code of Civil Procedure, 1859, section 270, as regards the first attachment, but was modified with respect to any surplus by a provision for the rateable distribution thereof amongst other persons who had taken out

(5) 23 A. 313 at p. 322; 3 Bom. L. R. 713; 5 C. W. N. 649; 28 I. A. 203.

execution (section 271). That Code did not apply to the Supreme Courts, whose officer, the Sheriff, would doubtless be in the same position as an English Sheriff and administer the same law, though I am not aware of any direct authority on the point.

The previous law has now been replaced by the provisions of the Code of Civil Procedure, which applies to all Civil Courts, and it cannot now be contended that an attachment by an officer of Court confers any priority upon the attaching creditor. [Section 64 of the Code of 1908; *Frederick Peacock* v. *Madan Gopal* (6) and *Sankaralinga Reddi* v. *Kandasami Tevan* (7).] Much less can it be contended that an order of the Court under rule 52 confers any priority upon the person at whose instance the order was passed, since it amounts at most to an injunction restraining any dealing with the fund (See form No. 21, Appendix E, of the first Schedule of the Code) and merely renders any payment to the judgment-debtor, contrary to the attachment thereby effected, void as against all claims enforceable under the attachment, including claims for the rateable distribution of assets (section 64).

For these reasons, I am of opinion that none of the applicants has established any priority by virtue of his attachment, and that the fund in Court must be distributed on the principle followed by the Court in the administration of the assets of a deceased person or an insolvent, that is, rateably amongst the creditors who have put in claims thereto. [See *Soobul Chunder Law* v. *Russick Lal Mitter* (8).]

There remains a question as to the procedure to be followed with respect to the payment of the shares of the holders of decrees of the Courts of Small Causes, who have applied for payment to them directly. It is, I think, obvious that this cannot be done, because this Court cannot record satisfaction of those decrees, which may moreover be themselves attached or already satisfied. The case has been provided for by rule 180 of the Civil Rules of Practice, 1902, but not by the rules of this Court or the Court of Small Causes, and it is not clear what is the proper procedure. The shares of these creditors must, therefore, be carried to separate accounts entitled in the matter of their respective decrees, and be subject to the order of the Court of Small Causes of Madras.

The application of Hajee Muhammad Sait Shirajee is not correctly entitled, because it should have been made in Suit No. 237 of 1908, to the credit of which the fund stands; since, however, no objection has been raised, I direct the application to be amended by entitling it in that suit.

The shares of the judgment-debtors in Suits Nos. 315 of 1911 and 381 of 1912 will be paid to the credit of those suits.

The plaintiff in his suit is a Muhammadan woman, and several of the decrees against her appear to have been made by consent; having regard to these facts and the allegations made against each other by the several applicants, and in order to give them an opportunity of establishing those allegations in other proceedings, I direct that this order be not issued by the Registrar for ten days.

Each party will add the costs of his application to his decree amount.

(6) 21 C. 428; 6 C. W. N. 577.
(7) 30 M. 413; 17 M. L. J. 334; 2 M. L. T. 365.
(8) 15 C. 202 at p. 209.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 184 OF 1913.

March 24, 1915.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Tyabji.

Sri KAKARALAPUDI LAKSHMI NARAYANA JAGANADHA RAJU GARU AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Sri RAJAH KANDUKURI VEERA SARABHA VARAHA LAKSHMI NARA SIMMA VENKATA JOGI BALASURYA PRASADA RAO GARU AND ANOTHER—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 6 (a)—Contract Act (IX of 1872), s. 23—Agreement to sell by reversioner of an estate when it devolves upon him—Specific performance, if enforceable—Contract, validity of.

A contract by an expectant reversionary heir to an estate to sell the same if and when it devolves upon him, is not specifically enforceable. The contract is prohibited by section 6 of the Transfer of Property Act and is also void under section 23 of the Contract Act. [p. 243, col. 2; p. 245, col. 1.]

Nasir-ul-Haq v. *Fyaz-ul-Rahman*, 9 Ind. Cas. 530; 33 A. 457; 8 A. L. J. 275, not followed.

Gitabai v. *Balaji Keshav*, 17 B. 232, distinguished.

Jones v. *Roe* (1789) 3 T. R. 88 at p. 93; 100 E. R. 470; 1 R. R. 656, *In re Parsons, Stockley* v. *Parsons*

(1890) 45 Ch. D. 51; 59 L. J. Ch. 666; 62 L. T. 929; 38 W. R. 712, *Ram Chandra Tantra Das* v. *Dharmo Narayan Chuckerbutty*, 7 B. L. R. 341; 15 W. R. (F. B.) 17, *Wiseman* v. *Roper*, (1645) 1 Ch. Rep. 158; *Carleton* v. *Leighton*, (1805) 3 Mer. 667; 36 E. R. 255; *Harwood* v. *Tooke*, (1812) 2 Sim. 192; 29 R. R. 81; 57 E. R. 761; *Wethered* v. *Wethered*, (1828) 2 Sim. 183; 29 R. R. 77; 57 E. R. 757; *Lyde* v. *Mynn*, (1833) Myl. & K. 683; Coop. T. Brough. 123; 39 E. R. 839; 36 R. R. 415; *Ram Niranjan Singh* v. *Prayag Singh*, 8 C. 138; 10 C. L. R. 66, *Sumsuddin* v. *Abdul Husein*, 31 B. 165; 8 Bom. L. R. 781, *Dhoorjeti Subbayya* v. *Dhoorjeti Venkayya*, 30 M. 201; 2 M. L. T. 184; *Sham Sundar Lal* v. *Achhan Kunwar*, 21 A. 71 at p. 80; 25 I. A. 183; 2 C. W. N. 729; *Nund Kishore Lal* v. *Kanee Ram Tewary*, 29 C. 355; 6 C. W. N. 395; *Manickam Pillai* v. *Ramalingam Pillai*, 29 M. 120; *Mohammad Hashmat Ali* v. *Kaniz Fatima*, 27 Ind. Cas. 701; 13 A. L. J. 110, referred to.

Appeal against the decree of the District Court of Ganjam at Berhampore, in Original Suit No. 19 of 1912.

Messrs. *S. Srinivasa Iyengar* and *P. Somasundaram*, for the Appellants.

Messrs. *P. Narayanamurthy* and *B. Somayya*, for Respondent No. 1.

Messrs. *N. Subba Rao* and *P. Gopalasami Iyengar*, for Respondent No. 2.

JUDGMENT.

WALLIS, C. J.—This is an appeal from the decree of the District Judge of Ganjam dismissing a suit brought by the plaintiff for specific performance of a contract entered into on the 11th May 1894 by the defendants and their father, who were at that time reversioners of the Urlam estate, by which they undertook to sell the estate to the plaintiff and to execute a proper sale-deed in his favour when the time came for putting him in possession. The learned District Judge, now Mr. Justice Kumaraswami Sastri, has dismissed the suit, on the ground that such a contract by reversioners is prohibited by section 6 of the Transfer of Property Act and is also void under section 23 of the Indian Contract Act as tending to defeat the provisions of law contained in the aforesaid section of the Transfer of Property Act. The question is undoubtedly one of great importance, and Mr. S. Srinivasa Iyengar has contended forcibly before us that contracts of this kind were enforceable both in England and in India before the Transfer of Property Act and that section 6 was not intended to affect them.

There can be no doubt that before the Act, in England and in India, a mere chance of succeeding to an estate was a bare possibility incapable of assignment: *Jones* v. *Roe* (1), *In re Parsons, Stockley* v. *Parsons* (2) and *Ram Chandra Tantra Das* v. *Dharmo Narayan Chuckerbutty* (3), where it was held that the interest of an heir under the Hindu Law expectant on the death of a widow in possession was not properly liable to attachment and sale in execution. It was nevertheless held in England that in the case of such expectancies equity would enforce a contract to convey the estate when it fell in. This was decided in the time of Charles I in *Wiseman* v. *Roper* (4) and notwithstanding certain observations of Lord Eldon in *Carleton* v. *Leighton* (5) and *Harwood* v. *Tooke* (6), was affirmed in *Wethered* v. *Wethered* (7) and *Lyde* v. *Mynn* (8) and has since been treated as settled law. Mr. Srinivasa Iyengar contends that the law in India was the same, and that the Transfer of Property Act has not made any difference and he refers to *Raja Saheb Perhlad Sein* v. *Baboo Budhoo Singh* (9), where their Lordships with reference to such an expectancy speak of "a contract to be performed in future and upon the happening of a certain contingency of which the purchaser may claim a specific performance, if he comes into Court showing he has done all he was bound to do." The other side refer to a passage in *Musammat Oodey Koowar* v. *Musammat Ladoo* (10), where their Lordships observed that a certain petition by which the petitioner renounced her claim to succeed on the death of a kinsman did not operate as a conveyance or a contract, *first*, because the petitioner had at the time no interest in the property and *secondly*, because the petitioner did not show that she was

(1) (1789) 3 T. R. 88 at p. 93; 100 E. R. 470; 1 R. R. 656.
(2) (1890) 45 Ch. D. 51; 59 L. J. Ch. 666; 62 L. T. 929; 38 W. R. 712.
(3) 7 B. L. R. 341; 15 W. R. (F. B.) 17.
(4) (1645) 1 Ch. Rep. 158.
(5) (1805) 3 Mer. 667; 36 E. R. 255.
(6) (1812) 2 Sim. 192; 29 R. R. 81; 57 E. R. 761.
(7) (1828) 2 Sim. 183; 29 R. R. 77; 57 E. R. 757.
(8) (1833) 1 Myl. & K. 683; Coop. T. Brough. 123; 39 E. R. 839; 36 R. R. 415.
(9) 2 B. L. R. 111 at p. 117; 12 W. R. (P. C.) 6; 12 M. I. A. 275; 2 Suth. P. C. J. 225; 2 Sar. P. C. J. 429; 20 E. R. 343.
(10) 13 M. I. A. 585 at p. 598; 15 W. R. (P. C.) 16; 6 B. L. R. 283; 2 Suth. P. C. J. 388; 2 Sar. P. C. J. 628; 20 E. R. 609.

contemplating any conveyance, but these observations did not amount to a direct ruling as to a contract to convey when the estate came into possession. It was apparetly with reference to this case that their Lordships observed in a passsage of an unreported judgment, cited in *Ram Nirunjun Singh* v. *Prayag Singh* (11), "that it went far to show that the principle of English Law, which allows a subsequently acquired interest to feed, as it is said, the estoppel, does not apply to Hindu conveyances." It was held by the Calcutta High Court in that case, following the English authorities, that a contract between expectant heirs to divide the estate, when it fell in, in a particular way was enforceable, and this was treated as well established by Sir Charles Sargent in *Gitabai* v. *Balaji Keshav* (12) at a time when the Transfer of Property Act had not been extended to Bombay. Lastly, in *Nasir-ul-Haq* v. *Fyaz-ul-Rahman* (13) the learned Judges were of opinion that such contracts were not affected by the provisions of section 6 citing the decision in *Ram Nirunjun Singh* v. *Prayag Singh* (11) which was before the passing of that Act, but the point was unneccessary for the decision.

It cannot be said that there is direct authority in India the other way, but the respondents rely on *Sumsuddin* v. *Abdul Husein* (14) and *Dhoorjeti Subbayya* v. *Dhoorjeti Venkayya* (15) as to the scope of section 6 of the Transfer of Property Act. That section provides that "property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force and that (*a*) the chance of a heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred." In the former case Jenkins, C.J., and Beaman, J., held a release by a Muhammadan woman of her expectancy of succeeding to a share of her father's estate was void as opposed to the provisions of the section and could not, as in England, be enforced in equity when the reversion fell into possession. In the later decision to which I was a party, it was held that a mortgage by an expectant heir of his chance of succession was void under section 6 and could not be enforced by virtue of section 43. This is in accordance with the observations of Lord Davey delivering the judgment of their Lordships in *Sham Sundar Lal* v. *Achhan Kunwar* (16) and with the observations of their Lordships in the judgment cited in *Ram Nirunjun Singh* v. *Prayag Singh* (11). It is, however, contended by Mr. Srinivasa Iyengar that these decisions do not affect the present point, and that in granting the specific performance the Court will not be giving effect to the equitable doctrine of feeding the estoppel, which he admits may be inapplicable, but merely enforcing a contract to do something in future which will not be illegal at the time it is done, *viz.*, to convey the estate after it has fallen into possession.

The other side rely on the ruling of Jenkins, C. J., that under section 6 (1) it was not intended to allow of the transfer of a mere chance of succession either at law or in equity, and if this be so, they contend that the learned District Judge was right in holding that the contract was void under section 23 of the Indian Contract Act, on the ground that, if permitted, it would defeat the provisions of section 6 (1) of the Transfer of Property Act.

On this question, looked at apart from authority, I should not entertain any doubt, as it seems futile to forbid such transfers of expectancies if contracts to transfer them are to be enforced as soon as the estate falls into possession. In these circumstances it seems to me that it is our duty to give effect to what we consider plain provisions of our statute law instead of following a course of English decisions, which would appear to have been based from the very first on a regard for long established practice rather than on principle and to have failed to commend themselves to Lord Eldon. For these reasons I think the District Judge was right and that the appeal must be dismissed with costs. Memorandum of objection is dismissed with the costs.

TYABJI, J.—The question in this appeal is whether specific performance may be granted

(11) 5 C. 138; 10 C. L. R. 66.
(12) 17 B. 232.
(13) 9 Ind. Cas. 530; 33 A. 457; 8 A. L. J. 275.
(14) 31 B. 165; 8 Bom. L. R. 781.
(15) 30 M. 201; 2 M. L. T. 184.
(16) 21 A. 71 at p. 80; 25 I. A. 183; 2 C. W. N. 729.

of an agreement, which has been entered into by an expectant reversioner, to transfer certain properties if and when the properties should devolve upon him as reversioner.

It was not seriously suggested that there was any rule of Hindu Law by which the rights of parties should be determined, to the exclusion of section 6 (*a*) of the Transfer of Property Act. Some cases that were relied upon by the appellant in reference to this point were decided before the Transfer of Property Act came into force, and, therefore, proceeded on the rule of English equity which enforces specific performance of such agreements: they do not enunciate any specific rule of Hindu Law which is to prevail unaffected by the Transfer of Property Act [section 2 (*d*) of the Act]. On the other hand in *Sham Sundar Lal* v. *Achhan Kunwar* (16), there is a dictum of the Privy Council to the contrary effect which seems to have been given effect to in *Nund Kishore Lal* v. *Kanee Ram Tewary* (17), *Manickam Pillai* v. *Ramalingam Pillai* (18) and *Sumsuddin* v. *Abdul Husein* (14).

It seems to me, therefore, that the appeal must be decided with reference to the Transfer of Property Act. The effect of section 5 and clause (*a*) of section 6, so far as material, is that an act by which a person purports to convey in present or in future the chance of an heir-apparent succeeding to an estate does not operate to transfer the chance. The argument of the appellant was two-fold, (1) that there is no attempt in the present case *to convey* any such chance, that what was done was an *agreement to convey* something in future and (2) that the subject of the agreement was the *property* and the rights after they were to become vested, not merely a chance of succeeding as an heir-apparent.

This argument does not seem to me to be sound. When property is conveyed in future, there is said to be a transfer of property no less than when it is conveyed in present (section 5 of the Transfer of Property Act), and the Legislature has provided that the chance of an heir-apparent cannot be the subject of conveyance in present or in future. An agreement, therefore, to convey in future such a chance cannot be considered a valid contract, because it is an agreement to transfer that which the law says is incapable of transfer. The "object" of such an agreement is of such a nature that, if permitted, it would defeat the provisions of section 6 (*a*) of the Transfer of Property Act (Indian Contract Act, section 23.)

Can it then be said that what was agreed to be transferred here was not such a chance but something else? The Transfer of Property Act does not permit a person having expectations of succeeding to an estate as an heir, to transfer the expectant benefits; when such a transfer is purported to be made, an attempt is in effect made by the two persons to change with each other their legal positions, an attempt by the one to clothe the other with what the Legislature refuses to recognise as rights but styles as a mere chance incapable of being transferred. It would be defeating the provisions of the Act to hold that though such hopes or expectations cannot be transferred in present or future, a person may bind himself to bring about the same results by giving to the agreement the form of a promise to transfer not the expectations, but the fruits of the expectations, by saying that what he has purported to do may be described in a different language from that which the Legislature has chosen to apply to it for the purpose of condemning it.

When the Legislature refers to the transaction as an attempt to transfer a chance, it indicates the true aspect in which it requires the transaction to be viewed. The alleged transferor never purports to transfer a chance *eo nomine*, but the Legislature by the terminology it has adopted has in effect laid down that until the expectant heir actually succeeds to the inheritance, he has no right but a mere chance of succeeding and that when he purports to deal with the subject of his expected inheritance, he in fact deals only with that chance, whatever be the name by which he chooses to designate it.

It seems to me to be unnecessary to deal with the English cases which have been cited to us, as we must guide ourselves by the provisions of the Acts of the Legislature. It was pointed out to us that *Sumsuddin* v. *Abdul Husein* (14) has been dissented from: see *Nasir-ul-Haq* v. *Fyaz-ul-Rahman* (13)

(17) 29 C. 355; 6 C. W. N. 395.
(18) 29 M. 120.

and *Mohammad HashmatAli* v. *Kaniz Fatima* (19) and inasmuch as *Sumsuddin's* case (14), purports to proceed on rules which must be applicable to Hindus as well as Mussalmans, it is argued that the decision is inconsistent with the well recognised principle that a Hindu reversioner may empower a widow to alienate property in which she has only a life-estate. That principle has, however, been supported on the ground that the reversioners' consent furnishes evidence of necessity or that the reversioners in effect release their claim, and the Allahabad Court seems to proceed on the basis that releases or relinquishments ought [contrary to the decision in *Sumsuddin's* case (14)] to be governed by a different rule from that applicable to transfers. On these points it is not necessary for me to express any opinion, as we have not to deal with a relinquishment.

I agree, therefore, that the agreement cannot be enforced and that the appeal should be dismissed with costs. The memorandum of objections is also dismissed with costs.

Appeal dismissed.

(19) 27 Ind. Cas. 70; 13 A. L. J. 110.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 88 OF 1914.

March 3, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

ANANTA RAMAPPA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SUBRAYA AND ANOTHER—PLAINTIFF—DEFENDANT No. 1—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXVI, r. 14 Partition decree—Execution—Division by casting lots, legality of—Equitable rule.

A casting of lots for the purpose of allotting shares to the parties in execution of partition decrees is not opposed to Order XXVI, rule 14. The most equitable way by which properties could be assigned to co-parceners is to draw lots after dividing the properties with reference to the number of sharers.

Narsing Narain Singh v. *Harkhu Singh*, 8 C. L. J. 521, followed.

Appeal against an order of the Court of the District Judge of South Canara, in Execution Appeal No. 7 of 1913, in Execution Petition No. 23 of 1913.

FACTS.—A Commissioner appointed to make partition, cast lots for the purpose of allotting shares to the co-parceners. Objection having been taken to this procedure, the District Judge held that the procedure followed was quite proper. The defendants appealed.

Mr. *K. Yegnarayana Adiga*, for the Appellants :—The procedure adopted by casting lots is quite illegal. Order XXVI, rule 14, Civil Procedure Code, does not countenance such a thing. See also *Narsingh Narain Singh* v. *Harkhu Singh* (1).

Mr. *B. Sitarama Rau*, for the Respondents, was not called on.

JUDGMENT.—We see no reason to interfere with the order of the District Judge. We are not prepared to follow the decision in *Narsingh Narain Singh* v. *Harkhu Singh* (1), if it intends to lay down that the casting of lots for the purpose of allotting shares to the parties is opposed to Order XXVI, rule 14. We think the most equitable way by which properties could be assigned to co-parceners will be to draw lots after dividing the properties with reference to the number of sharers. That has been done in this case and we find no justification for holding that that procedure is unwarranted or illegal.

The appeal is dismissed with costs.

Appeal dismissed.

(1) 8 C. L. J. 521.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 20 OF 1915.

April 17, 1915.

Present:—Mr. Justice Chamier.

Sheikh RAZA HUSAIN—DEFENDANT—APPELLANT

versus

Musammat HASAN JAN—PLAINTIFF—RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 42—Suit for compensation—Jurisdiction.

M and *R* mortgaged a property belonging to *H* for their own proposes. The mortgagee obtained a decree. *H* paid off the decree to save his property

and subsequently sued *R* alone to recover the money:

Held, that the suit was for compensation for an impudent wrong committed against *H* by *M* and *R* and was cognizable by a Small Cause Court. [p. 246, col. 2.]

Held, further, that *M* was not a necessary party to the suit, as each of the two executants of the mortgage was jointly and severally responsible to recompense the plaintiff. [p. 246, col. 2.]

Civil revision against the decree of the Small Cause Court Judge of Bareilly, dated the 18th of January 1915.

Mr. *Hamid Ullah*, for the Appellant.

Mr. *Haider*, for the Respondent.

JUDGMENT.—I admitted this application for revision, because it appeared to me that the suit was by one of several joint mortgagors of immoveable property for contribution in respect of money paid by her for the redemption of the mortgaged property and was, therefore, excluded from the cognizance of a Court of Small Causes, being a suit of the kind described in Article 42 of Schedule II of the Provincial Small Cause Courts Act. On examination of the record which has now arrived, I find that the suit is not of the description which I had supposed. It appears that one Muhammad Razi, who held a general power-of-attorney from the plaintiff, joined with the defendant Raza Husain in borrowing Rs. 300 from a man called Lalta Prasad. As security for payment of the money they purported to mortgage certain property belonging to the plaintiff. Muhammad Razi, without reference to the plaintiff took advantage of the power-of-attorney in his favour to mortgage his employer's property and he actually signed the deed on her behalf as her *mukhtar*. The plaintiff had no knowledge of the transaction until a suit was brought upon the mortgage. In that suit a decree for sale was obtained by Lalta Prasad and the plaintiff's property was proclaimed for sale. In order to save the property the plaintiff paid off the amount of the decree, and she then brought the present suit against Raza Husain saying that she intended to bring another suit against the heirs of Muhammad Razi.

Raza Husain objected that the suit could not proceed in the absence of Muhammad Razi's heirs. This objection was rightly thrown out. Raza Husain and Muhammad Razi, according to the evidence, conspired together to mortgage for their own purposes property belonging to the plaintiff. It is quite clear that they became jointly and severally responsible to recompense the plaintiff. They could have been sued together or either of them could have been sued alone. The property belonged to the plaintiff alone, and therefore, it is doubtful whether within the meaning of Article 42 the executants of the bond could be described as joint mortgagors of the property. But assuming this much in favour of the defendant, I have no hesitation in holding that the suit is not one for contribution at all. The plaintiff does not admit that she is liable for any portion of the money. It is in reality a suit by her for compensation for an impudent wrong committed against her by the defendant and another person and was, in my opinion cognizable by a Court of Small Causes. This application for revision by the defendant in this suit is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CITY CIVIL COURT APPEAL No. 17 OF 1913.

March 18, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

SREEKISAN PITTY AND ANOTHER—DEFENDANTS—APPELLANTS

versus

KOTA NAMALWARAYYA—PLAINTIFF—RESPONDENT.

Registration—Receipt containing agreement to accept rent-deed, whether compulsorily registrable.

A document which, besides being a receipt for money paid, contains an agreement to accept a rent-deed is an agreement to lease and is inadmissible in evidence without registration. [p. 247, col. 1.]

Appeal against the decree of the City Civil Court in Original Suit No. 190 of 1911.

Messrs. *T. R. Ramachandra Aiyar*, *C. Venkata Subbaramiah*, for the Appellants.

Messrs. *Venkatasubba Rao*, *Radhakrishnayya*, for the Respondent.

JUDGMENT.—We think that Exhibit B, besides being a receipt for the money paid by the defendants, is also a written record of

the plaintiff's agreement to accept a rent-deed, which was to be executed by the defendants and a record of the terms of the agreement to lease entered into between the plaintiff and the defendants. Exhibit A is referred to in Exhibit B as a document to be read with and as part of Exhibit B.

We think that having regard to the decisions in *Narayanan Chetty* v. *Muthiah Servai* (1) and in *Syed Ajam Sahib* v. *Meenatchi Devastanam* (2), Exhibit B must be treated as an agreement to lease and is inadmissible in evidence for want of registration. The decree of the lower Court will stand reversed and the suit will stand dismissed so far as it prays for specific performance.

Under the circumstances the parties will bear their own costs in both Courts.

Appeal allowed; Suit dismissed.

(1) 8 Ind. Cas. 520; 9 M. L. T. 142; 21 M. L. J. 44; 35 M. 63.

(2) 8 Ind. Cas. 668; 35 M. 95; 8 M. L. T. 437; (1910) M. W. N. 766; 21 M. L. J. 202.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 17 OF 1915.

April 19, 1915.

Present:—Justice Sir P. C. Banerji, KT.

TALAIMAND SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GOBIND SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Arts. 41, 42—Decree on mortgage—Payment by one co-mortgagor—Suit for contribution—Jurisdiction.

A suit by one co-mortgagor against the other co-mortgagors for contribution in respect of money paid by him to discharge a decree obtained on their joint mortgage is not cognizable by a Small Cause Court. [p. 247, col. 2.]

Civil revision against an order of the Small Cause Court Judge of Azamgarh, dated the 3rd November 1914.

Mr. *Hamid-Ullah*, for the Appellants.

Mr. *Iqbal Ahmad*, for the Respondents.

JUDGMENT.—This is an application for revision, and the only ground pressed is that the suit was not cognizable by the Court of Small Causes in which it was instituted, so that that Court had no jurisdiction to entertain the suit. In my opinion the plea raised is a valid one. There was a decree obtained against the parties to this suit upon a mortgage of 1891, which directed the mortgaged property to be sold. The plaintiffs' case was that this property belonged to both the parties and that as it was advertised for sale, they (the plaintiffs) had to discharge the amount of the decree in order to save the property from auction-sale; that they paid on account of defendants' share of the property a sum of Rs. 353-2-11 and that they were entitled to recover this sum from the defendants. The suit was to recover this sum of Rs. 353-2-11, and a further amount. The case is clearly one covered by Article 41 of Schedule II to the Provincial Small Cause Courts Act. It was a suit for contribution by a co-sharer in joint property in respect of a payment made by him of money due from a co-sharer. If the plaintiffs' allegation is true, they as co-shares had to pay money payable by the defendants who were their co-sharers in the property, and they claimed contribution in respect of the payment made by them. In any case it is a suit covered by Article 42, being in substance a suit by one of several joint mortgagors for contribution in respect of money paid by him for the redemption of the mortgaged property. The effect of the payment alleged to have been made by the plaintiffs was to redeem the property from the mortgage under which it was ordered to be sold. Therefore, the suit was one which was not cognizable by the Court of Small Causes and that Court had no jurisdiction to try it. It is true that it was the applicants themselves who instituted the suit in the Court of Small Causes, but that did not give the Court jurisdiction to try it. I accordingly direct that the case be sent back to the Court below with directions to return the plaint to the plaintiffs for presentation in the proper Court. As it was the plaintiffs themselves who brought the suit in the Court below, they must bear all the costs of the respondents including costs in this Court.

Case sent back.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 115 OF 1914.

March 23, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

ANDI MOOPAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MUTHUVIRAMA REDDY AND ANOTHER—DEFENDANTS—RESPONDENTS.

Public highway, right of user of—Religious procession, carrying of—Civil right—Special damage, if necessary to maintain action—Injunction, grant of—Civil Procedure Code Act V of 1908, O I, r. 8—Amendment.

Every citizen has an inherent right to conduct religious processions through the public streets. This natural right may be restricted in the interests of public safety or its exercise may be limited, so that it may not infringe rights of property possessed by others, and the burden lies upon those who claim to impose fetters upon the exercise of such rights to establish the limitation. [p. 249 col 1]

Sundram Chetti v. *The Queen and Ponnusami Chetti* v. *The Queen*, 6 M. 203; 2 Weir 77; *Parthasaradi Ayyangar* v. *Chinna Krishna Ayyangar*, 5 M. 304; *Sadagopachariar* v. *Ramo Rao*, 26 M. 376; *Sadagopachariar* v. *Krishnamoorthy Rao*, 4 A. L. J. 333; 11 C. W. N. 585; 5 C. L. J. 566; 17 M. L. J. 240; 9 Bom. L. R. 663; 2 M. L. T. 204 (P. C.); 30 M. 185; 30 I. A. 93; *Vijiaraghavachariar* v. *Emperor*, 26 M 554; 13 M. L. J. 171; *Kandasawmy Mudali* v. *Subraya Mudali*, 1 Ind. Cas. 716; 32 M 478; 19 M. L. J. 617, followed.

The right of every citizen to pass through public streets in procession is a civil right. [p. 249 col. 2.]

Vibudapriya Thirthaswami v. *Esoof Sahib*, 8 Ind. Cas. 175; (1910) M. W. N. 719; 9 M. L. T. 44; 35 M. 28; 20 M. L. J. 879, *Channu Dat Vyas* v. *Babu Nandan*, 6 Ind. Cas. 223; 7 A. L. J. 529; 32 A. 527; *Baslingappa* v. *Dharmappa*, 7 Ind. Cas. 663, 34 B. 571; 12 Bom. L. R. 586, followed.

Where the suit is by a headman to declare the right of his community to pass through public streets in procession and where that right is denied, he can maintain a suit without alleging special damage to himself. [p. 250, col. 1.]

Muthayya Reddi v. *Sudalaimuthu Nadar*, 5 Ind. Cas. 902; 20 M. L. J. 119; 8 M. L. T. 114; *Kandasawmy Mudali* v. *Subraya Mudali*, 1 Ind. Cas. 716; 32 M. 478; 19 M. L. J. 617; *Khaji Syyad Hussain Sahib* v. *Ediga Narasimhappa*, 16 Ind. Cas. 962; (1913) M. W. N. 991; 12 M. L. T. 491; 23 M. L. J. 539; *Kandasawmy Kovundan* v. *Karupanna Kovundan*, 21 Ind. Cas. 601; (1913) M. W. N. 1001; 14 M. L. T. 509, *Siddeswara* v. *Krishna*, 14 M. 177; 1 M. L. J. 321; *Abzul Miah* v. *Nasir Mahommed*, 22 C. 551, followed.

An original defect in the plaint can be cured by a subsequent order of amendment. [p. 250, col. 1.]

Srinivasa Chariar v. *Raghavachariar*, 23 M. 28; 7 M. L. J. 281; *Chennu Menon* v. *Krishnan*, 25 M. 399; *Fernandez* v *Rodrigues*, 21 B. 784; *Baldeo Bharthi* v. *Bir Gir*, 22 A. 269; A. W. N. (1900) 69; *Kalu Khabir* v. *Jan Meah*, 29 C. 100, followed.

Where an injury is of such a character that pecuniary compensation will not afford sufficient relief or where it is necessary to avoid multiplicity of judicial proceedings, an injunction will be granted. [p. 250, col. 2]

In cases where an actual offence is threatened, it is not necessary that recourse must be had to the Criminal Courts before seeking redress in the Civil Courts. [p. 250, col. 2.]

Ex parte Ball, In re Shepherd, (1879) 10 Ch. D. 667; 48 L. J. Bk. 57; 27 W. R. 563; 40 L. T. 141; 14 Cox. C. C. 237; *President of the Taluq Board, Kundapur* v. *Burde Lakshmi Narayana Kamphi*, 31 M. 54; 17 M. L. J. 537; 2 M. L. T. 461; *Attorney-General* v. *Sheffield Gas Consumers Company*, (1853) 43 E. R. 119 at p. 125; 3 De G. M. & G. 304; 22 L. J. Ch. 811; 17 Jur. 617; 11 W. R. 245; 98 R. R. 151 and *Emperor of Austria* v. *Day*, 45 E. R. 861; 3 De G F. & J. 217; 30 L. J. Ch. 690; 4 L. T. 494; 7 Jur. (N. S.) 639; 9 W. R. 712; 2 Giff. 628; 130 R. R. 101, followed.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Trichnopoly, in Appeal Suit No. 64 of 1913, preferred against that of the Court of the District Munsif of Kulitalai, in Original Suit No. 540 of 1909.

Mr. *S. T. Srinivasagopalachariar*, for the Appellants.

Mr. *K. C. Gopaladesikachari*, for Mr. *S. Srinivasa Aiyangar*, for the Respondents.

JUDGMENT.—The suit was originally filed by four persons, who styled themselves the headmen of the Pallar community, to establish their right to go in procession through certain public streets on some specified occasions. The Hindu inhabitants of the village to which the parties belong were arrayed as defendants. The defendants denied the right claimed by the plaintiffs. They had obtained an order from the Deputy Magistrate on the 20th July 1909 against the plaintiffs' passing in procession through the streets. The District Munsif, without taking any evidence, came to the conclusion that the defendants had no right, on the pleadings, to obstruct the plaintiffs, and relying on the decision in *Kandasawmy Mudali* v. *Subraya Mudali* (1) gave the plaintiffs the decree as prayed for. On appeal the learned District Judge drew attention to the fact that the suit was not instituted under Order I, rule 8, and that there was no allegation of any special injury having been sustained by the plaintiffs. He also referred to the fact that the averments of the plaintiffs were not definite regarding the road and the occasion during which the procession had to be

(1) 1 Ind. Cas. 716; 32 M. 478; 19 M. L. J. 617.

carried through. He, therefore, remanded the case for disposal to the District Munsif. After remand the plaintiffs obtained sanction under Order I, rule 8. They also filed an additional statement of their claim. The particulars of their right are set out in the revised judgment of the new District Munsif at page 21 of the printed papers. Broadly speaking, the claim of the plaintiffs is that they are entitled to proceed in procession from their hamlet along the public streets with music and tom-tom, (1) on the occasion of taking articles of worship to the Hindu temple, (2) on the occasion of receiving brides and bridegrooms during or after marriage, (3) on the occasion of taking presents to their masters' houses when any marriage or death took place and (4) on the occasion of proceeding to the Christian temple to drag the car.

The defendants denied all these rights and also stated that the rights claimed were not of a civil nature. The two main issues in the case were, (1) whether the reliefs claimed in the plaint are cognizable by a Civil Court and (2) whether the plaintiffs have established a custom for passing in procession, in the way alleged by them, through the public streets. On these issues the District Munsif came to the conclusion that the rights of the plaintiffs were made out, and gave them a declaration and injunction restraining the defendants from interfering with the exercise of the plaintiffs' rights. The Subordinate Judge, who heard the appeal, rested his judgment solely on the ground that the right claimed by the plaintiffs is not of a civil nature and dismissed the suit. This second appeal has been preferred against his judgment.

We are clearly of opinion that the suit is of a civil nature. Every citizen has an inherent right to conduct religious processions through the public streets. This natural right may be restricted in the interests of public safety; or its exercise may be limited so that it may not infringe the rights of property possessed by others. The burden will be upon those who claim to impose fetters upon the exercise of such rights to establish the limitation. The principles which have been guiding Courts in India in granting relief in such cases have been well laid down by Sir Charles Turner in the cases of *Sundram Chetti* v. *The Queen* and *Ponnusami Chetti* v. *The Queen* (2). See also the decision in *Parthasaradi Ayyangar* v. *Chinna Krishna Ayyangar* (3) and the decision in *Sadagopachariar* v. *Rama Rao* (4). The latter decision was affirmed in appeal by the Judicial Committee of the Privy Council in the case of *Sadgopachariar* v. *Krishnamoorthy Rao* (5). In the case *Vijiaraghavachariar* v. *Emperor* (6) Mr. Justice Bashyam Aiyangar inclined to the view that an assembly of persons passing a highway chanting prayers cannot be said to be lawfully engaged in the performance of a religious worship, unless it can be proved that the highway was dedicated subject to such a user. Mr. Justice Subramania Aiyar expressed a more decided opinion and said that the use of a highway for carrying processions is not its natural or legitimate user. In a later case *Kandasawmy Mudali* v. *Subraya Mudali* (1), Benson and Sankaran Nair, JJ., expressed doubts regarding the correctness of the position taken up by these learned Judges. Having regard to the decision of the Judicial Committee in the case *Sadagopachariar* v. *Krishnamoorthy Rao* (5) and to the long course of decisions on the question, we must hold that the right of every citizen to pass through public streets in procession is a civil right. The decision in *Vibudapriya Thirthaswamy* v. *Esoof Sahib* (7) supports this view. In the case *Channu Dat Vyas* v. *Babu Nandan* (8), the question did not relate to the right of procession. The Bombay High Court has accepted the view enunciated in *Sadagopachariar* v. *Rama Rao* (4). *Vide* the decision in *Baslingappa* v. *Dharmappa* (9). The Subordinate Judge is, therefore, wrong in dismissing the suit on that ground. As he has, however, expressed his concurrence with the findings of fact arrived at by the District Munsif, we shall proceed to deal with the arguments addressed to us in appeal in regard to them.

(2) 6 M. 203; 2 Weir 77.
(3) 5 M 304.
(4) 26 M. 376.
(5) 30 M 185; 4 A. L. J. 333; 11 C. W. N. 585; 5 C. L. J. 566; 17 M. L. J. 240; 9 Bom. L. R. 663; 2 M. L. T. 204 (P. C.); 30 I. A. 93.
(6) 26 M. 554; 13 M. L. J. 171.
(7) 8 Ind. Cas. 175; 35 M. 28; 20 M. L. J. 879; (1910) M. W. N. 7 9; 9 M. L. T. 44.
(8) 6 Ind. Cas. 223; 32 A. 527; 7 A. L. J. 529.
(9) 7 Ind. Cas. 663; 34 B. 571; 12 Bom. L. R. 586.

A subsidiary question was raised on behalf of the respondents that as the plaintiffs alleged no special damage, they had no cause of action to maintain the suit. In the original plaint the plaintiffs asked for a declaration, as headmen of their community, that they were entitled to march in procession through the public streets. The cause of action was the infraction of their individual rights. They also referred to the order passed by the Magistrate prohibiting them from going in procession. Under these circumstances, the plaintiffs were entitled to maintain the suit to vindicate the right denied to them. See the decision in *Muthayya Reddi* v. *Sudalaimuthu Nadar* (10) and the decision in *Kandasawmy Mudali* v. *Subraya Mudali* (1). In the case of *Khaji Syyad Hussain Sahib* v. *Ediga Narasimhappa* (11), the plaintiff alleged no special injury, butclaimed a right which was common to himand to the general public. The learned Judges held that such a suit was not maintainable The case *Kandaswamy Kovundan* v. *Karupanna Kovundan* (12) lays down a similar proposition. On the other hand, in the case *Siddeswara* v. *Krishna* (13) Mr. Justice Muthusami Aiyar points out that although a right litigated may be common to the plaintiff and to the other members of the public, there will be a right of action if the injury suffered is special to the plaintiff. The case *Abzul Miah* v. *Nasir Mahommed* (14) emphasises this principle. We are of opinion that the plaint, as originally framed, disclosed a cause of action which affected the plaintiffs injuriously and that it was not necessary to allege or prove any special damage.

Moreover, whatever may have been the defect in the original plaint, that has been cured by the permission obtained, after remand, to sue under Order 1, rule 8. It is now settled law that a suit instituted without obtaining sanction under the said Order can be validated subsequently. See he decision in *Srinivasa Chariar* v. *Raghava Chariar* (15), the decision in *Chennu Menon* v. *Krishnan* (16), the decision in *Fernandez* v. *Rodrigues* (17), the decision in *Baldeo Bharthi* v. *Bir Gir* (18) and the decision in *Kalu Khabir* v. *Jan Meah* (19). The objection must be overruled.

It was also contended that as the substance of the grievance amounts to a criminal offence contemplated by the defendants, no civil suit will lie, and that the only remedy was by way of indictment. We see no force in the argument. Even in cases where an actual offence is threatened, it is not the law that recourse must be had to the Criminal Courts before seeking redress in the Civil Courts. See the decision in *Ex parte Ball, In re Shepherd* (20) and the decision in *President of the Taluq Board, Kundapur* v. *Burde Lakshmi Narayana Kampthi* (21). The decision in *Attorney-General* v. *Sheffield Gas Consumers Company* (22) and the decision in the *Emperor of Austria* v. *Day* (23) were cited to show that no injunction should be granted in such cases. We do not think that these cases have any application. Under the Specific Relief Act, where the injury is of such a character that pecuniary compensation will not afford sufficient relief, or where it is necessary to avoid multiplicity of judicial proceedings, an injunction will be granted. The present case is eminently a fit one for the grant of such a prayer.

We must reverse the decree of the lower Appellate Court and restore that of the District Munsif, with costs in this and in the lower Appellate Court.

Appeal allowed.

(10) 5 Ind. Cas. 902; 20 M. L. J. 119; 8 M. L. T. 114
(11) 16 Ind. Cas. 962; (1913) M. W. N. 991; 23 M L. J. 539; 12 M. L. T. 491.
(12) 21 Ind. Cas. 601; (1913) M. W. N. 1001; 14 M. L. T. 509.
(13) 14 M. 177; 1 M. L. J. 321.
('4) 22 C. 551.
(15) 23 M. 28; 7 M. L. J. 281.
(16) 25 M. 399.
(17) 21 B. 784.
(18) 22 A. 269; A. W. N. (1900) 69.
(19) 29 C. 100.
(20) (1879) 10 Ch. D. 667; 48 L. J. Bk. 57; 27 W. R. 563; 40 L. T. 141; 14 Cox. C. C. 237.
(21) 31 M. 54; 17 M. L. J. 537; 2 M. L. T. 461.
(22) (1853) 43 E. R. 119 at p. 125; 3 De.G. M. & G. 304; 22 L. J. Ch. 811; 17 Jur. 677; 11 W. R. 245; 98 R. R. 151.
(23) 45 E. R. 861; 3 DeG. F. & J. 217; 30 L. J. Ch. 690; 4 L. T. 494; 7 Jur. (N. S.) 639; 9 W. R. 712; 2 Giff. 528; 130 R. R. 101.

RAM CHANDRA *v.* GOPI NATH.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2207 OF 1912.

March 10, 1915.

Present:—Mr. Justice Sharfuddin and Mr. Justice Coxe.

RAM CHANDRA MARWARI—DEFENDANT No. 1—APPELLANT

versus

GOPI NATH CHOWDHURI AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 10, 12—Property given to widow for maintenance with no right to transfer—Condition, whether valid—Life-estate, whether property—Maintenance, right of, transfer of.

A life-interest is just as much property as an absolute interest and any condition absolutely restraining the transferee from disposing of that property is void. [p. 251, cols. 1 & 2.]

Where the plaintiff and the defendant No. 2 came to an agreement in a former suit that certain property should be given to the latter for her maintenance but that she should not be able to alienate it:

Held, that the restriction on the defendant No. 2's right to alienate the property was contrary to sections 10 and 12 of the Transfer of Property Act and, therefore, void. [p. 251, cols. 1 & 2.]

A right to maintenance cannot be transferred under section 6 (*d*), Transfer of Property Act, 1882, but specified property given in lieu of maintenance can be transferred. [p. 251, col. 2.]

Appeal against the decree of the District Judge, Mozafferpore, dated the 13th May 1912, affirming that of the Munsif, Muzafferpore, dated the 31st October 1911.

Babu *Shorashi Charan Mitra*, for the Appellant.

Babu *Gour Chandra Pal*, for the Respondents.

JUDGMENT.

COXE, J.—In this case the plaintiff and the defendant No. 2 came to an agreement in a former suit that certain property should be given to the latter for her maintenance, but that she should not be able to alienate it. She has alienated it to the defendant No. 1 and the plaintiffs accordingly have brought this suit to recover possession.

The suit has been decreed by the Courts below and the defendant No. 1 appeals. It is contended on his behalf that the restriction on the defendant No. 2's right to alienate the property is contrary to sections 10 and 12 of the Transfer of Property Act.

It appears to me that this contention must succeed. The property transferred to the defendant No. 2 appears to have been a life-interest. That, however, is just as much property as an absolute interest, and any condition absolutely restraining the transferee from disposing of that interest is, in my opinion, void.

The lower Court has relied on the case of *Kuldip Singh* v. *Khetrani Koer* (1). But though in that case there was a condition that the widow with the life-interest should not be empowered to execute any sort of document, yet the clause which was really considered by the learned Judge was a stipulation that transfers by either of the parties should not be valid unless consented to by both. It seems clear that this was the only clause that was considered. We sent for the original paper-book and find that this was the clause referred to in the judgment of the Court below. It is the only clause referred to in the head-note of the case and I may observe that it is in this light that the case is regarded in Mr. Gour's commentary on the Transfer of Property Act, section 379. A clause of that kind would certainly not amount, in my opinion, to an absolute restraint on the transferee from parting with the property; and as the decision in the case cited proceeded exclusively on that clause, it does not, in my opinion, bind us to hold that the restriction in the present case, which is of a very different nature, does not come within the scope of sections 10 and 12 of the Transfer of Property Act.

It has been contended that what was given to the defendant No. 2 was merely a right to maintenance and could not be transferred under section 6, clause (*d*), of that Act. But this clearly is not so. No doubt a right to maintenance cannot be transferred; but here specified property was given to the lady in lieu of her maintenance.

It is contended that sections 10 and 12 do not apply by reason of the provisions of section 2, clause (*d*). I do not think, however, that this can be regarded as coming within that section.

The transfer was certainly not a transfer by the operation of law or in execution of a decree. Was it then a transfer by a decree? The compromise was embodied in the decree. It has been laid before us, and it shows that the parties had settled their dispute and that the present plaintiff had agreed to give to the second defendant the

(1) 25 C. 869; 2 C. W. N. 463.

property in question. The plaint says that the defendant, second party, received the property under the said decree, or, to use the words of paragraph 5, "on the basis of the said decree." It can, therefore, I think, be rightly said that the decree itself transferred the property to the defendant No. 2.

In my opinion, the appeal succeeds and the suit must be dismissed with costs throughout.

SHARFUDDIN, J.—I agree.

Appeal allowed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 68 OF 1914.

March 15, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

G. KOTHANDARAMIAH—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE GOVERNMENT OF MADRAS —DEFENDANT—RESPONDENT.

Civil Service Regulations, Arts. 458, 464, *interpretation of—Pension rules—Officer removed from Government service, whether entitled to pension under Article* 458.

Under Articles 458 and 464 of the Civil Service Regulations it is essential that an officer to be entitled to pension must be in the service on the date of his retirement. Therefore, an officer removed by Government from service before that date, can have no claim for any pension. [p. 253, col. 1.]

Appeal from the judgment of the Hon'ble Mr. Justice Bakewell, dated the 12th August 1914, in ordinary original civil jurisdiction, in Civil Suit No. 80 of 1914.

FACTS.—The plaintiff, while in Government service, was removed therefrom by the Government of Madras in 1901. Till 1913 he went on agitating the matter by way of appeal and not having had any redress, instituted the present suit for a declaration that he was entitled to a superannuation pension of Rs. 146-10-8 under Article 458 of the Civil Service Regulations and for other reliefs. Bakewell, J., who heard the suit, sitting on the original side, dismissed the same. The plaintiff appealed.

Messrs. *T. Rangachariar*, *K. Narain Row* and *C. Venkatasubbaramiah*, for the Appellant:—Article 458, read with Article 464, Civil Service Regulations entitles the appellant to the pension.

The Advocat-General and the Government Solicitor, for the Respondent, were not called on.

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiff is the appellant before us. He brought the suit for a declaration that he was entitled to a pension of Rs. 146-10-8 per mensem, or such other sum as the Court may fix, from 1st August 1913 till his death; and for consequential reliefs. Paragraph 16 of the plaint says: "Plaintiff is thus eligible for pension under Articles 458 and 459 of the Civil Service Regulations from and after 1st August 1913, when plaintiff completed his age of 55 years." It was conceded in argument that Article 459 does not apply to the case, as the plaintiff was not "required" by the Local Government "to retire" when he attained the age of 55 on 1st August 1913. The other Article 458, which is relied on, is (omitting irrelevant portion), "a superannuation pension is granted to an officer in superior service entitled by rule to *retire* at a particular age." Mr. Rangachariar, who appears for the plaintiff, asked us to read this Article with Article 464, which says that "an officer in superior service, who has attained the age of 55 years, may, at his option, retire on a superannuation pension." Now, it is clear, (and if I understood Mr. Rangachariar aright, it was conceded by him) that *prima facie* these articles are applicable only if, when the officer attains the age of 55, *he was in service*, and, *while so in service*, exercised his option to retire from service. It is admitted in the plaint (paragraphs 8 and 9) that in 1901 the plaintiff was removed from Government service by the Government of Madras. Paragraph 18 also makes it clear that the plaintiff ceased to be in Government service in 1901, as he says in that paragraph that he was expecting all along to be reinstated in the Government service between 1901 and 1913 and was appealing to Government for restoration to service from time to time. I see nothing in any

of the other sections quoted to us by Mr. Rangachariar from the Regulations, which compels us not to give effect to the plain meaning and implication of the words of section 458, namely, that it is only an officer who is and has continued in Government service when and till he reached the age of 55, and who elects to retire at that age while so being in service, that is entiled to claim a pension under the Regulations. There being thus no basis at all in the Civil Service Regulations for the plaintiff's claim, the suit was rightly dismissed by the learned trial Judge and I would dismiss this appeal. The plaintiff must pay the defendant's costs.

NAPIER, J.—I entirely concur. The plaintiff claims a superannuation pension. The mere name for this class of pension is sufficient to put him out of Court, for it is clear that Article 458 of the Civil Service Regulations only applies to pensions granted to persons entitled or compelled to retire at a particular age. The plaintiff has neither been supperannuated nor did he retire. There is, therefore, obviously no foundation for this claim. I should like to add that we express no opinion as to whether this suit would lie, or whether these Regulations are conditions attached to the service binding on Government or whether this suit is maintainable without leave under the Pensions Act. All these points have not been dealt with by the trial Judge and we confine ourselves to the particular point on which the suit was dismissed.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 262 OF 1911.

April 2, 1915.

Present:—Justice Sir Donald Johnstone, KT., and Mr. Justice Shah Din.

Musammat FAZLAN DEFENDANT—APPELLANT

versus

IMAM-UD-DIN—PLAINTIFF—RESPONDENT.

Deed, construction of—Dastbardarinama—*Widow relinquishing her life-estate for consideration—Sale or relinquishment—Consideration not passed - Deed, validity of.*

Where a widow executed and registered a deed styling it a *dastbardarinama*, and stated in it that she renounced all her rights as widow in the estate of her husband held by her in favour of the next male reversioner in consideration of his agreeing to pay her a certain amount which amount was never paid:

Held, that the deed was not a sale-deed but a deed of release by which the widow surrendered her life-estate in her husband's land. [p. 254, col. 2.]

Held, further, that since no part of the consideration for the surrender of her life-estate was paid to her by the reversioner the agreement embodied in the deed was void and unenforceable. [p. 254, col. 2.]

Second appeal from the decree of the Divisional Judge, Hoshiarpur Division, dated the 1st December 1910, affirming that of the Subordinate Judge, 2nd Class, Hoshiarpur, dated the 14th December 1909, decreeing claim on payment of Rs. 775.

The Hon'ble Mr. *Muhammad Shafi*, K. B., and Rai Bahadur *Pandit Sheo Narain*, for the Appellant.

Mr. *Fazl-i-Hussain*, for the Respondent.

JUDGMENT.—This appeal has arisen out of a suit brought under the following circumstances. The defendant-appellant, *Musammat* Fazlan, who is the widow of one Nathe Khan, deceased brother of the plaintiff-respondent, Imam-ud-Din, was in possession in 1906 of one-half of the estate of her deceased husband, the other half being in possession of another widow, named *Musammat* Jainan, who has since died. On the 27th July 1906 *Musammat* Fazlan executed a deed on a stamp paper of eight annas in favour of Imam-ud-Din, by which she surrendered to him her life-estate in 110 *kanals* 17 *marlas* of land, which was in her possession as Nathe Khan's widow, in consideration of Rs. 775. The consideration money was made up of the two following items:

(*a*) Received at home	... ...	Rs. 125
(*b*) To be received in cash before the Sub-Registrar	...	Rs. 650

The parties appeared before the Sub-Registrar on the 27th July to have the deed registered, but the hour being late registration could not be effected and the parties were directed to appear again on the following day. Next day *Musammat* Fazlan appeared but Imam-ud-Din absented himself, and so the document was not registered and remained in the Sub-Registrar's office. Later, on the application

of Imam-ud-Din the document was compulsorily registered on the 20th October 1906. *Musammat* Fazlan then admitted that she had executed the document, but denied that she had received the consideration mentioned therein.

Meanwhile, on the 22nd December 1905 Imam-ud-Din had executed a lease of the land dealt with in the deed of the 27th July 1906 in favour of *Musammat* Fazlan: and on the strength of that lease *Musammat* Fazlan obtained a decree for rent against Imam-ud-Din on the 9th February 1909. Imam-ud-Din appealed from that decree, but his appeal was rejected by the Collector on the 28th April 1909. On the 22nd July 1909 the present suit was instituted by Imam-ud-Din against *Musammat* Fazlan for a declaration that the plaintiff was in possession of 110 *kanals* 17 *marlas* of land as proprietor thereof and that *Musammat* Fazlan had no rights whatever in the land. The suit was based on the registered deed, dated the 27th July 1906, above referred to. The defendant, *Musammat* Fazlan, pleaded, *inter alia*, that she did not execute the deed in question with her free consent and that no consideration whatever was paid to her.

The Subordinate Judge held that the defendant had executed the deed as a free agent, but that the consideration entered therein had not been received by her. He was of opinion that the deed was in the nature of a deed of sale and that non-payment of the consideration did not make it void or unenforceable. He accordingly decreed the plaintiff's claim, conditional on payment to the defendant by the plaintiff of Rs. 775 and delivery by him to her of a certain deed of relinquishment relating to a house. On appeal the learned Divisional Judge took the same view, namely, that although the consideration expressed in the deed had not been paid to the defendant, the deed which evidenced a transaction of sale was valid and could be enforced at the instance of the plaintiff. He accordingly dismissed the appeal.

Before us several points have been argued by the learned Counsel on both sides, but in the view which we take of the case it is unnecessary to discuss them here. The *first* question for decision is whether the deed, dated the 27th July 1906, is or is not a sale-deed; for if it is not a sale-deed, then the ground upon which the lower Courts have decreed the plaintiff's claim, namely, that he can enforce the deed as against the defendant although no part of the consideration expressed therein is proved to have passed to the defendant, is untenable. We have read the deed, which, as has been stated above, is written on a stamp paper of eight annas, and we have no doubt whatever that it is not a sale-deed, but a deed of release by which the defendant surrendered her life-estate in her half share of her husband's land (for *Musammat* Jainan, the other widow of Nathe Khan, was then alive) to the plaintiff, who was the next male reversionary heir of Nathe Khan, in consideration of his paying her Rs. 775. In the body of the deed it is nowhere stated that the deed was a deed of sale or that the defendant had sold her life-estate to the plaintiff for Rs. 775. If the transaction had been one of sale, the deed would have been written on a stamp paper of the value of Rs. 8, and not on a stamp paper of annas eight. Besides, in the concluding sentence the deed is called a *dastbardarinama*, which means a deed of release, and the executant states in the deed that she renounces all her rights as widow of Nathe Khan in the land held by her. This surrender of her life-estate by the widow to the next male reversionary heir was made by her in consideration of his agreeing to pay her Rs. 775, but this amount was never paid as agreed upon and the widow remained in possession of the estate, and in fact in 1905 obtained, as stated above, a decree for rent against the present plaintiff in respect of the land in suit. It is quite clear, then, that since no part of the consideration for the surrender of her estate was paid to the widow by the plaintiff, the agreement embodied in the deed of the 27th July 1906 was void and unenforceable, and the plaintiff acquired no rights whatever under that deed in the land in suit by virtue of the said deed. The deed not being a deed of sale, the doctrine that non-payment of consideration expressed in the deed did not prevent the proprietary rights in the land passing to the plaintiff, does not hold good in this case.

For the foregoing reasons, we accept this appeal and setting aside the decree of the

Divisional Judge, dismiss the plaintiff's suit with costs throughout.

Appeal accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1061 OF 1912.

April 10, 1913.

Present:—Mr. Justice Miller and Mr. Justice Sadasiva Aiyar.

NARASAPPAYYA—PLAINTIFF—APPELLANT

versus

S. GANAPATHY RAO AND ANOTHER—DEFENDANTS—RESPONDENTS.

Easement—User for less than prescriptive period, whether possession—Right of suit—Incorporeal right, nature of—Adverse possession—Inclosure, proof of—Strongest evidence.

Easements are not capable in an exact sense of being possessed. The enjoyment which may in time ripen into an easement is not possession and gives no possessory right before the due time is fulfilled. [p. 256, col. 1.]

Per *Sadasiva Aiyar, J.*—An incorporeal right which can be the subject of legal possession while in the process of acquisition should be a right which, by its very nature, is presumably one enjoyed to the exclusion of others, or there must be clear evidence that one who is acquiring the incorporeal right by the enjoyment of it has been in enjoyment with the distinct *animus* or intention of excluding other persons from like enjoyment with himself. [p. 259, col. 2.]

Inclosure is the strongest possible evidence of adverse possession. [p. 260, col. 1.]

Second appeal against the decree of the District Judge of South Canara, in Appeal No. 221 of 1910, preferred against that of the District Munsif of Mangalore, in Original Suit No. 335 of 1908.

Mr. *B. Sitarama Rao*, for the Appellant.

Mr. *K. Yagnyanarayana Adiga*, for the Respondents.

JUDGMENT.

MILLER, J.—The plaintiff prays for an injunction to prevent the defendants from cutting a channel from a tank, from which he waters some of his fields, so as to deprive him of the water. He alleged, *inter alia*, that the defendants were threatening to construct a dam to prevent the water from flowing to his fields, but this they denied.

The District Munsif, as I understand him, held that the plaintiff has a right to a supply of water from the pond in question to the exclusion of the defendants and on that ground issued the injunction prayed for. The District Judge holds that the plaintiff has no right to the water of the pond, though he had been in the habit of taking it through a channel for some time not exactly determined, but less than twenty years. He dismissed the suit.

In second appeal it is contended that on the finding of the District Judge we ought to hold that the plaintiff, though he has not by prescription acquired a right to take the tank water through his channel, is nevertheless entitled, having been for some time taking it in that way, to prevent the defendants, who have also no right to take the water, from taking it so as to deprive him of his supply, and in support of this contention reliance is placed on *Kondapa Rajan Naidu* v. *Dwarakonda Suryanarayana* (1). It is perhaps unfortunate that in that case the learned Judges have referred to the right for which protection was there claimed as "in the nature of an incorporeal right in process of acquisition." It seemed to me during the argument before us that reliance was sometimes placed on this observation as suggesting the existence, in the eye of the law, of what I may call a partially acquired easement, as though the period required for the acquisition of an easement were a period of gestation, during which the easement gradually acquires form and life by a process of growth within the womb of prescription, and during which it is capable of suffering an injury.

It is perhaps hardly necessary to say that this is not the law. That is made clear by Farwell, J., in *Greenhalgh* v. *Brindley* (2). You have your easement or you have nothing. You have nothing more for 19 years' enjoyment than for 19 months, except possibly a greater prospect of success. What is growing and gradually ripening is not your easement, but your chance of success, and that is not a thing which the law protects. But I do not think that the learned Judges had in their minds anything in the nature of an inchoate or embryonic easement. Their decision was based on the view that in

(1) 6 Ind. Cas. 266; 20 M. L. J. 803; 34 M. 173 M. L. T. 352; (1910) M. W. N. 117.

(2) (1901) 2 Ch. 324; 70 L. J. Ch. 740; 84 L. T. 763; 49 W. R. 597; 17 T. L. R. 574.

many cases incorporeal rights are as much capable of possession as rights to corporeal hereditaments. This means that you may have an enjoyment of a thing incorporeal without title, an enjoyment which may properly be called possession and which will be protected in the same way that possession without title of corporeal things is protected. The question in each case will, therefore, be not whether the plaintiff has been enjoying the benefit which he seeks to retain, but whether he has possession of it.

In the opinion of Sir Frederick Pollock, no mean authority on questions of possession, easements "are not capable in an exact sense of being possessed. The enjoyment which may in time ripen into an easement is not possession and gives no possessory right before the due time is fulfilled. The only possession that can come in question is the possession of the dominant tenement itself"—Pollock on Torts, 8th Edition, page 375: and in Holmes' Common Law it is pointed out that "where an easement has been actually created, whether by deed or prescription, although it is undoubtedly true that any possessor of the dominant estate would be protected in its enjoyment, it has not been so protected in the past on the ground that the easement was in itself an object of possession but by the survival of precedents" founded, as he elsewhere explains, on ideas which permitted the acceptance of a theory that an easement is something belonging, attached, adhering, appurtenant, to the dominant estate itself and not to the owner thereof personally, and the learned author expresses the opinion that a person using a way for some years without an easement would not be protected in its use against third persons (Holmes' Common Law, pages 240, 241). The same illustration is repeated elsewhere in the same work, "a way, until it becomes a right of way, is just as little susceptible of being held by a possessory title as a contract" (page 354), and again "The Common Law does not recognize possession of a way; there must exist a right against the servient owner before there is a right against anybody else. At the same time it is clear that a way is no more capable of possession because somebody else has a right to it than if no one had" (page 382).

In the Roman Law the enjoyment of a servitude (or of certain servitudes) was considered to be a *quasi*-possession, *i. e.*, I take it, not a true possession, but something like it.

I do not wish to suggest that on its facts *Kondapa Rajan Naidu* v. *Dwarakonda Suryanarayana* (1) was wrongly decided, but I am not sure that any question of possession of an incorporeal thing really arose there, and I must confess that I find it easier to accept generally Sir Frederick Pollock's view than the statement of the learned Judges in that case. I find difficulty in conceiving of any true possession of things incorporeal, though no doubt the enjoyment of some easements resembles in some ways the occupation and use of a corporeal thing, and it may be that there are cases in which the resemblance is so close as to warrant the extension to this *quasi*-possession of the protection which is given to true possession.

It is noticeable that Sir Frederick Pollock does not refer to *Jeffries* v. *Williams* (3) in the passage which I have extracted above, and that, I venture to think, is because he did not regard that case as bearing on the question; the actual decision turned on a question of pleading, and, though there are observations in the judgment which suggest that the protection of a possessory right was in the minds of the learned Judges, still, as is pointed out in *Dhuman Khan* v. *Muhammad Khan* (4), the decision is based on the fact that the defendant was on the declaration to be taken to be a wrong-doer, as he had negligently injured the plaintiff's house and was not alleged to be the owner of the adjacent close or to have the owner's rights of mining and digging therein.

But, if the case is to be taken as a decision on a question of possessory right, it does not follow that other easements are similarly capable of possession. When I by building on my own land obtain the support for my house of my neighbour's land, it may perhaps be said without great inaccuracy that I have obtained something very like possession of the support. But can this be said of the plaintiff's claim in the present case?

(3) (1855) 5 Ex. 792; 20 L. J. Ex. 14.
(4) 19 A. 153; A. W. N. (1897) 22.

NARASAPPAYYA *v.* GANAPATHY RAO.

In *Stockport Waterworks Company* v. *Potter* (5), Bramwall, B., observed that the mere taking of water (from a river) by the plaintiffs did not give them a right of action; and referred to *Whaley* v. *Laing* (6) as deciding this point. In *Whaley* v. *Laing* (6), the plaintiff took water from a canal, by license of the owner of the canal, into a cistern of his own and thence to the engines which worked his mines. The defendant polluted the water of the canal and the foul water entered the plaintiff's cistern. Bramwell, B., delivered the judgment of the Court of Exchequer, holding that the plaintiff had a right of action but declining to decide whether he had any possessory right in the water; the ground of their decision was that the defendant without right caused foul water to flow on to the plaintiff's premises. The case was like *Jeffries* v. *Williams* (3), based on questions as to the sufficiency of the plaintiff's declaration and the defendant's pleas and in the Exchequer Chamber the judgment was reversed by a majority of the Judges, *Laing* v. *Whaley* (7). Willes, J., accepted the judgment of Bramwell, B., in the Court below and Crowder, J., held that the permission of the land-owner gave the plaintiff a rightful enjoyment of the water and the defendant had wrongfully polluted the stream. But Crompton, J., thought the plaintiff was bound to aver a right to the water and construed the declaration as averring such a right, but held on the facts that no right existed and refusing to construe the declaration, as the Court below had done, as one complaining of foul water thrown on the plaintiff's premises, was of opinion that the judgment ought to be reversed. Erle, J., agreed with him. Willams, J., held the declaration bad for want of any allegation that the plaintiffs were rightfully in enjoyment of the benefit of the water of the canal, and Wightman, J., stated the facts to be that neither the plaintiffs nor the defendants had any right to do that which they did and held that, on the facts as upon the pleadings, the judgment ought to be reversed. On the pleadings he found nothing in the declaration to show that the defendant by fouling the water had injured any right of the plaintiffs or could as against them be considered a wrong-doer, and that no right of action was shown. Martin, B., in the lower Court and Crompton, J., in the Exchequer Chamber put the case of the poisoning of a pond by a man without right and consequent injury to the cattle of a man watering them at that pond by permission of the owner. And Crompton, J., thought that in that case an action against the poisoner of the water might be founded in some circumstances, not on any right in the water, but on the wilful injury to the plaintiff's property. These cases are nearer the present case than the case of *Jeffries* v. *Williams* (3), and suggest that the enjoyment of the water of a river by taking it without right is not a possessory right which the Law of England will protect. Possession seems to involve an appropriation to the exclusion of others and with the intention of maintaining such exclusion, and it seems impossible to apply such a conception to the mere taking of water from a stream through a cut in the bank. There may be, no doubt, possession of the actual cut or channel, through which the water is taken, and possession of the water once it is appropriated, and that possession might be protected, and this seems from the record of the case reported in *Kondapa Rajan Naidu* v. *Dwarakonda Suryanarayana* (1) to have been the question there raised; the actual channel used exclusively by the plaintiff was obstructed by the defendant. *Acchamma* v. *Venkamma* (8) presents to my mind considerable difficulty, if it is to be regarded as a case in which the Court protected a possessory right. I find it difficult to conceive of the possession of the access of light to a house. But it may be that the learned Judges considered that the action would lie on account of injury to the plaintiff's property, as is suggested in *Dhuman Khan* v. *Muhammad Khan* (4) and by the observation of Crompton, J., in *Whaley* v. *Laing* (6), and that the

(5) (1864) 3 H. & C. 300 at p. 318; 10 Jur. (N. S.) 1005; 10 L. T. (N. S.) 748; 140 R. R. 453.

(6) (1857) 2 H. & N. 476; 26 L. J. Ex. 327; 29 L. T. (O. S.) 312; 5 W. R 834; 115 R. R. 645.

(7) (1858) 3 H. & N. 675; 27 L. J. Ex. 422; 4 Jur. (N. S.) 960; 6 W. R. 750; 117 R. R. 918.

(8) 5 M. L. J. 24.

defendant would have to justify the *prima facie* nuisance by showing some right in himself. Possibly this is what they mean when they say that against a wrong-doer it was not necessary to show a prescriptive right. But even in this case we have the idea of exclusion which is essential to possession; the plaintiff's house alone was served by the light which was obstructed by the defendant's wall, and in this case, therefore, there may be some justification for protecting what may be regarded as a sort of possessory right.

In the present case, the plaintiff has no possession that I can see; he has not enclosed the pond; he has only cut a hole in one bank and that cannot give him possession of all the water in the pond; if I do not get possession of an unenclosed common by turning out my horse in one end of it to graze, I do not get possession of an unenclosed pond and its contents by making a cut in one end of it. The plaintiff has possession of the water when he gets it into his channel, but in no true sense has he possession of it before that. It is open to any one to go to the pond and draw water therefrom, and the defendant is not a wrong-doer as against the plaintiff; dishonesty apart, the case is parallel to one in which one man, being in the habit of stealing manure for his field from a farm yard, finds one day that another thief has been beforehand with him and taken the manure which he intended to steal. There could be no right of action in such a case.

The appeal must be dismissed with costs.

SADASIVA AIYAR, J.—The plaintiff is the appellant. The facts found might shortly be stated thus. There is a small natural pond on Government land from which the plaintiff has been taking water to irrigate his lands, which are evidently on a lower level than the tank bed. It is not clear from the evidence for how many years past he has been so using that water, but the District Judge finds that he has not been doing it for any length of time, and that he has acquired no right as against the Government to use the water of the pond for *suggi* cultivation. The plaintiff purchased the land only eleven or twelve years before the suit. The defendants shortly before the suit dug a trench in another corner of the tank and tried to take the water of the tank to their own lands situated in the direction of the other corner. They also had no right as against the Government to do so. The plaintiff sued for an injunction against the taking of the pond-water into the defendants' fields. The District Judge dismissed the plaintiff's suit, because the plaintiff possesses no legal right to take water from the plaint pond and the defendant by trying to take the water of the pond could not, therefore, infringe any legal right of the plaintiff. The contention of the learned Vakil for the plaintiff, Mr. Sitarama Rao, is that, because the plaintiff had been using the tank water for some years, though he had no right to do so, he was in possession of an incorporeal right to take such water and that the defendants as trespassers have no right to take such water and to interfere with the enjoyment by the plaintiff of such incorporeal right. Reliance has been placed on *Acchanna* v. *Venkamma* (8) and *Kondapa Rajan Naidu* v. *Dwarakonda Suryanarayana* (1). Whether an incorporeal right of easement which is merely in process of acquisition can be held to be capable of legal possession at all till the process of acquisition is complete, is a very doubtful question. Pollock in his book on Torts at page 375 says as follows:—"Easements and other incorporeal rights in property, rather a fringe to property than property itself," as they have been ingeniously called, are not capable in an exact sense of being possessed. The enjoyment which may in time ripen into an easement is not possession, and gives no possessory right before the due time is fulfilled: "a man who has used a way ten years without title cannot sue even a stranger for stopping it." In *Bonner* v. *Great Western Railway Company* (9), Baggallay, L. J., says, differing from Bacon, V. C., in the Court below: "I am unable to take the same view of the case as was taken by the Vice-Chancellor . . . In the present case the person complaining has no rights at all. It is admitted that the windows through which the plaintiff has derived light and air for a certain number

(9) (1883) 24 Ch. D. 1; 48 L. T. 619; 32 W. R. 190; 47 J. P. 580.

of years past, have not been enjoyed for a sufficient length of time to give him a right to that light. It appears that for sixteen years he has had the enjoyment of these windows, and the view taken by the Vice-Chancellor was apparently this, that he had an accruing right to the enjoyment of this light which, supposing there was no interruption on the part of the Railway Company, he might enjoy until the whole twenty years had expired, and that the defendants ought to be restrained from interfering with the acquisition of the easement by the plaintiff. But it seems to me to be contrary to every principle on which the Court acts in cases of this kind, that a person who has no right should obtain an injunction to restrain a Railway Company or *anybody else* from doing that which will interfere with his acquiring a right, by reason of his being unmolested for a certain length of time." Lindley, L. J., said in the same case: "The plaintiff comes here asking an injunction to restrain the defendants from interfering with certain lights which, he admits he has no title to. That appears to me to be the simple answer to the case, quite apart from anything else." Fry, L. J., concurred on the same ground, namely, "that the plaintiff has not enjoyed the lights, which are interfered with by that hoarding, for twenty years and he, therefore, has no *prima facie* title whatever to the access of light to that building." As regards the case in *Jeffries* v. *Williams* (3), as far as I could understand it, it was decided on the highly technical ground that the defendant's plea of "not guilty" did not properly raise the question of the plaintiff's title to lateral support from the adjacent sub-soil to his buildings and hence the defendant's plea must fail on that question. Anyhow I should be prepared on principle, if necessary, to differ from the dicta in *Acchanna* v. *Venkamma* (8) and *Kondapa Rajan Naidu* v. *Dwarakonda Suryanarayana* (1), to the effect that incorporeal rights in process of acquisition can be the subject of such legal possession as should be protected against the acts of another trespasser.

Assuming, however, that incorporeal rights in process of acquisition can be the subject of legal possession, what is the nature of the incorporeal right capable of such possession even while in process of acquisition? I am clear that the incorporeal right should be a right which, by its very nature, is presumably one enjoyed to the exclusion of others, or there must be clear evidence that one who is acquiring the incorporeal right by the enjoyment of it has been in enjoyment with the distinct *animus* or intention of excluding other persons from like enjoyment with himself. In *Acchanna* v. *Venkamma* (8), the plaintiff was enjoying access to light across a *poramboke* land to his windows. The right he was so enjoying was clearly enjoyed exclusively and the defendant, a trespasser, was interfering with plaintiff's said exclusive enjoyment by building a wall upon that *poramboke* land. In *Kondapa Rajan Naidu* v. *Dwarakonda Suryanarayana* (1) also, I found on a perusal of the records that the plaintiff in that case had collected Government water flowing from certain hills into a channel and had been taking *the whole* of that water through that channel, which was under his control for about eighteen years, *into a tank belonging to him.* The defendant in that case put up a dam *in that channel which had been so under the plaintiff's exclusive control*, and diverted the water through a new channel which the defendant dug, branching from the channel under the plaintiff's control. The circumstances of that case, therefore, clearly indicated that the plaintiff had a clear intention to exclude others from using the water flowing through the channel which supplied the plaintiff's tank. In the present case, the facts proved do not establish any such intention on the plaintiff's part. He had nothing to do with the collection of the water which fell into the Government pond, and the mere fact that the Government Revenue Officers have not prevented the plaintiff from drawing the water (naturally stored in that pond) to irrigate the plaintiff's lands for a few years before suit, cannot raise any presumption that the plaintiff intended to exclude every other *ryot* from taking the water to their lands like the plaintiff, or even that the plaintiff when drawing the water began an enjoyment which he intended after sixty years (see Article 149 of the Limitation Act) to mature into a right against the Government to take such water against the wishes of the Government.

As I said above, even if a person could be said to be in legal possession of an incorporeal right *which he is merely in process of acquiring*, and even if it be held in consequence that he could sue others for infringement of that so-called possession, such a possession must at least be "exclusive" in the sense in which it is used by Lightwood in his book on Possession. He says at page 14, "Not only must the alleged possessor exercise the acts of ownership over the land, but other persons must be excluded. In English Law, however, the rule only requires that there should be no other person exercising acts of ownership or claiming possession adversely to the possessor. Two persons may jointly exercise acts of ownership, and they may thus gain a possession which vests in them an estate as joint tenants [*Ward* v. *Ward* (10); *cf.* Litt., S. 311], but in such a case there is really one possession, and the possessors enjoy together the rights which flow from it. It is different where there are two persons on land each claiming possession independently of the other, and then neither can acquire actual possession without excluding the other." (*cf.* Holmes' Common Law, 235, referring to *McGahey* v. *Moore* (1); *Barnstable* v. *Thacker*; Bigelow's Leading Cases on Torts, 353).

The question whether foreign interference is to be deemed to be in fact excluded is somewhat more difficult in the case of land than of goods. In the case of goods, as a rule, both the original act of appropriation and the existing custody are such as obviously to exclude others, but with land it is different. The possessor may be absent from the land, and other persons may be upon it. The practical rule appears to be that the area of the alleged possession must be marked out, and that there must be an habitual observance of its limits by the world at large (*cf.* Pollock and Wright on Possession, page 13). Ordinarily, as just stated, the area of possession is marked out by means of fences or other actual barriers which are themselves likely to keep away intruders. Inclosure is the strongest possible evidence of adverse possession [*Seddon* v. *Smith* (12)]. "If," said Bramwell, L. J., in *Coverdale* v. *Charlton* (13), "there were an inclosed field, and a man had turned his cattle into it, and had locked the gate, he might well claim to have a *de facto* posssession of the whole field; but if there were an uninclosed common of a mile in length, and he turned one horse on one end of the common, he could not be said to have a *de facto* possession of the whole length of the common." If, as regards possession of a land itself, the difficulty of establishing exclusive possession is a serious one in many cases, the difficulty is much greater in the case of several incorporeal rights (like the right to irrigate the plaintiff's land from the water of a tank belonging to another) and the difficulty is still further increased in the case of an incorporeal right which is still in process of acquisition.

In the present case, the plaintiff's having taken for some years water stored in a Government pond cannot be held to constitute exclusive possession in the plaintiff of a right to take such water or a possession even intended to exclude others from doing a similar act, no more than the fact of a *ryot* having watered his cattle in the water of a Government pond for some years would, by itself, show a right or intention to exclude another *ryot* from watering his cattle also, when the latter subsequently finds it convenient to do so, though he had not done so before. In the result I would dismiss the second appeal with costs.

Appeal dismissed.

(10) (1871) 6 Ch. App. 789.
(11) 3 Ired. (N. C.) 35.
(12) (1877) 36 L. T. 168.
(13) (1878) 4 Q. B. D. 104 at p. 118; 48 L. J. Q. B. 128; 40 L. T. 88; 27 W. R. 257.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 2679 OF 1912.
March 4, 1915.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Richardson.

AKHIL CHANDRA SHAHA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

INDIA GENERAL NAVIGATION AND RAILWAY COMPANY, LTD., AND RIVERS STEAM NAVIGATION COMPANY, LTD.,—DEFENDANTS—RESPONDENTS.

Carriers Act (III of 1865)—Common carrier,

AKHIL CHANDRA SHAHA *v.* INDIA GENERAL NAVIGATION AND RAILWAY CO., LTD.

liability of, for loss of goods--Burden of proof—Negligence—Question of law or fact—Appeal, second.

A common carrier in India is liable as an insurer, that is, he is responsible for the safety of the goods entrusted to him in all events, except when loss or injury arises from act of God or King's enemies. But his liability for loss or injury in respect of the goods carried may be varied by contract. [p. 261, col. 2.]

Moothora Kant Shaw v. *India General Steam Navigation Company*, 10 C. 166; 13 C. L. R. 342; 8 Ind. Jur. 247; *Irrawaddy Flotilla Co.* v. *Bhuwan Das*, 18 C. 620(P.C.); 18 I. A. 121 and *British and Foreign Marine Insurance Company* v. *India General Navigation and Railway Co.* 9 Ind. Cas. 364; 38 C. 28; 15 C. W. N. 226, followed.

The burden of proof of absence of negligence is upon the common carrier, on the theory that the loss or damage to the goods is *prima facie* proof of negligence. [p. 261, col. 2].

Choutmull Doogar v. *River Steam Navigation Co.*, 24 C. 786, 1 C.W.N. 201 affirmed on appeal to the Judicial Committee in the *River Steam Navigation Co.* v. *Choutmull Doogar*, 26 C. 398; 26 I. A. 1; 3 C. W. N. 145, *Sesham Patter* v. *Moss*, 17 M. 445 and *India General Steam Navigation Co.* v. *Bhagwan Chandra Pal*, 19 Ind. Cas. 245; 40 C. 716; 17 C. W. N. 632; 17 C. L. J. 939, referred to.

In order to find whether the question of negligence is a question of law or fact, the rule is that from any given state of facts the Judge must say whether negligence can legitimately be inferred and the Jury, whether it ought to be inferred. In other words, if the contention is that there is no evidence of negligence, the question is one of law; on the other hand, the question, whether the evidence is sufficient to justify the inference of negligence is one of fact. [p. 262, col. 2.]

Metropolitan Railway Co. v. *Jackson*, (1877) 3 A. C. 193 at p. 200; 47 L. J. C. P. 303; 37 L T. 679; 26 W. R. 175, followed

Central Cachar Tea Co. v. *River Steam Navigation Co.*, 24 C. 787 at p. 791*n*, referred to and followed.

Appeal against the decree of the District Judge, Backergunj, dated the 19th of July 1912, reversing that of the Munsif, first Court, Barisal, dated the 22nd of December 1911.

Babus *Jogendra Chandra Ghose* and *Satis Chandra Ghose*, for the Appellants.

Babus *Mohendra Nath Roy* and *Mohini Mohan Chatterjee*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for damages. On the 7th April 1910, the plaintiffs made over to the defendants, who are common carriers, sixty bags of sugar for carriage from Calcutta to Jhalakati. The goods were received in the ordinary course of business and were placed on a flotilla for conveyance to the place of destination. On the 12th April, between 2-30 and 3 in the morning the flat, which carried the goods, struck a snag; the vessel thus sprang a leak and the sugar in the bags was spoiled by the water. The plaintiffs accordingly claim as damages the price of the sugar. The defendants plead non-liability by virtue of the condition printed on the back of the forwarding note. The Munsif decreed the suit, but on appeal the District Judge has dismissed it. On behalf of the plaintiffs the decision of the District Judge has been assailed as erroneous in law, and reference has been made to the provisions of the Indian Carriers Act, 1865, and to judicial decisions thereon.

Two principles applicable to cases of this description must now be accepted as firmly settled. The *first* principle is that a common carrier in this country is liable as an insurer, that is, he is responsible for the safety of the goods entrusted to him, in all events, except when loss or injury arises from act of God or King's enemies. But his liability for loss or injury in respect of the goods carried may be varied by contract. This is clear from the decision of a Full Bench of this Court in *Moothora Kant Shaw* v. *India General Steam Navigation Company* (1), as also from the decision of the Judicial Committee in *Irrawaddy Flotilla Company* v. *Bhuwan Das* (2) and a recent decision of this Court in *British and Foreign Marine Insurance Company* v. *India General Navigation and Railway Company* (3). The *second* principle is that the burden of proof of absence of negligence is upon the common carrier, on the theory that the loss or damage to the goods is *prima facie* proof of negligence. On this point it is sufficient to refer to the cases of *Choutmull Doogar* v. *River Steam Navigation Company* (4), affirmed on appeal to the Judicial Committee in the *River Steam Navigation Company* v. *Choutmull Doogar* (5), *Sesham Patter* v. *Moss* (6) and *India General Steam Navigation Company* v. *Bhagwan Chandra Pal* (7).

(1) 10 C. 166; 13 C. L. R. 342; 8 Ind. Jur. 247.
(2) 18 C. 620 (P. C.); 18 I. A. 121.
(3) 9 Ind. Cas. 364; 38 C. 28; 15 C. W. N. 226.
(4) 24 C. 786; 1 C. W. N. 201.
(5) 26 C. 398; 26 I. A. 1; 3 C. W. N. 145.
(6) 17 M. 445.
(7) 19 Ind. Cas. 245; 40 C. 716; 17 C. W. N. 632; 17 C. L. J. 639.

Now, the fifth clause of the conditions printed on the back of the forwarding note in the present case is in these terms:—"The Company will not be liable for the loss or damage to any property delivered to be carried, caused by the act of God, stress of weather, difficulties and casualties of navigation, or any accident of the rivers or navigation, or any other loss or damage of whatever nature or kind soever, unless such loss or damage shall have arisen from the negligence or criminal act of their servants or agents." The burden of proof is upon the defendants, carriers, to establish that the loss did not arise from negligence on their part. This point of view was apparently not fully appreciated by the District Judge, when he stated that in his opinion there was not sufficient evidence from which he could reasonably infer such negligence on the part of the servants of the defendants as would entitle the plaintiffs to damages. No question of burden of proof, however, really arises in this case, for as, was pointed out in the case of *Central Cachar Tea Company* v. *River Steam Navigation Company* (8), where evidence has been given on both sides of the circumstances under which the loss took place, and the Court has arrived at a finding upon the whole of such evidence, the question of burden of proof ceases to have any practical importance. Consequently, the ultimate point for consideration in the present case is whether the defendants have established absence of negligence on their part. This question requires consideration from two points of view, *viz.*, in the *first* place, was the injury to the flat due to negligence of the servants of the carriers, and *secondly*, after the collision had taken place, was there any negligence on their part in their attempt to save the goods? As regards the *first* branch of this question, the District Judge has found that there was no evidence to show that the snag was visible at the time of the night the flotilla passed, and he has drawn the inference that the accident was not attributable to careless navigation. As regards the *second* branch, he has found that as soon as the collision had taken place, the *serangs* went into the port-hole and found the water waist deep there. They at once set to work with the pumps and reduced the accumulation of water. This was clearly their first duty, and by the time this was done, a good deal of damage would necessarily have been caused to the sugar. Reference, however, has been made to the circumstance that the bags of sugar had been placed alongside some bags of soda and that the water which had passed through the soda did greater damage to the sugar than might otherwise have happened. But we are unable to hold that this was an act of negligence on the part of the carriers; they were under no obligation to keep the bags of different articles in distinct compartments in anticipation of a possible accident. The conclusion follows that the finding of the District Judge that there was no negligence on the part of the carriers, does not involve any error of law.

It has been finally argued that the question whether there was or was not negligence on the part of the carriers under given circumstances, is always a question of law which can be determined by this Court in second appeal. We are unable to accept this contention as well founded on principle. The rule applicable to cases of this description was enunciated by Lord Cairn in the case of *Metropolitan Railway Company* v. *Jackson* (9) in these terms: "It is indeed impossible to lay down any rule except that which at the outset I referred to, namely, that from any given state of facts the Judge must say whether negligence *can* legitimately be inferred and the Jury, whether it *ought* to be inferred." In other words, if the contention is that there is no evidence of negligence, the question is one of law for the Judge to decide; on the other hand, the question, whether the evidence is sufficient to justify the inference of negligence, is one of fact. The present case is clearly of the latter description.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

(8) 24 C. 787 at p. 791*n*.

(9) (1877) 3 A. C. 193 at p. 200; 47 L. J. C. P. 303; 37 L. T. 679; 36 W. R. 175.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 49 OF 1914.

April 6, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

ALLAHABAD TRADING AND BANKING CORPORATION, LTD.—PETITIONER—APPELLANT

versus

GHULAM MUHAMMAD AND OTHERS—OPPOSITE PARTIES—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 31—Secured creditor, meaning of—Agreement appointing creditor sole agent for sale of debtor's goods—Sale-proceeds to be paid to creditor.

Where an agreement was entered into between a debtor and his creditor whereby the latter was appointed the sole agent for the sale of all books already published or thereafter to be published by the debtor with a condition that the sale-proceeds, after deducting the commission, was to be credited towards the discharge of the debt:

Held, that the creditor was entitled to be regarded as a secured creditor. [p. 264, col. 2.]

Secured creditor means a person holding a mortgage, charge, or lien upon property of the debtor or any part thereof as security for the debt due to him from the debtor. [p. 264, col. 1.]

First appeal from an order of the District Judge, Allahabad, dated the 11th March 1914.

Dr. *Satish Chandra Banerjee* (with him Mr. *Sarat Chandra Chaudhuri*), for the Appellant.

Mr. *Harendra Krishna Mukerji* (with him Messrs. *S. J. Shapoorjee, Girdhari Lal Agarwala, Ladli Prasad Zutshi* and *Uma Shankar Bajpai*), for the Respondents.

JUDGMENT.—The only question for decision in this appeal is whether the appellant, the Allahabad Trading and Banking Corporation, Limited, is entitled to be regarded as a secured creditor of the respondent, Ghulam Muhammad, who has been declared an insolvent. The appellant Bank rests its claim to be regarded as a secured creditor (1) upon an agreement, dated October the 18th 1910, (2) upon section 171 of the Indian Contract Act, and (3) upon section 221 of the same Act. The learned District Judge has held that all three grounds are untenable. As regards the *second* and *third* grounds we may content ourselves with saying that we agree with the Court below that neither section 171 nor section 221 of the Contract Act gives the appellant any lien on the property in question. The *first* ground requires careful examination. The agreement above mentioned was entered into between Ghulam Muhammad and his wife, *Musammat* Shahzadi, on the one hand and the appellant Bank on the other. It begins by appointing the Bank sole agent for the sale of all books already published or to be published thereafter by the City Press and Messrs. G. A. Asghar and Co. It appears that Ghulam Muhammad and his wife were owners of the City Press and carried on business also under the name of Messrs. G. A. Asghar & Co. The appointment of the Bank as the sole agent of Ghulam Muhammad and his wife for the sale of the books is declared to be subject to several terms or conditions. The first condition is, shortly, that all books then in stock and all books to be published thereafter are to be made over at once to the appellant Bank and the liability of the Bank in respect of the books made over to them is specified. The second condition is that a commission of eight per cent. will be allowed to the Bank on the net value of all books sold by it, except school and college books on which a commission of ten per cent. will be allowed. The third condition is that the sale proceeds of the books realized by the Bank shall be placed to the credit of Ghulam Muhammad's and *Musammat* Shahzadi's joint loan account every month after deducting the commission due to the Bank. The fourth clause deals with discounts. The fifth with the giving of credit to purchasers. The sixth with the question of advertising books for sale. The seventh clause provides that the agreement shall continue as long as Ghulam Muhammad and *Musammat* Shahzadi remain owners of he City Press and the firm of Messrs. G. A. Asghar & Co., and as long as the appellant Bank continues. The eighth condition (so called) is an undertaking by one Ram Charan Shukul, on behalf of the appellant Bank, to act as the sole agent of the City Press and of Asghar & Co., on the terms and conditions set out in the agreement. The appellant Bank relies principally upon the third clause of the agreement, namely, that which provides that the sale proceeds shall be credited to the joint loan account of Gulam Muhammad and *Musammat* Shahzadi. On behalf of the general body of creditors, it is contended that the agreement of October the 18th 1910 evidences no more than a contract of agency, and it is argued that the parties cannot have intended to make the books security for any particular loan, seeing

that it is expressly provided that the agreement is to last so long as the two businesses owned by Ghulam Muhammad and his wife exist, and so long as the appellant Bank continues to do business; it is said that if the intention had been to make the books security for the benefit of the appellant Bank, some express provisions would have been made regarding proceeds of sale after the loan was paid off. Stress is also laid on the fact that the agreement does not in express terms confer either a lien or a charge on the Bank.

The learned District Judge says that the claim of the Bank based upon the agreement of October the 18th, 1910, is obviously untenable, for the agreement does not provide that books shall be regarded as security for the debt or that the creditors shall have a lien on them, and that the third clause, on which the Bank relies so much, prescribes merely the way in which the sale proceeds shall be applied. On behalf of the Bank it is contended that the agreement should be construed as a whole, and that the test is whether the parties to the agreement intended that the Bank should, under it, have special facilities for recovering the advances which it had made. The expression "secured creditor" is not defined in the Provincial Insolvency Act. For the purposes of this case both sides are content to accept the definition contained in the English Bankruptcy Act, according to which *secured creditor* means a person holding a mortgage, charge, or lien upon the property of any debtor or any part thereof as security for the debt due to him from the debtor. The word security is not defined in the Indian Act or in the English Act. On behalf of the Bank it is contended that the word means and includes anything that makes payment of the money more secure or the money more readily recoverable. There can be no doubt that the agreement was intended to give the appellant Bank the exclusive right to sell all the books published by the debtor and his wife and to appropriate the whole of the proceeds, after payment of the commission, towards the discharge of the joint loan account. According to the agreement the Bank had a right not only to retain, when handed over, the books of the debtor and his wife and sell them, as provided in the agreement, but a right to call upon the debtor and his wife to deliver all books, as they were published, for the purpose of being sold by the Bank. It seems to us impossible to avoid the conclusion that the intention was to confer a security upon the Bank. A question might arise as to whether the general body of creditors would not be entitled to any surplus proceeds available after discharge of the Bank's claim. We are informed, however, that there is no prospect of there being any balance after the discharge of the Bank's claim and that we need not consider the question any further. We hold that the agreement was intended to give the appellant Bank a lien or charge on the books and that, therefore, the Bank is entitled to be regarded as a secured creditor. We allow this appeal and set aside the order of the District Judge. Costs of this appeal and of the proceedings in the Court below will be paid out of the estate. In the circumstances this means that the appellant Bank will be entitled to add its costs to the amount due to it under the agreement.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 271 OF 1914

April 26, 1915.

Present:—Justice Sir P. C. Banerji, KT.

PADARATH TEWARI—PLAINTIFF—APPELLANT

versus

BAZ SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Possession by tenant of parti land for tying cattle and other agricultural purposes—Presumption—Adverse possession, question of, if arises.

Where a tenant is in possession of a *parti* land at a short distance from the site of his house for the purposes of keeping his cattle troughs, cattle-shed and sugar-cane press, the presumption is that the land was given to him for purposes ancillary to agriculture, and if he builds a house on the land for the stalling of cattle and storing of the implements of husbandry, the *zemindar* cannot get the house demolished so long as he remains a tenant. [p. 265, col. 1.]

No question of adverse possession arises in such a case. [p. 265, col. 1.]

Second appeal from the decision of the District Judge of Benares, dated the 12th November 1913.

Mr. *Harnandan Prosad*, for the Appellant.

Mr. *Harendra Krishna Mukerjee*, for the Respondents.

JUDGMENT.—The plaintiff, who is one of the co-sharers in the village, brought the

suit out of which this appeal has arisen for demolition of certain constructions made by the defendants on *parti* land. The defendants contended that they had been in possession of this land for a long time, that they had their cattle troughs, sugar-pressing mill and a shed for storing sugarcane juice and keeping cattle on the land and that they had rebuilt the shed which they had there. The Court of first instance found in favour of the defendants and dismissed the suit, and this decree has been affirmed by the lower Appellate Court. In my judgment on the findings of both the Courts below, the decision of the lower Appellate Court is right. It has been found that the house of the defendants, who are tenants in the village, is at a short distance from the site in dispute, that they have been in possession of this site for upwards of 12 years and have had their cattle troughs, cattle shed and sugarcane press there, and that all that they have now done is to build a house for the stalling of cattle and storing of the implements of husbandry. The learned Judge from all these circumstances drew the inference that the land had been given to the defendants as a part of their holding, and that they were entitled to occupy the land so long as their holding existed. In my opinion the inference which the learned Judge drew from the facts is a reasonable inference. Where a tenant has been in possession of a piece of land for purposes ancillary to the purposes of his agricultural holding, the fair presumption is that the land was given to him for the purposes last mentioned. There was no question of adverse possession in this case. Under the circumstances found, the plaintiff was not entitled to eject the defendants from the land in suit and his suit was rightly dismissed. I dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 758 OF 1914.

January 22, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

K. GURUSWAMY NAIDU—DEFENDANT—APPELLANT

versus

K. SUBBA NAIDU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLIII, r. 1 (u)—Order of remand under Madras Estates Land Act (I of 1908), whether appealable.

No appeal lies against an order of remand made in proceedings under the Madras Estates Land Act I of 1908.

Appeal against the decree of the District Court of Chengleput, in Appeal Suit No. 314 of 1913, preferred against that of the Court of the Sub-Collector of Chengleput, in Original Suit No. 20 of 1912.

Mr. *N. Viswanadha Aiyar*, for the Appellant.

Mr. *T. Ethiraja Mudaliar*, for the Respondents.

JUDGMENT.—This appeal can only be brought under Order XLIII, rule 1, (*u*) corresponding to section 588 (28) of the old Code of Civil Procedure, which is part of Chapter XLIII, and does not apply to proceedings under the Madras Estates Land Act (*vide* section 192). The appeal does not lie and is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL MISCELLANEOUS APPEAL No. 2028 OF 1914.

March 5, 1915.

Present:—Mr. Justice Rattigan and Mr. Justice Shadi Lal.

DR. TARA CHAND JERAM DAS—RESPONDENT—APPELLANT

versus

THE OFFICIAL LIQUIDATORS OF THE PEOPLE'S BANK OF INDIA, LTD., LAHORE, IN LIQUIDATION—APPLICANTS—RESPONDENTS.

Limitation—Appeal filed with delay—Sufficient cause—Objection by respondent at hearing—Companies Act (VI of 1882), s. 169—Appeal—Notice to respondent—Limitation period, expiring during vacation—Extension of limitation period—Right of Official Liquidator to recover by summary process from creditor of Bank who realised his debt by suit before passing of winding-up order and after suspension of payment by Bank—Companies Act (VII of 1913), s. 284.

The period of three weeks prescribed by section 169 of the Companies Act may be extended by Appellate Court, when it is satisfied that the appellant showed due diligence but failed on account of circumstances beyond his control, such as the Court being closed on account of the vacations. [p. 267, col. 1.]

No extension can be claimed on the ground that

the Pleader for the appellant wrongly believed that section 284 of the Companies' Act, 1913, was applicable to the case, for the section clearly lays down that Act of 1882 applied to cases in which proceedings were pending when the Act of 1913 came into force. [p. 267, col. 2.]

A respondent is entitled to contest an *ex parte* order extending the period of three weeks prescribed by section 169 of the Companies Act, 1882. [p. 266, col. 2.]

An Official Liquidator is not entitled by summary order to a refund of money realized by a creditor of the Bank before the order of winding-up was passed but after the Bank had passed a resolution stopping payment of debts. The Liquidator has to file a regular suit like other claimants to recover the amount realized by such creditor of the Bank. [p. 268, col. 2; p. 269, col. 1]

Miscellaneous first appeal from an order of the District Judge, Lahore, dated the 21st August 1914, directing appellant to refund Rs. 1,546-3-7.

Lala *Bhagwan Das*, for the Appellant.

Mr. *Herbert* and Lala *Madan Gopal*, for the Respondents.

JUDGMENT.—The People's Bank of India, Limited, is being woundup by the Court at Lahore and in the course of the winding-up proceedings, and upon the application of the Official Liquidators, the District Judge issued notices to certain persons to refund to the Official Liquidators sums of money respectively realised by them in execution of decrees obtained in suits against the Bank instituted after the said Bank had suspended payment. Several of these persons appeared before the District Judge in person or by Counsel and on various grounds contested their liability to make such refunds; and eventually, by order dated 21st August 1914, the District Judge found (except as regards certain specified persons who were exempted from liability) that the sums realized by the contesting respondents were invalid under section 213 of the Indian Companies Act, 1882, as against the Official Liquidators. The learned Judge accordingly directed (1) the said respondents to refund to the Official Liquidators such sums as they had respectively realised in execution of their decrees, and (2) "the Official Liquidators to take action under the Act to recover such amount."

Before proceeding, we may here explain that the People's Bank of India, Limited, a very extensive financial concern with branches in various parts of India and Burma, suspended payment on the 19th September 1913. The news of this fact soon spread and within a day or two a number of creditors and depositors instituted suits against the Bank to recover their money, and many of them succeeded in obtaining decrees and realising their moneys before an order was passed by the Court for the winding-up of the insolvent Bank. As a matter of fact, an application in this behalf was made to the District Judge, Lahore, on the 21st October 1913 and on the 17th November 1913 the Court accepted the application and directed the Bank to be woundup under the orders of the Court. Under the provisions of section 133 of the Act the winding-up must, therefore, be deemed to have commenced on the 21st October 1913, when the petition for the winding-up was presented. Several of the persons affected by the order of the District Judge, dated 21st August 1914, filed appeals, under section 169 of the Act, to this Court and this judgment will dispose of all these appeals.

At the hearing before us a preliminary objection was raised on behalf of the Official Liquidators that notice of the appeals was not given to them within three weeks of the date of the District Judge's order, and that as there was no reasonable excuse for this delay, the appeals must be held to be barred by section 169. As a matter of fact the period was extended in each case by orders of this Court but as those orders were passed *ex parte*, the Official Liquidators are entitled to ask us to decide whether such extensions of time were rightly granted, and if we hold that they were not, to reject the appeals on that ground. In this connection we were referred to a ruling of this Court reported as *Sultan Singh* v. *Badhawa Singh* (1), where it was laid down that an extension of time should not be allowed unless the appellant can show that he himself has been duly diligent and that any delay that has occurred has been due either to the respondent's conduct or to some action or inaction on the part of the Court. We have no hesitation in accepting this principle, and what we have here to decide is whether

(1) 22 Ind. Cas. 795; 68 P. R. 1914; 100 P. L. R. 1914.

the particular appeals before us fall within the spirit of the authority cited.

At the time when the District Judge passed his order, the Chief Court was in vacation and was closed for ordinary civil work, and we consider that that fact afforded sufficient justification for appellants to wait until the Court re-opened after the vacation, and that the test to be applied is to see whether after the re-opening of the Court, they exhibited such diligence as would justify the Court in granting them an extension of time.

Now, in all but two cases, the appeals were actually filed in this Court before the close of the vacation and prompt steps were taken immediately after the vacation to ensure service of notice on the Official Liquidators without unnecessary delay, with the result that in all cases (except the two above referred to) notices were actually given to the latter within three weeks from the date when the Court re-opened for civil work. In these circumstances, we are of opinion that extension of time was rightly granted to those appellants and that consequently Miscellaneous Civil Appeals Nos. 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037 and 2130 are within time. Mr. Parker's argument that in any event an extension of time cannot be granted after the expiration of the period limited by section 169, has no force in view of the high authorities to the contrary [see *Banner* v. *Johnstone* (2), *Manchester Economic Building Society, In re*(3)]. On the other hand, Miscellaneous Civil Appeals Nos. 2317 and 2318 were admittedly not filed till the 5th October 1914, and process fees for issue of the notices were not paid till the 5th January 1915. The only explanation for this delay that the learned Pleader for those appellants (Mr. Moti Lal) can give is that his clients would not reply to his letters and that he himself was under the impression that the provisions of the Indian Companies Act, 1913, applied to the appeals. The *first* ground obviously can afford no sufficient excuse, and as to the *second*, section 284 of the Act of 1913 is so clear in its terms that we cannot understand how any one could have supposed that the appeals were to be governed by its provisions, and not by those of Act VI of 1882. We must accordingly hold that these two appeals are barred by section 169 of Act VI of 1882 and dismiss them, as we hereby do. But as, for reasons to be given, we hold that the District Judge had no jurisdiction to pass the order now under appeal, we leave the parties in those appeals to bear their own costs. Civil Appeal No. 2129 of 1914 was apparently filed under a misapprehension, as the appellant, Murli Dhar, was expressly excepted from the operation of the District Judge's order. As he is not present either in person or by Pleader or agent, his appeal is dismissed in default.

Reverting now to the appeals which we hold to be within time, we find it unnecessary in the view we take to discuss the question whether the District Judge was or was not right in finding that the payments by the Bank to the appellants in execution of their decrees were invalid under section 213 of the Act as against the Official Liquidators. In our opinion the proceedings before the District Judge, from the date when the official Liquidators applied to him to take action to recover such amounts up to and including his order of the 21st August 1914, were wholly without jurisdiction, inasmuch as there is no provision in Act VI of 1882 which enables the Court directing the winding-up to recover or authorise the recovery of moneys in the hands of persons, other than those expressly mentioned in section 149, by summary process.

In support of the District Judge's order we have been referred to sections 152, 165 and 166 of the Act, but we can find nothing in any of these sections which gives jurisdiction to recover such moneys by summary process. Section 152 merely provides that in cases where the Court directs certain persons to pay money, it may, instead of directing the money to be paid to the Official Liquidator, direct that such money shall be paid into the Banks therein specified. In other words, it is in the nature of a supplement to section 149 and does not *per se* enlarge the jurisdiction of the Court as to the persons to whom such orders may be given [see Sir W. Page Wood, L. J., *In re United English and Scottish Life Assurance Company, Ex parte*

(2) 40 L. J. Ch. 730; 5 H. L. 157; 24 L. T. 542.
(3) 53 L. J. Ch. 115; 24 Ch. D. 488; 49 L.T. 793; 32 W. R. 325.

Hawkins (4)]. Now sections 149 and 152 of the Indain Companies Act, 1882, correspond (for all practical purposes) with sections 100 and 103 of the English Companies Act, 1862, and it has been authoritatively settled by the Courts in England that section 100 of the English Act is applicable only to the persons therein specifically mentioned and must not be extended to include other persons (Buckley's Companies Act, 5th Edition, page 166). Mr. Herbert for the Official Liquidators argued that a creditor of the Bank who had by means of undue or fraudulent preference obtained payment of his debt must be regarded as "a trustee," in respect of money so obtained, for the Bank and its other creditors as represented by the Official Liquidators. But the case of *In re United English and Scottish Company, Ex parte Hawkins* (4), above cited, is direct authority to the contrary. In this case, Selwyn, L. J., remarked: "I think *Hollingsworth's* case (5) and *Cox's* case (6) are conclusive authorities that a constructive trust of this kind is not within the 100th section of the Companies Act, 1862." So too in the case of the *Marlborough Club, In re* (7), Romily, M. R., refused to place on the list of contributories persons who had fully paid up their shares and observed, "I cannot put them on solely to give the Court jurisdiction to enforce payment of the debts due from them. The Liquidator must recover these debts in the County Court in those cases where the debts are small, and where they are large he must bring actions in the usual way. The rule is the same in bankruptcy proceedings. If a payment or other disposition of property, otherwise valid, be made in circumstances that amount to a fraudulent preference, the payment at the time it is made is a good payment and so remains unless and until it is set aside as a fraudulent preference. The creditor is, therefore, not a trustee for the trustee in bankruptcy, and the proper order to make is for repayment, but if he do not repay he cannot be committed to prison under the Debtor's Act, 1869, the remedy must be enforced in the ordinary way." (Halsbury's Laws of England, Volume 2, section 474 citing *Ex parte Hooson* (8)].

Sections 165 and 166 of Act VI of 1882 in no way help the contentions of the Official Liquidator. The former section deals with the case of contributories and debtors to the Company, and a creditor of the Company who has, whether lawfully or by undue or by fraudulent preference, obtained payment of his money from the Company, cannot by any strech of language be described as either a contributory or as a debtor of the Company. The latter section merely provides that "orders made by a Court under this Act may be enforced in the same manner in which decrees of such Court made in any suit pending therein may be enforced." Clearly this provision relates to such orders only as are made with jurisdiction, and does not cover orders passed *ultra vires*.

It was contended that unless the Official Liquidator could, by summary process, recover from those persons money alleged to have been paid to them by way of undue or fraudulent preference, he would be put to the grave inconvenience of having to institute innumerable suits in various districts in order to recover such moneys. We are not insensible of this difficulty and inconvenience, but as usual there are two sides to this question and the person from whom recovery is sought may justly urge that as he is not in any way connected with the Company except in so far as he happened to be one of its creditors, it is manifestly unjust that he should be made to refund money to the Company, unless and until the question whether he obtained payment of it by means of undue or fraudulent preference has been decided in the ordinary way by regular suit, and not by summary inquiry.

For the reasons given and upon the authorities above referred to, we hold that the District Judge had no jurisdiction under Act VI of 1882 to direct the refund of the moneys obtained by the appellants in execution of their decrees or to autho-

(4) 3 Ch. App. 787 at p. 790; 19 L. T. 232; 16 W. R. 1136.

(5) 3 De G. &. Sm. 102; 64 E. R. 399; 84 R. R. 303.

(6) 3 De G. & Sm. 180; 19 L. J. Ch. 167; 14 Jur. 387 64 E. R. 435.

(7) 5 Eq. 365; 37 L. J. Ch. 296; 18 L. T. 46; 16 W. R. 668

(8) 8 Ch. App. 231; 8 L. T. 4; 21 W. R. 152; 42 L. J. Bk. 19.

rise the Official Liquidators to take action to recover the said money under that Act. The only course open to the Official Liquidators is to institute suits in the regular way and when they do so they can, of course, rely upon the provisions of section 213 and adduce evidence in support of their contentions. The question, whether the payments made to the creditors of the Bank under the circumstances set forth in the District Judge's orders are invalid under the provisions of section 213 of Act VI of 1882, is one which can be determined only by the Court trying such suits, and the District Judge, as the Court directing the winding-up of the Company, had no jurisdiction to express an opinion thereon.

We accordingly accept the appeals above mentioned as being within time and set aside the order of the District Judge dated 21st August 1914. The Company must pay all costs both here and in the Court below.

Appeal accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 384 OF 1913.

March 8, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

KALAVAGUNTA SINGARA CHARLU AND OTHERS—DEFENDANTS NOS. 1, 5 AND 6—APPELLANTS

versus

SREEMAN GUDIMALLA VENKATA SESHAMMA—PLAINTIFF—RESPONDENT.

Hindu Law—Gift by Hindu widow to her husband's niece after consummation of latter's marriage, whether valid—Improvements, bona fide, *by donee—Compensation.*

A Hindu widow has no right to make a gift, even of a reasonable portion of her husband's property, to a lady born in her husband's family after the consummation of that lady's marriage. [p. 270, col. 1.]

Where the donee or her representatives effect, during the period they are in possession, *bona fide* improvements on the property they are entitled to claim compensation for the same and a decree in ejectment should not be passed until the value of such improvements is paid to them. [p. 270, col. 1.]

Ramasami Ayyar v. *Vengidusami Ayyar*, 22 M. 113, *Anavilla Sundararamayya* v. *Cherla Sitamma*, 10 Ind. Cas. 56; 9 M. L. T. 469; (1911) 1 M. W. N. 422; 21 M. L. J. 695; 35 M. 628, *Pugalia Vettor Ammal* v. *Vettor Goundan*, 13 Ind. Cas. 475; (1912) M. W. N. 89; 11 M. L. T. 103; 22 M. L. J. 321, distinguished.

Second appeal against the decree of the Court of the District Judge of Kistna at Masulipatam, in Appeal Suit No. 275 of 1912, preferred against that of the Court of the Principal District Munsif of Tanuku in Original Suit No. 508 of 1910.

Mr. *P. Narayanamurti*, for the Appellants.

Messrs *P. R. Ganapathi Aiyar* and *R. Rangaswami Aiyangar*, for the Respondents.

This second appeal coming on for hearing on the 8th of September 1914, the Court delivered the following

JUDGMENT.—In *Ramasami Ayyar* v. *Vengidusami Ayyar* (1), a sonless widow was held entitled to make a gift to her daughter's husband of a reasonable proportion of the estate (which the widow had inherited as qualified owner) *on the occasion of the daughter's marriage*, because such a gift of land "is believed to enhance the merit of the primary act *viz.*, the giving of a virgin in marriage," and "a qualified owner" (like a Hindu widow who has inherited her husband's or son's estate) has the power "to do all acts proper and incidental to the marriage of a female" of the family to which her husband belonged. In *Anavilla Sundararamayya* v. *Cherla Sitamma* (2), a Hindu father was held entitled to make a gift of a fair proportion of his lands to his daughter even after her marriage and the gift was held binding on the son of the donor. In *Pugalia Vettor Ammal* v. *Vettor Goundan* (3), a gift by a Hindu male owner to his deceased co-parcener's daughter of a reasonable portion of the family estate was held binding on the undivided son of the donor.

In the present case, the gifts were made by a Hindu widow (a qualified owner) to the daughter of her husband's undivided predeceased brother and to the son of another daughter of the said deceased brother. The gift to the niece was after the niece's marriage. (The District Judge's assumption that the brother of the donor's husband was a divided member is clearly erroneous in the face of the plaintiff's own admission in

(1) 22 M. 113.

(2) 10 Ind. Cas. 56; 21 M. L. J. 695; 9 M. L. T. 469; (1911) 1 M. W. N. 422; 35 M. 628.

(3) 13 Ind. Cas. 475; 22 M. L. J. 321; (1912) M. W. N. 89; 11 M. L. T. 103.

her evidence, there being, as we take it, nothing on the record to support the finding of division).

The only question, therefore, in this appeal is whether the principle of the cases above quoted is to be still further extended by allowing a qualified owner like a Hindu widow to exercise the privilege of making gifts of reasonable fractions of her husband's estate to her husband's married niece and to the son of another niece long after the niece's marriages. So far as the gift to the husband's niece's son is concerned, it clearly cannot be upheld as he never was a member of the widow's husband's family, though his mother was a member till her marriage.

The question of the validity of the gift to the niece is not so easy to decide. But there are three difficulties in the way of upholding even that gift:

(*a*) The donor was a Hindu widow who (as we are constrained by precedents to hold) was only a qualified owner.

(*b*) The gift was made in pursuance of an alleged authority given by the donor's husband and that alleged authority has been found to be false, and it is very doubtful whether it is permissible to the donee to fall back on the alleged power of the donor herself to make such a gift even in the absence of a direction by her husband.

(*c*) The gift was made long after the marriage, and not on or about the time of the marriage or the consummation ceremony.

There is no case in which it has been held that a qualified owner like a Hindu widow has the right to make such a gift even to her own daughter after the consummation of the marriage of such daughter, much less to a lady born in her husband's family after the consummation of the lady's marriage.

We, therefore, agree with the lower Appellate Court that the gifts in question in this case are invalid.

But we think that the District Munsif ought to have raised issues on the questions whether the 1st defendant has made improvements on the property gifted to his father and what the value of those improvements is (having regard to the 8th paragraph of the 1st defendant's written statement). If the 1st defendant has made such improvements (as the District Munsif finds in the 11th paragraph of his judgment), we have no doubt that he made the improvements believing in good faith that he was absolutely entitled to the site on which he built the house which forms the improvement.

The learned District Judge's finding on the question of improvements is so indefinite that we are unable to accept it, and we request him to give distinct findings on the two issues above mentioned on the evidence on record and on any further evidence which the parties may adduce. The findings should be submitted within two months from receipt of records and ten days will be allowed for filing objections.

In compliance with the above order the District Judge of Kistna at Masulipatam submitted the following

FINDINGS. * * * * *

5. *Issue* (1). I find that the 1st defendant built a tiled house on the property gifted to his father and that it replaced two old wooden buildings which though destroyed by fire, would not have been likely to last long and were only worth Rs. 100.

6. *Issue* (2). The value of the house at the persent day may, I think, be taken as Rs. 500.

This second appeal coming on for final hearing after the return of the findings of the lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the finding. We shall modify the decree in the plaintiff's favour by adding that the plaintiff shall take possession of the house and the materials on the house standing on the plaint house site, only on depositing its value (Rs. 500) into Court to be paid to the 1st defendant and his assigns and representatives. If the plaintiff has taken possession of the house and its materials, she should pay Rs. 500 to the 1st defendant and his assigns with interest at 6 per cent. from the date of her taking possession. The parties will pay and receive proportionate costs in all Courts.

Appeal rejected; Decree modified.

SHANKER *v.* RAM KISHEN.

PUNJAB CHIEF COURT.

FIRST CIVIL MISCELLANEOUS APPEAL No. 597 OF 1914.

February 15, 1915.

Present:—Justice Sir Donald Johnstone, Kt.

SHANKER—JUDGMENT-DEBTOR—APPELLANT

versus

RAM KISHEN—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXVIII, r. 5—Attachment before judgment—Dismissal of suit by first Court—Cessation of surety's liability—Decree by Appellate Court—Security—Appeal, second—Plea of want of registration of security, if allowed.

When a surety pledges property by bond in order to save the property of a defendant attached before judgment under Order XXXVIII of Civil Procedure Code, the liability of the surety or of the property pledged ceases as soon as the suit is dismissed, by the first Court, and that liability is not revived by the Appellate Court decreeing subsequently the plaintiff's claim. [p 271, col. 2.]

Shek Suleman v. *Shivram Bhikaji*, 12 B. 71; *Ma Bi* v. *Kalidas*, 5 Ind. Cas. 985; 5 L. B. R. 156; *Maung Po Khet* v. *Maung San Ya*, 8 Ind. Cas. 980; 3 Bur. L. T. 135, followed.

The plea of want of registration of surety bond cannot be entertained on second appeal when the point has not been raised in the two Courts below. [p. 271, col. 2.]

Joy Gopal Mozoomdar v. *Thoko Monee Dabee*, 11 W. R. 381, followed.

Sarbaland Khan v. *Chanda Singh*, 84 P. R. 1877, referred to.

Miscellaneous first appeal from an order of the Divisional Judge, Ambala, dated the 15th June 1914, reversing that of the Munsif, first Class, Ambala, dated the 5th May 1914, refusing to execute the decree against the surety.

Mr. *Sewa Ram Singh*, for the Appellant.

Mr. *Nand Lal*, for the Respondent.

JUDGMENT.—The facts of this case are simple and are stated by the learned Divisional Judge in his judgment. The first Court held that inasmuch as the suit was dismissed on the original trial, the liability of the surety came to an end. The learned Divisional Judge, however, was of opinion that there is nothing in the surety agreement which confines his liability to the satisfaction of the decree of merely the first Court, that it was an unconditional security for the whole of plaintiff's claim and that the security demanded and taken under Order XXXVIII, rule 5, Civil Procedure Code, was such as would be sufficient to satisfy any decree passed at any stage in the suit. The surety has now come up here with a second appeal and he takes two points:—*First*, that, inasmuch as the surety bond was not registered, it is not admissible in evidence; *secondly*, that upon the dismissal of the suit in the original Court his liability came to an end. With reference to the *first* of these two points Mr. Nand Lal, for the decree-holder, raises the objection that the plea of want of registration, not having been taken in either of the two Courts below, cannot be taken now. Against this Mr. Sewa Ram Singh quotes *Sarbaland Khan* v. *Chanda Singh* (1) and various rulings mentioned at page 29 of Sanjiva Row's Registration Act. Mr. Nand Lal, however, relies upon *Joy Gopal Mozoomdar* v. *Thako Monee Dabee* (2), and my own opinion is that the law is correctly stated there. *Sarbaland Khan* v. *Chanda Singh* (1) is not in point, because there it was only a question of interference by the first Appellate Court. I need not, therefore, express any opinion as to whether the bond required registration or not.

On the merits, however, I entirely agree with the appellant surety. It is quite clear from Order XXXVIII, Civil Procedure Code, and section 145 of the Code that, when a property is attached before judgment, or when a surety on behalf of a defendant pledges property by way of security so as to save the defendant from attachment of his property, the attachment of the defendant's property or the liability of the surety in person or property, as the case may be, comes to an end if the first Court dismisses the suit. In this case the first Court did dismiss the suit and, therefore, the appellant's property and the appellant in person ceased to be liable in any way. The decree-holder appealed against the dismissal of his suit, but did not ask for any *relief before judgment* against the defendant and in my opinion it is, therefore, quite clear that this appeal must succeed. I have looked at *Shek Suleman* v. *Shivram Bhikaji* (3), *Ma Bi* v. *Kalidas* (4) and *Maung Po Khet* v. *Maung San Ya* (5). These rulings seem

(1) 84 P. R. 1877.
(2) 11 W. R. 381.
(3) 12 B. 71.
(4) 5 Ind. Cas. 985; 5 L. B. R. 156.
(5) 8 Ind. Cas. 980; 3 Bur. L. T. 135.

to me to be exactly in accordance with law and in point, and I am not aware of any authority which I am bound to follow, which takes a contrary view.

For these reasons I accept the appeal, set aside the order of the lower Appellate Court and restore that of the first Court. The decree-holder will pay Shankar appellant's costs throughout.

Appeal accepted.

PUNJAB CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 288 OF 1914.

July 22, 1914.

Present:—Mr. Justice Shadi Lal.

Lala DAULAT RAI—PETITIONER

versus

Rai Sahib Pandit WAZIR CHAND AND ANOTHER LIQUIDATORS OF THE HINDUSTAN BANK, LIMITED (IN LIQUIDATION)—RESPONDENTS.

Companies Act (VII of 1913), s. 284, meaning of—Pending proceedings, if affected by new Act—Interpretation of Statute.

A construction which leads to absurdity or inconvenience should be avoided, unless the express words of a Statute compel the Court to hold otherwise. [p. 273, col. 1.]

Construction is to be made of all the parts together, and not of one part only by itself. [p. 273, col. 1.]

The plain and rational meaning of section 284 of the Companies Act of 1913 is that the new Act operates upon proceedings arising out of the windings-up which commenced after its enforcement (*i. e.*, 1st April 1914) and that no part of the Act has application to the pending liquidations. [p. 273, col 2.]

Application, under section 24, Civil Procedure Code, for transfer of certain proceedings under section 214 of the Indian Companies Act, VI of 1882, pending against the petitioner in the Court of the Additional District Judge, Multan, to some other competent Court.

Mr. *Oertel*, for the Petitioner.

Messrs. *C. Bevan Petman* and *Jai Gopal Sethi*, and *Bhai Teja Singh*, for the Respondents.

JUDGMENT.—This is an application by Daulat Rai, late Managing Director of the Hindustan Bank, Limited, now in liquidation, for transfer of certain proceedings under section 214 of the Indian Companies Act, VI of 1882, pending against him in the Court of Lala Damodar Das, Additional District Judge, Multan. I have perused the affidavit of the petitioner and the counter-affidavit of Rai Sahib Pandit Wazir Chand, one of the Liquidators of the Bank, and the explanation submitted by the learned Judge of the Court below. After giving my careful consideration to the above documents and to the very lengthy arguments which have been addressed to me, I have arrived at the conclusion that the petitioner has failed to make out a case for transfer and that this application must be dismissed.

Before dealing with the merits, it is necessary to decide an important question of jurisdiction which arises in the case. The Company went into liquidation in January 1914 when the Act of 1882 was in force. It is clear that under the provisions of that Act, the Court of the District Judge, being the principal Court of original jurisdiction in the District, was competent to hear and adjudicate upon all matters in connection with the winding-up of a Company and that when the winding-up in the present case began, Lala Damodar Das, who was the District Judge at that time, had jurisdiction over proceedings in the liquidation of this Company. It, therefore, follows that if the Act of 1882 had continued to remain in force, no objection to the jurisdiction of the District Court could have been taken. That enactment was, however, repealed by the Indian Companies Act, VII of 1913, which came into force on the 1st of April 1914, and which provides that, unless the Local Government by notification empowers any District Court to exercise jurisdiction under that Act, the Court having that jurisdiction shall be the High Court [*vide* section 3, sub-section (1)]. No notification has so far been issued by the Local Government, and there is no doubt that under the Act of 1913, the Chief Court is the only Court which has jurisdiction in the winding-up of a Company having its registered office in this Province.

The question then arises, whether that Act has retrospective operation and applies to proceedings which began before it came into force. Does it, in other words, deprive a Court of the jurisdiction which it already possessed before the date of its commencement and make subsequent proceedings taken by that Court *coram non judice?* Was it intended that all the liquidation cases pending in the different District Courts should stop abruptly on the 1st of April 1914 and

be transferred bodily to the Chief Court to be dealt with in their further stages by that Court? An answer in the affirmative would lead to a result which could not, in my opinion, have been intended by the Legislature and before I lay down a proposition of that kind, I should like to have some authority in support of it.

Now, it is a sound canon of interpretation of Statutes that a construction which leads to absurdity or inconvenience should be avoided, unless the express words of a Statute compel the Court to hold otherwise.

The learned Counsel for the petitioner has not cited any law in support of his argument that the District Courts ceased, on the 1st of April 1914, to have jurisdiction over cases of which they were already seized. On the other hand, I find that section 284 of the Act of 1913 is sufficiently wide to preserve the existing jurisdiction over cases which began before the commencement of the Act. That section states that "The provisions of this Act with respect to winding-up shall not apply to any Company of which the winding up has commenced before the commencement of this Act, but every such Company shall be wound-up in the same manner and with the same incidents as if this Act had not been passed, and, for the purposes of the winding up, the Indian Companies Act, 1882, shall be deemed to remain in full force." The language of the section is clear and unambiguous, and it would be difficult to find a more explicit and comprehensive provision of law.

The learned Counsel for the petitioner, however, contends that the section has application only to the 'manner' and 'incidents' of the winding-up, and has no reference to the jurisdiction of the Court. I am unable to accept the contention. This argument ignores the opening and the concluding clauses of the sentence, which show unmistakably the intention of the Legislature. It is an elementary rule that construction is to be made of all the parts together, and not of one part only by itself. *Incivile est nisi tota lege perspecta, una aliqua particula ejus proposita, judicare vel respondere.* Such a survey is always indispensable even when the words are the plainest, for the true meaning of any passage is that which best harmonises with the subject and with every other passage of the Statute (*Vide* Maxwell on the Interpretation of Statutes, 4th Edition, page 42*). If I were to accept the contention put forward on behalf of the petitioner, I would have to apply to the pending proceedings a hybrid law, consisting of a portion of the new Act and of a portion of the old Act. Such a result was, in my judgment, foreign to the intention of the Legislature.

Taking the section as a whole, I have no hesitation in holding that its plain and rational meaning is that the new Act operates upon proceedings arising out of the windings up which commenced after its enforcement and that no part of the Act has application to the pending liquidations.

It is also contended on behalf of the petitioner that, even if the question of jurisdiction is governed by the old Act, Lala Damodar Das ceased to have jurisdiction over the winding-up of the Company when he ceased to be the District Judge and that as an Additional District Judge, he would have been competent to try the case if it had been assigned to him by the District Judge. But no order of assignment was, according to the learned Counsel for the petitioner, passed in the present case. This point was not in clear terms raised in the grounds; and Mr. Petman states that, if he had got notice of it, he would have been prepared to point out an order assigning the case to the Additional District Judge. It appears that Lala Damodar Das was originally the District Judge at Multan and began to hear the winding-up cases in that capacity. Subsequently he was placed on special duty to devote his whole time to those cases and was relieved of other work by another judicial officer who was appointed District Judge. Lala Damodar Das, who then became the Additional District Judge, continued to deal with the Company cases and no objection was ever raised to his jurisdiction, on the ground that a formal order assigning to him those cases had not been passed. *Omnia, præsumuntur rite esse acta* is a salutary rule and finds expression in the explanation to section 114 of the Indian Evidence Act, which says that the Court may presume that judicial and official acts have been regularly performed. I cannot,

*See 5th Edition, page 47.—*Ed.*

therefore, assume that there was no order of assignment. Section 75, sub-section (2), of the Punjab Courts Act, which contains the law on the subject, does not state that the order of assignment must necessarily be in writing, and a verbal order would, in my view, comply with the requirements of law.

For the reasons stated above I am clearly of opinion that Lala Damodar Das was competent to try the case and that the objection based upon want of jurisdiction must be overruled.

Coming now to the application on the merits, I find that the allegations contained in the affidavit of the petitioner have been completely disposed of by the explanation which has been submitted by the learned Judge of the Court below. The explanation is clear and conclusive, and in the face of it, it is difficult to hold that there is any valid ground for making an order of transfer. I want to guard against the possibility of any remarks made by me at this stage causing the slightest prejudice to the petitioner and accordingly consider it unnecessary to deal with the allegations *seriatim*. Suffice it to say that I have gone into the matter carefully and am unable to accede to the suggestion that the procedure of the learned Judge proves any bias or prejudice. There is no doubt that no Director or other officer of a Company likes proceedings started against him under section 214, and any Judge who undertakes to discharge this unpleasant duty and enforce the statutory liability of those directly connected with a Company would be liable to the same objection as has been urged in the present case.

I am at present not concerned with the correctness or otherwise of the order passed by the Additional District Judge. I have simply to see whether the petitioner has satisfied me that there is a reasonable apprehension that he will not have a fair and impartial trial in the Court of the present Judge. As pointed out in *Sher Singh* v. *Thakar Das* (1): "It is not every apprehension of the litigant that the superior Court has to take into consideration under the rule. The apprehension must be reasonable, *i.e.*, such as a man of sound sense would regard as legitimately raising the inference of bias. We cannot order a transfer merely because the party applying for it chooses to make unfounded allegations and to misconstrue the most innocent acts of the presiding Judge into indications of bias. To pay regard to the idiosyncracies of litigants in this way would place judicial officers at their mercy and lead to obstruction of public business. It would also promote the filing of unfounded and malicious applications. No man has a right to choose his own tribunal or to object to his case being tried in the Court which the law provides for it, unless for good cause."

Having regard to the above exposition of law, I feel no hesitation in holding that the petitioner has entirely failed to point out any act of the learned Judge which indicates bias, or is likely to create a reasonable apprehension thereof. I must, therefore, dismiss this application with costs.

Application dismissed.

(1) 88 P. R. 1903; 17 P. L. R. 1904.

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL No. 1739 OF 1914.

April 23, 1915.

Present:—Mr. Justice Chamier.

AMIR SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

CHHATTAR SINGH AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Execution—Uncertified payment under decree, recognization of—Instalment decree—Default—Limitation Act (IX of 1908), Sch. I, Art. 182 (7).

An uncertified payment under a decree cannot be recognized for any purpose under the new Code of Civil Procedure. [p. 275, col. 1.]

Where a decree provides for payment of the money due under it in instalments and in case of default in payment of any of the instalments, the whole amount becomes payable at once, an application for execution should be made within three years of the first default. [p. 275, col 1.]

Execution second appeal from the decision of the District Judge of Meerut, dated the 24th June 1914.

Mr. *Mohan Lal Sandal*, for the Appellant.

The Hon'ble Mr. *Gokul Prasad*, for the Respondents.

MARIAN BEEVIAMMAL *v.* KADIR MEERA SAHIB TARAGAN.

JUDGMENT.—This appeal arises out of an application made on November 12th, 1913, for execution of a decree dated May the 10th, 1909. The decree was for a considerable sum of money to be paid in certain instalments. The first instalment amounting to Rs. 124 was to be paid at the end of *Aghan Sambat*, 1966 corresponding with December the 26th, 1909. The second instalment amounting to Rs. 62 was to be paid at the end of *Jeth Sambat* 1967. Subsequent instalments of Rs. 62 each were to be paid at the end of *Aghan* and at the end of *Jeth* till the whole decree was satisfied. In case of default the whole amount became payable at once. The decree-holders in their application of November 12th, 1913 stated that they had received the first four instalments, but that there had been a default in payment of the instalment due at the end of *Aghan Sambat* 1968, and they, therefore, claimed the whole amount remaining due under the decree. Payment of the first 4 instalments was not certified to the Court or recorded by the Court and, therefore, cannot be recognized by any Court executing the decree. The learned Vakil for the decree-holders relies upon a decision of this Court based upon section 258 of the Civil Procedure Code of 1882, but the words relied upon by this Court as justifying the view that a Court might recognize an uncertified payment for some purposes, have now disappeared from the Code with the result that an uncertified payment cannot be recognized for any purpose, certainly not for the purpose of saving limitation. The decree in question provides in plain terms that if there is default in payment of any instalment, the whole amount of the decree shall become payable. It has been held in a large number of cases that clause (7) in the 3rd column of Article 182 of Schedule I to the Limitation Act applies to such a provision as this. The only point on which there is any room for doubt is whether the decree directed payment to be made on a certain date. The decree directs that instalments are to be paid on or before the last day of *Aghan* and *Jeth*, and that if there is default, the whole amount shall become payable at once This appears to me to bring the case within clause (7), and I hold that the application for execution should have been made within three years of the 1st default. The decree-holders being unable to prove that any instalments have been paid, I must take it that the first default occurred at the end of *Aghan Sambat* 1966. Therefore, the present application for execution, made more than three years after that time, is barred by limitation and should have been dismissed I was referred to a judgment of the Bombay High Court in a case in which the effect of subsequent payment and acceptance of overdue instalments was discussed. It appears to have no bearing on the present case, as it is not suggested that there was acceptance of an overdue instalment or anything in the shape of waiver which would affect the period prescribed by the Limitation Act. I allow this appeal, set aside the order of the Court below and dismiss the respondents' application for execution with costs throughout. Costs in this Court will include fees on the higher scale.

Appeal allowed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 71 OF 1913.

March 9, 1915.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

MARIAN BEEVIAMMAL—PLAINTIFF—APPELLANT

versus

KADIR MEERA SAHIB TARAGAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Heirs of deceased Muhammadan—Tenants-in-common—Heir, one, right of, when barred—Adverse possession—Knowledge—Execution suit for share—Limitation Act (IX of 1908), Sch. I, Arts. 120, 144, when applicable.

To a suit brought by one of the heirs to recover his share of the estate left by a Muhammadan who died intestate, Article 144 of the Limitation Act is applicable if the property is immoveable, but if it is moveable, Article 120 is applicable. [p. 278, col. 1.]

Khalersa Hajee Bappu v. *Puthen Veettil Ayissa Ummah*, 6 Ind. Cas. 59; 8 M. L. T. 4; 20 M. L. J. 288; 34 M. 511; (1910) M. W. N. 447, followed.

The heirs of a deceased Muhammadan take as tenants-in-common and the right of one heir to a share will not become barred, unless and until the other heirs set up an adverse right to the knowledge of that heir. Mere intention on their part will not affect the character of possession, nor is the heir bound to inquire whether there has been an adverse dealing with his property. [p. 278, col 1.]

Corea v. *Apuhamy*, (1912) A. C. 230; 105 L. T. 836; 8 L. J. P. C. 151, referred to.

Where the other heirs are in entire charge of property, the heir sought to be excluded is not bound to assure himself that he is not excluded from inherit-

ance and that his interests will not be looked after by them. [p. 278, col. 2.]

The right of an heir to claim interest arises only from the date when he makes a demand and that is met by a refusal. [p. 278, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge of Tinnevelly, in Original Suit No. 56 of 1911.

FACTS.—The plaintiff, a Muhammadan lady, brought a suit in the Sub-Court of Tinnevelly for her share of her husband's property, who died in 1899 leaving seven children. She alleged that her son and her step-sons had defrauded her to the extent of 1/8th of Rs. 28,000 which was her share of the cash left by her husband. The step-sons pleaded that there had been no fraud and that their father had given each of his sons 100 sovereigns before his death and directed that the remaining cash should be divided into seven shares after his death to the exclusion of the plaintiff. The Subordinate Judge dismissed the suit as barred by limitation, being 23 years after her husband's death.

Mr. *T. R. Ramachandra Aiyar*, for the Appellant, contended that the plaintiff was unaware of the existence of the large sum of money at the time of her husband's death and her step-sons had fraudulently concealed the fact from her.

Mr. *M. D. Devadoss*, for the Respondents, contended that the plaintiff was a tenant-in-common and though Article 120 of the Limitation Act applied, there was no proof that there was any demand by the plaintiff within six years before suit, and that the defendants held the property in such a way as to extinguish her right.

JUDGMENT.—The suit was brought in November 1911 by the plaintiff, a Muhammadan lady, to recover her share of the property left by her husband, Alli Mallik Mudalia Taraganar, who died on the 14th April 1889 leaving him surviving his sons by his predeceased wives, and the plaintiff and her son, the 5th defendant.

The Subordinate Judge held, that the plaintiff's deceased husband left all his property to his sons with the knowledge and consent of the plaintiff and that these latter had subsequently effected a partition among themselves of the property left by their father, also with the consent of the plaintiff and that the plaintiff's claim, if any, is now barred by limitation. The plaintiff appeals.

In 1878 the deceased Mudalia Taraganar effected a partition between himself and his four sons by his second wife then deceased. The property was divided into eight shares, each of the four sons of the second wife getting a share, and Mudalia Taraganar, his third wife, and his two sons by the third wife (the 3rd and 4th defendants) each getting a share. Mudalia Taraganar seems to have retained in his own hands the shares of the 3rd and 4th defendants and of his third wife. The property that was then divided into eight equal shares was valued at Rs. 64,405-10-6 (Exhibit II). In 1889 there was another partition. See Exhibit III. The 3rd wife had then died. The property which was then estimated to be of the value of Rs. 28,271-15-5 was divided into four shares, the father, the deceased Mudalia Taraganar, his two sons by the third wife (the 3rd and 4th defendants), his son by the plaintiff (*i. e.*, the 5th defendant) each getting a share of the value of Rs. 7,067-15-10. With respect to the share of Mudalia Taraganar, it was settled that after his death the *mahar* due to his wife less the value of the jewels given to her should be paid out of his share and the remainder should be divided equally between his seven sons. No share was set apart for the plaintiff. On the 8th March that is 14 days after the partition-deed, Exhibit III, the father, Mudalia Taraganar, made his Will by which he appointed the 4th defendant as the guardian of the 5th defendant, who was then an infant. He was to submit his accounts to the other brothers and maintain the plaintiff out of the income of the 5th defendant's estate. It is the defendants' case that four or five days after making this Will he gave all his sons 100 sovereigns each in the presence of the plaintiff, and that he directed a division of the cash kept by him into seven shares after his death and that the plaintiff assented to this. They also allege that some months after their father's death they divided the property left by him in accordance with his directions into seven shares with the plaintiff's knowledge and that the 5th defendant's share was delivered to the 4th defendant. As to the value of the property left by him which is divided into seven shares, there is no dispute. The total value of the properties, including the 600 sovereigns alleged to have been

given by their deceased father to his sons, is stated to be Rs. 25,473 in the plaint, and this value is accepted by the defendants. It is the plaintiff's 1/8th share of this amount, Rs. 3,184-2, together with interest that she seeks to recover in this suit.

The questions for decision are: (1) whether the father gave his sons 100 sovereigns each in his life-time; (2) whether there was a partition of the remaining properties with the knowledge and consent of the plaintiff and whether the plaintiff waived her claim to her share; and (3) whether the plaintiff's suit is barred by limitation.

As to the distribution of 100 sovereigns to each of his sons, evidence is given on behalf of the plaintiff to the effect that her husband was unconscious at the time he is alleged to have given the sovereigns to his sons. The burden of proof, however, is on the defendants and we have, therefore, to consider the evidence adduced on their behalf. The 3rd defendant, as defendants' 1st witness, the 4th defendant, as defendants' 2nd witness, and the 1st defendant, as defendants' 10th witness, swear that their father was not unconscious as stated by plaintiff's witnesses, but that he gave to his sons 100 sovereigns in plaintiff's presence and he directed a division of the sovereigns into seven shares after his death and that the plaintiff assented to this. The defendants' 3rd witness, who was a farm servant under the deceased father, and the 4th witness, who is the brother of defendants Nos. 6 and 12 and a cousin of the 1st and 2nd defendants, support this evidence. Except the 3rd witness all the others are interested. The Subordinate Judge refers to a credit entry in the account book kept by the 4th defendant of the 5th defendant's estate showing that 100 sovereigns worth Rs. 1,500 were given to the 5th defendant for his 1/5th share on the 26th *Masi* (12th March). The first entry relating to this gives no date, the entry above being dated 26th *Masi* 1064. But there is another entry which gives the date 26th *Masi*. That is the date of the execution and registration of the Will. But the oral evidence of the defendants is clear that it was not on the day the Will was registered, but four days after that, that the sovereigns were given to the defendants by their father. The book itself does not appear to be one kept in the ordinary course of business. These entries do not find a place in the day book. The 1st defendant does not produce his account book: neither does the 4th defendant. He says he has no account book of his own, but keeps an account book, Exhibit B, for the 3rd defendant whose affairs he manages, and that account book does not contain a similar entry. The story is not probable. Their father had already made his Will in anticipation of his death and if he was going to distribute his money amongst his sons, no reason is alleged why he should have distributed a few and reserved the rest. The documentary evidence, far from supporting the defendants' oral evidence, as we have pointed out, rather contradicts it. We are, therefore, unable to accept the story told by the defendants.

That the defendants divided the property left by their father among themselves is true. But that would not affect the plaintiff's claim, unless it is shown that she is estopped from putting it forward. No estoppel is pleaded. Assuming that she was aware of the fact of partition among themselves, mere knowledge alone will not create an estoppel.

The next question is whether the plaintiff's claim is barred by limitation. The plaintiff's claim is alleged not to be barred on two grounds. *First*, it is alleged that the defendants are guilty of fraud: *secondly*, it is said that the possession of the defendants was that of tenants-in-common. We are not satisfied that the defendants have been guilty of any fraud and that the plaintiff was accordingly kept by them in ignorance of the facts.

The plaintiff states that after her husband's death she found his door open, that she asked the defendants, whether he had left any property and that the defendants assured her that he had left none. This statement by the plaintiff is uncorroborated and we are not prepared to find, on her unsupported evidence, any fraud on the part of the defendants. The evidence shows that her property was in the hands of the defendants. She did not care to press her claims and she was willing to leave everything in the hands of the defendants. She knew she was entitled to get her dower. She was aware that the defendants were bound to

pay it to her and yet she did not make any effective demand for nearly 20 years. It is not likely, therefore, that though she must have known that her husband had left properties and though she also must have known that these defendants were in possession of them, she would have claimed any. All that can be said against the defendants is that they were under a moral obligation to pay to her her share of the property left by her husband and that they did not either inform her of her interest or take the trouble to give her share to her, but that, on the other hand, they distributed it among themselves, and that they had committed a fraud which would bring the case under section 18 of the Limitation Act. It has now been decided that in suits brought by one of the heirs to recover his share of the estate left by a Muhammadan who dies intestate, Article 123 of the Limitation Act does not apply as the estate is at once vested in the heirs as tenants-in-common. It was pointed out that Article 123 only applies to suits against executors and administrators or other persons whose legal duty it is to distribute the estate among certain persons. This has been held by a Full Bench of this Court. In the case of immoveable property Article 144 is applicable, and in the case of moveable property Article 120 is applicable. See *Khadersa Hajee Bappu* v. *Puthen Veettil Ayissa Ummah* (1). We are bound by this decision and accordingly hold that Article 120 applies to the case before us. The defendants having taken possession of the property as tenants-in-common, they must be deemed to have been in possession of such property on behalf of themselves and of the plaintiff and it lies on them to show that so far as the plaintiff is concerned, the character of their possession was changed six years before the date of their suit. The judgment of the Judicial Commitee in *Corea* v. *Appuhamy* (2) would show that mere intention on their part is not enough to change the character of that possession. Nor is it sufficient to show that if the plaintiff had inquired, she might have found out that they had divided the property among themselves. When the plaintiff's husband died she was about 18 years of age. One of these defendants was appointed by her husband as her son's guardian. They were her relatives under whose protection and control she was, living and who were supporting her. She was therefore, entitled to assume that her interests would be looked after by them. In these circumstances, we cannot assume there was sufficient notice to her that her property was being dealt with by the defendants as their own, even assuming that such knowledge would be sufficient. Applying the principle laid down by their Lordships we must hold that the plaintiff's claim is not barred.

The plaintiff, however, has not proved that she had made any demand for her share; nor is it proved that the defendants have realised any interest on the property left with them. The plaintiff is not, therefore, entitled to recover any interest before the date of the suit. The plaintiff is entitled to get Rs. 3,184-2-0 for her 1/8th share. The 1st, 2nd, 3rd, 4th and 5th defendants must each pay her one-seventh of the amount payable to her. Defendants Nos. 6 to 11 as the representatives of Kunjoor Taraganar must pay her one-seventh, and defendants Nos. 12 to 16 as the representatives of Muhammad Moideen Taraganar must also pay her one-seventh. The plaintiff is entitled to her proportionate costs throughout.

Appeal partly allowed.

(1) 6 Ind. Cas. 50; 34 M. 511; 8 M. L. T. 4; 20 M. L. J. 288; (1910) M. W. N. 447.

(2) (1912) App. Cas. 230; 105 L. T. 836; 81 L. J. P. C. 151.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 20 OF 1913.

April 30, 1915.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

BALDEO THAKURAI AND OTHERS—DEFENDANTS—APPELLANTS

versus

UGRA NATH MISRA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Regulation XI of 1825, s. 4—By gradual, slow and imperceptible means—Burden of proof—Small villages—Small river—Large accretions, if by gradual, slow and imperceptible means—Adverse possession—Land under water for certain period—Vis major—Possession during such period—Presumption.

BALDEO THAKURAI *v.* UGRA NATH.

Where the question is of the manner in which land has been cut away from one village and thrown up on the other side of the river, the burden of proof is on the party who claims the accretion to show that the accretion to his tenure has been of the nature contemplated by the law as laid down in Regulation XI of 1825 and unless he can prove this satisfactorily, he cannot be said to have proved his title. [p. 281, col. 1.]

Where the villages are small in area and their common boundary but short in length and where there is a small river, shallow and fordable, which at one season of the year is liable to sudden floods cutting away a portion from the small estates:

Held, that under the circumstances the accretions of a few *bighas* per annum can hardly be said to be by gradual, slow and imperceptible means as contemplated by the Regulation. [p. 281, col. 2.]

A person cannot be said to have acquired a title by prescription to a land which remains covered with the flood water of a river for a certain period every year, as he must be deemed to have been dispossessed by *vis major* during the time of flood and as under law the possession during flood time is in the person who has title. [p. 282, col. 1.]

First appeal from the decision of the Additional District Judge of Gorakhpur, dated the 11th of October 1912.

The Hon'ble Dr. *Sunder Lal*, for the Appellants.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondents.

JUDGMENT.—The circumstances out of which this present appeal has arisen are as follows :—

The village of Purnian, which belongs to the plaintiffs-respondents, and the village of Chatrapar, which belongs to the defendants-appellants, are situated in the northern part of the Basti District. What is known as the Bilar Nadi flowed between them and at the last Settlement formed the boundary.

A reference to the Settlement Report and the maps attached thereto shows that what is called the Bilar river is really a bed of the Burhi Rapti, which falls into the larger Rapti river.

The Banganga, a hill torrent, flows into the Burhi Rapti and it apparently forced the latter river into another and more direct channel towards the Rapti. From the junction of the Banganga the old course of the Burhi Rapti is called the Bilar Nadi. At the time of the last Settlement, however, it was noted that Burhi Rapti after its junction with the Banganga was sending a greater part of its volume of water down the Bilar Nadi. The result of this has been that in places the Bilar has been cutting away its banks and altering its course.

This admittedly has happened in that portion of its course which lies between the two villages in the present case.

The plaintiffs have filed a map, which fairly accurately shows the position as regards these two villages which the river occupied at the time of Settlement and on the date of suit. One point will be noticed, that is that at Settlement time the boundary between the two villages was the mid-stream and that it was but a short one.

The plaintiffs' case is as follows :—

(1) that by custom the boundary between the two villages has always been the mid-stream line of the river, any land cut away from either village by a change in the course going to the owner of the other village;

(2) that the river has been gradually encroaching on the lands of Chatrapar and adding land to Purnian;

(3) that out of a total area of 43 *bighas* 9 *biswas* and 15 *dhurs* thus added to their village, an area of 26 *bighas* 2 *biswas* and 6 *dhurs* of land were added up to 1304 *Fasli* and 17 *bighas* 7 *biswas* 9 *dhurs* have been added since 1304 *Fasli*;

(4) that the land in question has been in the proprietary and adverse possession of the plaintiffs as of right;

(5) that the Revenue Authorities have surveyed the land and have held that a part of it is in possession of the defendants, and have passed an order adverse to the plaintiffs;

(6) that the plaintiffs being still in possession are entitled to a declaration of their title as proprietors, and if they be found not to be in possession, possession may be awarded to them

The defendants pleaded:

(1) that they, and not the plaintiffs, were in possession;

(2) that the lands in question had been suddenly cut away in the year 1314 *Fasli*;

(3) that there was no such custom, as alleged by the plaintiffs, under which the mid-stream was always the boundary between the villages;

(4) that the Bilar is not a navigable river and that rules of law as to alluvion and diluvion did not apply in the case of such a small shallow stream.

The Court below held as follows :—

(1) that the plaintiffs were in possession;

(2) that the custom alleged by the plaintiffs was not proved;

(3) that the provisions of section 4, clause I, Regulation XI of 1825, were applicable to the case and that the land in dispute had been gradually cut away from Chandrapar and added to Purnian and, therefore, the plaintiffs in law were the owners thereof. Accordingly the suit was decreed as to the declaration.

The defendants appeal. The first ground of appeal is not pressed.

The points pressed are:

(1) that the plaintiffs have failed to prove possession;

(2) that the law laid down in Regulation XI of 1825 does not apply to the case of a small shallow stream like the Bilar and that the land, being within the boundaries of the *mahal* settled with the defendants, is their property;

(3) that the area in quesion has not been shown to have been added to the plaintiffs' village by gradual, slow and imperceptible means and, therefore, the plaintiffs at no time acquired title.

On behalf of the respondents it is admitted that the custom of "Dhar-dhura" cannot be pressed, but it is pleaded:

(1) that the plaintiffs' possession is established;

(2) that Regulation XI of 1825 applies;

(3) that the accretion has been gradual and imperceptible and the plaintiffs have thus acquired title;

(4) that in any event the plaintiffs have been in adverse possession and have acquired a title by prescription.

In regard to the application of Regulation XI of 1825, we shall assume for the purposes of this appeal that the law as laid down therein does apply. In the view that we take of the facts it is unnecessary for us to decide the question.

We cannot agree with the Court below that the plaintiffs have proved either their possession or that the accretion has been by slow, gradual and imperceptible means as contemplated by section IV of the Regulation.

Furthermore, in the circumstances disclosed by the evidence of the plaintiffs' own witnesses, the plaintiffs could not have acquired title by prescription. In regard to possession we must point out that the burden was on the plaintiffs. The land in dispute admittedly lies within the ambit of the defendants' *zemindari*, and the land revenue assessed thereon has been paid by the defendants. The plaintiffs do not pretend to have ever paid any Government dues for it. They claim that land which at Settlement time was in the defendants' *mahal* is now in their possession and belongs to them, simply by reason of the action of the river. The burden is heavily on them to prove their possession.

Both sides called witnesses who swear in favour of those who have called them and as the lower Court has observed, the oral evidence one the one side is just as good as that on the other and it is not possible to come to a satisfactory conclusion as to which side is telling the truth, unless there is something else to guide the Court.

Documentary evidence as to possession there is *nil*. The villages are not subject to quinquennial Settlement. The *patwari* of Purnian has never recorded these lands in his records. The *patwari* of Chandrapar has recorded them as having been cut away by the river. It is highly probable that little heed has been paid until recent years to the lands, as they were sandy waste at first and have only slowly become culturable; and then the dispute arose in the Revenue Courts.

The lower Court has given some curious reasons for holding that the plaintiffs' case must be a true one:

(1) that the land having been gradually cut away and removed to the other side of the river, it is far more likely that the people on the other side should cultivate rather than that the people of Chandrapar should take the trouble to cross the river with their ploughs and oxen.

In the *first* place as, the plaintiffs' own village *patwari* shows, during the rainy season the land is under water and not culturable and during the rest of the

year the stream is shallow and fordable nearly everywhere. During the rains both sets of *zemindars* work their own ferries and the village of Chatrapar is at no greater distance appreciably from the spot than that of Purnian. A great deal of the land is even now uncultivated and the rest must have come very slowly under cultivation. Seeing how tenaciously these *zemindars* cling to their lands and how often riots take place over such cases, we can see no reason to hold that it is far more probable that the Purnian men cultivated than that the Chatrapar men did so. There was no great trouble involved in fording a shallow stream. Next, the Court below considers that because there has been no riot, therefore the Purnian men must have cultivated without let or hindrance. There is no reason to hold that the Purnian men are less law-abiding than the Chatrapar men.

Lastly, the lower Court considers that because in other similar cases in other villages along the Banganga and one or two on the Bilar the people of the villages to which land has been added have been allowed to retain such lands, therefore this must have been done in the present case.

As evidence of actual possession these instances are quite inadmissible; they were put forward simply as evidence of the custom of "Dhar-dhura."

In our opinion there are no circumstances outside the oral evidence which go to show that the plaintiffs rather than the defendants are in possession. The presumption is that the real owners, the defendants, who are paying the revenue are in possession. The oral evidence to prove the plaintiffs' possession is unsatisfactory and we, therefore, hold that the plaintiffs have failed to satisfactorily establish their possession.

The *next* point is the question of the manner in which the land has been cut away from the one village and thrown up on the other side of the river. The burden of proof is on the plaintiffs to show that the accretion to their tenure has been of the nature contemplated by the law as laid down in the Regulation mentioned and unless they can prove this satisfactorily, they cannot be said to have proved their title.

Their case is that the accretion commenced in 1295 *Fasli* and then up to 1304 *Fasli*, *i.e.* in 10 years, an area of 26 *bighas* 2 *biswas* and 6 *dhurs* was added to their village and that from 1304 *Fasli* up to 1315 *Fasli*, *i. e.* in 11 years, an area of 17 *bighas* 7 *biswas* and 9 *dhurs* has been added. The average accretion according to this was 2 *bigha* odd per annum for the whole period. In the period from 1295 *Fasli* the average was a little higher and in the second period somewhat lower.

There is no documentary evidence to show what area was added in any or each of the years in question, as apparently no measurements were ever made until the dispute arose in the Revenue Court. The plaintiffs have to depend on oral evidence only. They have called their *patwari* and some cultivators and neighbours, who state in a general way that the river has gradually cut away its banks and that each year an area of from one to four *bighas* has been thrown up on the other side; they cannot state what area accreted in any one year.

The *patwari* has only held his post as such for a period of 13 years and he found a considerable area on the Purnian side at the time of his appointment. The evidence of several witnesses is to the effect that the river has shifted its bed every year, but the extent of its movement in any one year is not given.

One fact is clear. It is only during the three months of the rainy season that the erosion takes place. At other periods the river is shallow and fordable and flows in a very gentle stream.

The boundary between the two villages at Settlement time was but a short one, judging by the map. Its exact length has not been proved, but neither of the villages is large in area. They are roughly speaking about 500 Government *bighas* each. If the boundary between the two villages had been of considerable length and the villages of any great size, then the cutting away of a narrow long strip and its addition to the other village might well be said to be an accretion by gradual, slow and imperceptible means, the area thus added being but a few Govenment *bighas* per annum.

But where the villages are small in area and their common boundary but short in length, the removal of only a few *bighas* per annum can hardly be said to be by gradual, slow and imperceptible means. The

erosion takes place only in the rainy season. There is not a constant, slow, daily cutting away, spread over a long period. As each flood has come and receded, the area cut away and added to the other side must in the case of these two small villages have been very perceptible. The proportion cut away each year is considerable, though the actual area is not great. Such an area would be of little consequence in the case of large estates on the banks of great rivers containing large volumes of water all through the year. In the present case we have a small river, shallow and fordable, which at one season of the year is liable to sudden floods, cutting away portions from small estates.

We find it impossible to hold that the accretion in this case has been that gradual slow and imperceptible accretion contemplated by the Regulation.

There remains the question of title acquired by prescription. Even assuming that the plaintiffs have cultivated those portions of the land which became culturable, we have it from the mouth of their own *patwari* that the land is only culturable in the *rabi* season, that it is every year covered with the flood water. While the floods are over the land, the plaintiffs cannot be said to have remained in possession. They have been then dispossessed by *vis major* and in the eyes of the law, the possession during flood time will be deemed to have been in the defendants who had title. To acquire a title by prescription the plaintiffs must hold continuously for a period of 12 years. In the circumstances it has been impossible for them to do this and, therefore, impossible for them to acquire title by adverse posession for a period of 12 years.

The law on this point is covered by a decision of their Lordships of the Privy Council and is not contested before us. In our opinion the plaintiffs have failed to prove any title to the land. The custom alleged has not been pressed before us and the lower Court has decided that point in favour of the appellants. We, therefore, allow the appeal, set aside the decree of the Court below and dismiss the suit with costs in both Courts, including in this Court fees on the higher scale.

Appeal allowed.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 26 OF 1911.

March 31, 1915.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Woodroffe.

ABED KHONDKAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

MOHENDRA LAL DE AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), ss. 624, 629—Review of judgment "Strict proof", meaning of—Objections- Proper safeguards- Formaliti s—Sufficiency of proof—Appellate Court's jurisdiction.

Per *Jenkins, C. J.*—"Strict proof" means anything which may serve directly or indirectly to convince a Court and has been brought before the Court in legal form and in compliance with the law of evidence. It is the formality which is prescribed and not the result that is described. [p. 284, col. 1.]

Section 629 of the Code of Civil Procedure, Act XIV of 1882, limits the grounds on which objections may be taken to the admission of a review; an objection may be taken when the admission has been in contravention of the provisions of section 624, that is to say, it has been made to a tribunal that has no power to grant it. [p. 284, cols. 1 & 2.]

Without proper safeguards, the Court of first instance is, the proper Court to determine whether or not there should be a review, but before a review is granted those safeguards must be observed. [p. 284, col. 2.]

Per *Woodroffe, J.*—The term 'strict', Order XLVII, rule 2 (*b*), refers to formalities, such as issue of notices, taking of evidence on oath or affirmation, legal proof of documents, cross-examination, and so forth. If such legal evidence be wanting objection may be made in appeal under Order XLVII, rule 7, which does not refer to the weight or sufficiency of the evidence. If the legal formalities are observed it is no objection that the probative force of evidence legally taken appears to be different to the Appellate Court from what it appeared to the Court granting review. [p 285, col. 1.]

"Strict proof" means proof according to the formalities of law. It does not refer to sufficiency of proof in securing a particular conviction. [p. 285, col 1.]

Gyanund Asram v. *Bepin Mohan Sen*, 22 C 734; *Bhyrub Chunder Surmah Chowdhry* v. *Madhubram Surmah*, 11 B L. R. (F.B.) 423; 20 W. R. 84; *Chunder Churn Agrodany* v. *Lo dunram Deb*, 25 W R. 324; *Kolcemooddeen Mundul* v. *Heerun Mundul*, 24 W. R. 186, referred to.

Whether the proof is according to law or not is within the jurisdiction of the Appellate Court to determine, but the question of sufficiency of evidence is for the Court admitting the review [p. 285, c l. 2.]

Appeal against the decree of the Hon'ble Mr. Justice N. Chatterjea, Judge of the Calcutta High Court, dated the 23rd January 1911, in Appeal from Appellate Decree No. 1181 of 1909.

ABED KHONDKAR *v.* MOHENDRA LAL.

Babu *Jnanendra Nath Sarkar*, for the Appellants.

Babu *Shiva Prasanna Bhattacharjya*, for the Respondents.

JUDGMENT.

JENKINS, C. J.—This is an appeal under the Letters Patent from a judgment of Mr. Justice Nalini Ranjan Chatterjea, before whom the case came by way of appeal from an appellate decree. The question that arises is as to the competence of an Appellate Court to question the propriety of a review granted by the Court of first instance, on the ground that the evidence in support of the application should not have been believed.

This suit is one for rent, and in the first instance it was decided adversely to the defendants' contention. The defendants, as a result of what appeared in the course of the trial, became aware of some new and important matter or evidence and as a result of that made an application to the Court of first instance for a review. The review was granted, because it appeared to the Court that there was strict proof of the allegation of the discovery of new and important matter or evidence not within the knowledge of the applicants and because that s rict proof convinced the Court of first instance. The result was that the review having been granted, the case was re-heard and a decree passed favourable to the defendants. From that decree an appeal was preferred by the plaintiffs, who objected not only on the merits but on the ground that the review should not have been granted. The lower Appellate Court has dealt with the second of these contentions and has held that the review was *ultra vires* or beyond the jurisdiction of the Court of first instance, so that the first decree was restored. The position of the defendants became this: that the decree in their favour was set aside and the first decree stood without their having any right to appeal therefrom. From this decree of the lower Appellate Court there was an appeal to this Court, which was heard by Mr. Justice Nalini Ranjan Chatterjee to whom it appeared that the decision of the lower Appellate Court was correct, and it is in these circumstances that the matter now comes before us by way of appeal under the letters patent.

The propriety of the course adopted by the learned Judge of first instance in granting the application for review is to be determined by reference to the provisions of the old Code which are substantially reproduced, though with a slight variation, in the present Code. Section 623 permits an application for a review of a judgment and provides that it may be made by any person considering himself aggrieved, who from the discovery of new and important matter or evidence, which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, desires to obtain a review of the decree passed or order made against him. It is only with that part of the section that we are now concerned. Section 624 provides that, "Except upon the ground of the discovery of such new and important matter or evidence as aforesaid, or of some clerical error apparent on the face of the decree, no application for a review of judgment, other than that of a High Court, shall be made to any Judge other than the Judge who delivered it." Section 626 provides that, "If it appears to the Court that there is not sufficient ground for a review, it shall reject the application. If the Court be of opinion that the application for the review should be granted, it shall grant the same, and the Judge shall record with his own hand his reasons for such opinion: Provided that (*a*) no such application shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree a review of which is applied for; and (*b*) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him, when the decree or order was passed, without strict proof of such allegation; and (*c*) an application made under section 624 to the Judge who delivered the judgment may, if that Judge has ordered notice to issue under proviso (*a*) to this section, be disposed of by his successor." It is only necessary now to refer to section 629 which provides that, "An order of the Court for rejecting the application shall be final; but, whenever such application is admitted, the admission may be objected to on the ground

that it was—(*a*) in contravention of the provisions of section 624, (*b*) in contravention of the provisions of section 626, or (*c*) after the expiration of the period of limitation prescribed therefor, and without sufficient cause. Such objection may be made at once by an appeal against the order granting the application, or may be taken in any appeal against the final decree or order made in the suit." No provision is made in section 588 of the old Code for an appeal from order in the case of an order granting a review; and the power to appeal, such as it is, rests on section 629 alone. It is in that respect that there is a slight difference between the old and the present Code.

The view taken by Mr. Justice Chatterjea in affirming the lower Appellate Court is that "strict proof" means proof that convinced the lower Appellate Court, and it is on that ground and on that ground alone that the result can be affirmed. In my opinion this is not the true view of the provisions of this chapter relating to review of judgments. The word "proof" ordinarily has one of two meanings: either the conviction of the judicial mind on a certain fact, or the means which may help towards arriving at that conviction. The use of word 'strict' seems to me to point to the second of these two meanings, and the strict proof, in my opinion, means anything which may serve directly or indirectly to convince a Court, and has been brought before the Court in legal form and in compliance with the requirements of the law of evidence. It is the formality which is prescribed and not the result that is described. This I think is apparent from the whole scheme of this Chapter on review. For instance, we find on one side that the rejection of an application for a review is final. There is no enquiry into the merits. On the other hand, we find that the granting of a review is not final, and as I read the Chapter it means that when a review is granted, certain formalities have to be observed—formalities designed to secure that the application for review should not be too readily and thus improperly granted. An examination of section 629 appears to me to support that view. It limits the grounds on which objections may be taken to the admission of a review; and the first ground described shows that an objection may be taken when the admission has been in contravention of the provisions of section 624, that is to say, it has been made to a tribunal that has no power to grant it. Passing over for a moment section 629 (*b*) we find that another objection allowed by section 620 (*c*) is that the application is made after the expiration of the period of limitation prescribed therefor and without sufficient cause. Then we come to the only other objection, which is that it is in contravention of the provisions of section 626; and section 626, so far as it relates to this topic, requires that there should be strict proof of the allegation. That appears to me to mean that there must be proof adduced before the Court that has to deal originally with the question of granting a review. Where there has been placed before that Court such evidence or other mode of proof as the law requires and permits, I cannot think that it was intended that on appeal under section6 29 it was to be open to the Appeal Court to say, though there has been legal evidence, and in that sense strict proof, that the proof did not convince it, though it convinced the Judge who heard the witnesses and, therefore, the application and the order granting the review were *ultra vires* and beyond the competence of the Court. That would bring about a state of affairs most undesirable and would bring into litigation fresh elements of chances and speculation. I think that the whole scheme of the Act recognises that with proper safeguards the Court of first instance is the proper Court to determine whether or not there should be a review, but that before a review is granted those safeguards must be observed. These safe guards have been observed in this case. I, therefore, think that the judgment of Mr. Justice Chatterjee is erroneous and must be set aside, and so also the decree of the lower Appellate Court. The case must, therefore, go back to the lower Appellate Court to be re heard on the merits. The appellants before us are entitled to all the costs in the High Court.

WOODROFFE, J.—The learned Subordinate Judge has held that an Appellate Court can consider whether there was strict proof of the allegations on which an application for a review was made. Assuming for the sake

of argument that this is so, a question arises, what is the meaning of strict proof. The Subordinate Judge was in effect of opinion that though the evidence was presented with strict formality, he could reject it as not being strict, because in his opinion it was insufficient, that is, lacking sufficient probative force in his eye to establish the allegations of the party applying for a review. I do not think this is correct. The term "strict" refers in this section, in my opinion, to formalities. Thus the section requires that formalities of law should be observed such as issue of notices, taking of evidence on oath or affirmation, legal proof of documents, cross-examination so forth. If such legal evidence be wanting, objection may be made in appeal under Order XLVII, rule 7. This rule does not, I think, refer to the weight or sufficiency of the evidence. If the legal formalities are observed, it is no objection that the probative force of evidence legally taken appears to be different to the Appellate Court from what it appeared to the Court granting review. In the present case the evidence was legally taken, but the Appellate Court disbelieved the evidence. The latter after criticising the evidence says that he disbelieves it, and because the first Court did believe, held that it was acting *ultra vires*. As an instance of the nature of the ground upon which the lower Appellate Court proceeded, I may refer to the following passage in his judgment: "Then it is not at all likely that the defendants would forget all about their own rent receipts which they had filed in a previous suit regarding this very property. I, therefore, disbelieve their story." "Strict proof," in my opinion, means proof according to the formalities of law. It does not refer to sufficiency of proof in securing a particular conviction. Thus an appeal has been allowed where the Judge has not recorded his reasons for granting an application for a review. [See the case of *Gyanund Asram* v. *Bepin Mohan Sen* (1)], or where he granted a review without inquiry or proof that the evidence was not within the knowledge of the applicant at the hearing or could not be adduced by him before the decree was passed. [See the case of *Bhyrub Chunder Surmah Chowdhry* v. *Madhubram Surmah* (2)], or where by going through the evidence a second time the Judge might come to a different conclusion [See the case of *Chunder Churn Aggrodany* v. *Looduuram Deb* (3)], or merely to enable the case to be re-argued [See the case of *Koleemooddeen Mundul* v. *Heerun Mundul* (4)]. In all these cases there was an absence of due formalities required by law. Whether the proof is according to law or not is within the jurisdiction of the Appellate Court to determine, the question of sufficiency of evidence is for the Court admitting the review. I may add here that the result of holding otherwise would be to affirm a judgment of a Judge in whose opinion it was erroneous. I, therefore, agree with the order passed by the Chief Justice.

Appeal allowed; Case remanded.

(1) 22 C. 734.

(2) 11 B. L. R. (F. B.) 423; 20 W. R. 84.

(3) 25 W. R. 324.

(4) 24 W. R. 186.

COURT OF THE BOARD OF REVENUE UNITED PROVINCES.

REVENUE PETITION NO. 30 OF 1904-05 OF JAUNPORE DISTRICT.

April 17, 1906.

Present:—Mr. Hardy, S. M.

BALAK AND OTHERS—APPLICANTS

versus

COLLECTOR OF JAUNPORE AS MANAGER—RESPONDENT.

Ejectment—Person occupying land—No rent paid—Occupancy rights, acquisition of—Agra Tenancy Act (II of 1901), s. 34.

In a suit for ejectment it was found that the land in dispute was held without payment of rent for a period of 26 years, twelve years out of which had expired while the old Act was in force. The status of *muafidars* was expressly disclaimed:

Held, that as there was no contract of tenancy between the parties, the tenant did not acquire occupancy rights. [p. 286, col. 1.]

Application for revision of the order of the Commissioner of Benares Division, dated the 23rd May 1905, confirming that of the Assistant Collector of Jaunpore District, in the case of ejectment.

JUDGMENT.—This is an application for revision in an ejectment case.

The applicants have held the land in dispute for a period of 26 years; they

have never paid rent on it and they expressly disclaim the status of *muafidars*. Respondent sued to eject them as non-occupancy tenants under section 58 (*a*). The applicants claimed right of occupancy rights from continuous possession for over 12 years. The first Court held practically that applicants had no right of occupancy tenants, inasmuch as they were not tenants at all but mere squatters on the land, and the Appellate Court confirmed this finding.

I am unable to agree with the arguments adduced by applicants. There is no evidence that any contract of tenancy existed between the parties, and had respondents attempted to obtain rent from applicants under Act XII of 1881, they would have failed to obtain a decree from the Rent Court. It was not until the Tenancy Act became law, that section 34 was enacted, that rent from such persons could be recovered in the Revenue Courts. I find, therefore, that applicants were not tenants of the land, and cannot have acquired right of occupancy rights in it: though (as has been held under the corresponding section 127 of the Oudh Rent Act) this does not bar the landholder from treating the trespassers as tenants, for the purpose of ejectment.

The application is rejected.

Application rejected.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 164 OF 1913.

March 19, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

ANNAMALAI MAYAMMAD MEERA ROWTHAN'S SON, ABDULLA ROWTHAN —DEFENDANT NO. 1—APPELLANT

versus

THE HONOURABLE *Rajah* VASUDEVA RAVI VARMA, STYLED VALIA NAMBIDI OF VENGUNNAT, AND OTHERS —PLAINTIFF AND DEFENDANTS NOS. 2 TO 15— RESPONDENTS.

Malabar Law—Kanomdar, *right of, to claim compensation for improvements—Malabar Compensation for Tenants' Improvements Act (Mad. Act I of* 1900).

A *kanomdar* is entitled to claim compensation for conversion of jungle lands into *paramba*s, notwithstanding any provision to the contrary in the deed of mortgage. [p. 287, col. 2.]

Randupurayil Kunhisore v. *Neroth Kunhi Kannan*, 1 Ind. Cas. 207; 18 M. L. J. 98; 5 M. L. T 277; 32 M. 1; *Kochu Rabia* v. *Abdur Rahman*, 24 Ind. Cas. 106; 1 L. W. 433; 15 M. L. T. 356; 26 M. L. J. 523; *Neechooli Parie Amma* v. *Chathanadath Kallassin Kunhi Kandan*, 12 Ind. Cas. 765; (1911) 2 M. W. N. 5.3; 11 M.L. T.30; 36 M. 410; 22 M. L. J. 221, followed.

A tenant is entitled to claim compensation for improvements according to the Malabar Compensation for Tenants' Improvements Act, 900, if the the terms of the mortgage agreement are less favourable to him than the provisions of the Act. [p 287, col. 2.]

Randupurayil Kunhisore v. *Neroth Kunhi Kannan*, 1 Ind. Cas. 207; 32 M. 1; 18 M. L. J. 98; 5 M. L. T. 277; *Kochu Rabia* v. *Abdur Rahman*, 24 Ind. Cas. 06; 1 L. W. 433; 15 M. L. T. 356; 26 M. L. J. 523, followed.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Palghat, in Appeal Suits Nos. 913 and 914 of 191 , dated the 21st September 1912, preferred against that of the District Munsif of Alatur, in Original Suit No. 325 of 1910.

Mr. *T. R. Ramachandra Aiyar*, for the Appellant.

Mr. *C. V. Ananthakrishna Aiyar*, for the Respondents.

This second appeal coming on for hearing on the 9th September, 1914, and having stood over for consideration till the 11th September 1914, the Court delivered the following

JUDGMENT.—The 1st defendant is the appellant. The suit was for redemption of a *kanom* for taking the accounts as between the mortgagor and mortgagee, including the value of improvements due to the mortgagee, and for the usual other reliefs.

The lower Appellate Court has decreed redemption and has given certain directions as to how the value of the improvements is to be calculated. The questions raised by the first defendant in this second appeal are:

(1) Whether the plaintiff could redeem that portion of the lands demised on the *kanom* of 1850 which portion is in the possession of the 1st defendant, on payment of the proportionate *kanom* amount and of the value of the improvements made on that portion by the 1st defendant;

(2) whether the 1st defendant is entitled to the value of the cost of the conversion of the jungle lands into *paramba* lands; and

(3) whether the rate of compensation to be allowed per *para* of seed-sowing lands is to be Rs. 7 per *para* as agreed upon between the mortgagor and the mortgagee under the document, Exhibit A of 1850, or whether the value should be calculated in accordance with the provisions of sections 9 to 18 of the Madras Act I of 1900, called the "Malabar Compensation for Tenants' Improvements Act."

As regards the first question, there is the distinct finding of the lower Appellate Court that the original mortgage of 1850 had been split up with the consent of both the parties and it is also stated in the lower Court's judgment that the objection was given up by the 1st defendant in the District Munsif's Court and was not argued in the lower Appellate Court.

Coming to the 2nd and 3rd questions, the lower Appellate Court construed the Full Bench decision in *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan* (1), as deciding that in the case of contracts made prior to 1st January 1885, the right to claim compensation depends upon the terms of the contract and the rate of compensation is also governed by the terms of the contract, and not by the provisions of the Malabar Compensation for Tenants' Improvements Act. As one of the terms of the *kanom*, Exhibit A, is that the mortgagor need not pay the cost of clearing the jungle lands and converting them into *parambas*, the lower Appellate Court disallowed that cost.

The decision in *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan* (1), has, however, been interpreted by the later Full Bench decision [*Kochu Rabia* v. *Abdur Rahman* (2)] as not inconsistent with the decision in *Koshikot Pudiya Kovilagath Sreeman Vikraman* v. *Chundayil Madattul Anant Pattar* (3), and in *Neechooli Parie Amma* v. *Chathanadath Kallassin Kunhi Kandan* (4). In the case of *Neechooli Parie Amma* v. *Chathanada'h Kallassin Kunhi Kandan* (4), it was held that where the *kanomdar* was not restrained by a contract made prior to January 1886 from making improvements, but was only restrained from claiming a right to compensation for such improvements, the *kanomdar* is entitled to claim compensation under the Act, notwithstanding the provision in the agreement. We are bound to follow the later Full Bench ruling and we hold that notwithstanding the terms of Exhibit A, the 1st defendant is entitled to claim compensation for conversion of jungle lands into *parambas*.

As regards the 3rd question, the same Full Bench ruling reported in *Kochu Rabia* v. *Abdur Rahman* (2), has held that the earlier Full Bench decision in *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan* (1). should not be construed as negativing the tenants' right to claim compensation for improvements according to the Act, if the terms of the mortgage agreement are less favourable to him as regards such right, even though the mortgage agreement was executed before 1886. Mr. C. V. Ananthakrishna Aiyar, the plaintiff's learned Vakil, argued that the opinion of the Full Bench on this point in *Kochu Rabia* v. *Abdur Rahman* (2), as to the construction of the judgment in *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan* (1), was erroneous. We naturally refused to listen to this argument.

In the result, we request the Subordinate Judge to submit findings as to the compensation due to the 1st defendant for the conversion of judgle lands into *parambas* and for the conversion of lands into rice-producing fields in accordance with the provisions of the Malabar Tenants' Improvements Act.

Time three months from receipt of records and ten days for filing memorandum of objections.

In compliance with the order contained in the above judgment, the Temporary Subordinate Judge of Palghat at Calicut submitted the following

FINDINGS.—I am asked by the High Court to submit findings on the following points:—

What is the compensation due to the 1st defendant (1) for the conversion of jungle lands into *parambas*, and (2) for the conversion of lands into rice-producing fields, in accordance with the provisions of the Malabar Tenants' Improvements Act?

(1) 1 Ind. Cas. 207; 32 M. 1; 18 M. L. J. 98; 5 M. L. T. 277.

(2) 24 Ind. Cas. 106; 26 M. L. J. 523; 1 L. W. 433; 15 M. L. T. 356.

(3) 6 Ind Cas. 887; 34 M. 61; (1910) M W. N. 402; 8 M. L. T. 218; 20 M. L. J. 849.

(4) 12 Ind. Cas. 765; 36 M. 410; (1911) 2 M. W. N. 513; 11 M. L. T. 30.

1*st point*. There is no evidence that the *parambas* yield any income. Apparently they do not yield, because they are in the course of reclamation into paddy fields. Jungle must be first removed, then there must be levelling and putting up of ridges by removing the roots of trees, but only the first portion of the work has been done, and the rest remains to be done. So, there will be no yield now. The 1st defendant is, therefore, entitled only to the costs of clearing the jungle under section 11 of the Act. There were two Commissions in this case, and both Commissioners agree that the costs will be Rs. 318-11-3.

3. I find that the 1st defendant is entitled to Rs. 318-11-3 on this head.

4. 2*nd point*. In deciding this point there are three things to be considered and they are (*a*) extent of lands, (*b*) the rent of the lands, and (*c*) the price of paddy, and I shall consider each head separately.

5. (*a*) I have already found the extent in pargraph 11 of my previous judgment, because it was upon the extent that I calculated the value of improvements at so much per *para*. The extent is 283-1/4 *paras* approximately.

6. According to survey measurements, 10 *paras* make one acre, and so there are about 28 and odd acres now. At the time of survey, the extent was 25 acres. So there is an excess of 3 odd acres now, or about 33 odd *paras*.

7. Out of 25 acres which existed at the time of Settlement, 15 was double crop and 10 single crop, as we see from the Settlement register. It is admitted by 1st defendant that he has not done anything for those lands since then. All the lands except plots L series are old lands, and yet the 1st defendant says that all of them except G series are double crop lands. This cannot be true. The extent of G series is only $16\frac{3}{4}$ *paras*, a little over $1\frac{1}{2}$ acres only, whereas we found that there were 10 acres of single crop lands. So, it is clear that many of the plots claimed by 1st defendant to be double crop are only single crop lands, and the Commissioners have found so in respect of several plots by actual observation. With regard to some other plots, the Commissioners have not expressed an opinion. However, it is certain that the extent of old single crop lands is at least 10 acres or 100 *paras*, and not 16 odd *paras* as contended by 1st defendant.

8. The Commissioners have made their calculation on the supposition that the 1st defendant will prove his assertion. They have taken all the lands pointed out by 1st defendant as double crop, and on that supposition they have prepared the account. So, they have made a mistake as to the rent also. For double crop lands they have calculated rent at 6-fold or so, and for single crop lands at 3-fold or so, and in that way they have arrived at the rent, but if the extent of double crop lands is less, there must be a diminution of rent also. For 150 *paras* of double crop the rent will be 900 *paras* of paddy, and for 100 *paras* of single crop the rent will be 300 *paras*, and thus the total will be 1200 *paras*, and this is the rent we find in Exhibit R. So, the rent of old lands is only 1200 *paras*.

9. I find that the extent of double crop lands is about 150 *paras*, and that of single crop lands 133 odd (including the new lands). Total is already found by me.

10. (*b*) In considering the first point, I have already said that the rent of old lands is only 1200 *paras*. The rent of new lands is only 93 odd as found by the Munsif.

11. I find, therefore, that the total rent is only 1293 *paras* and $1\frac{1}{2}$ *danglies*.

12. (*c*) As to the price, the Munsif says that he caused the Commissioners to make experiments and thus arrived at the figure according to the Government notification which was then in force. They, therefore, found that the price was 2 *paras* 6 *danglies* $2\frac{3}{4}$ *nazhies* a rupee. According to the latest notification dated 16th June 1914, the rate is 21·69 *danglies* per rupee, and this will come to about the figure arrived at by the Commissioners by actual experiment.

13. I find, therefore, that the price must be calculated at 2 *paras* 6 *danglies* 2-3/4 *nazhies* per rupee.

14. It follows, therefore, that the value of reclamation will come to Rs. 4,492-14-0, and I find accordingly.

15. It must be stated here that the plaintiff's Vakil argued that the *jenmi's* rent must be deducted along with revenue and cultivation expenses, but there is no provision

in the Act for such deduction, and it has not been usual to make such deduction till now. I disallow this contention. And it does not seem to have been taken in the lower Court.

16. Then, it was argued that the cost of *eries* and tanks must be taken as a part of the cost of making the reclamation and that the *eries* and tanks should not be separately paid for, in addition to the value of reclamation. The Act says that *eries* and tanks will be improvements. Further, there is no evidence that the crop can be raised only with the help of the *eries* and tanks. Sometimes these may be necessary, and at other times the rain water alone may be sufficient. There is no evidence on the point, apparently because the same was not taken in the lower Court. This is a new point raised here, and as it depends on evidence which is not on record, it cannot be allowed.

17. My finding is that on both heads together the 1st defendant is entitled to Rs. 4,811-9-3.

18. It may also be mentioned here that the 1st defendant purchased the property for Rs. 3,880 only, and after that he has made only about 93 odd *paras* of single crop lands and some *parambas*, and he is now getting more than Rs. 8,300.

This second appeal coming on for final hearing after the return of the finding of the lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the finding. We modify the decree of the lower Appellate Court by allowing to the 1st defendant Rs. 4,811-9-3 for improvements (on account of reclamation) in substitution of the amount of Rs. 1,983-1-7 awarded by the decree of that Court.

The plaintiff-respondent will pay the appellant-1st defendant's costs in this second appeal.

Time for redemption will be extended to six months from to date.

Decree modified.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL No. 323 OF 1914.

May 3, 1915.

Present:—Mr. Justice Piggott.

RAM NARAIN—JUDGMENT-DEBTOR—APPELLANT

versus

GOBIND PERSHAD—DECREE-HOLDER—RESPONDENT.

Mortgage—Redemption decree—Time fixed for payment of money—Appellate Court extending time and fixing another date, effect of—Interest.

In a redemption suit a certain date was fixed in the decree for payment of the money and it was provided that up to that date the mortgagor would pay interest at the contractual rate. The plaintiff appealed to the High Court. The High Court confirmed the decision of the Court below and, extending the period for payment of the money, fixed another date:

Held, that the effect of the extension of time by the Appellate Court was to substitute the date fixed by that Court for that fixed by the first Court, and that the mortgagee was entitled to interest at the contract rate up to the date fixed by the Appellate Court. [p. 290, col. 2.]

Execution first appeal from the decision of the Additional Subordinate Judge of Cawnpore, dated the 28th February 1914.

The Hon'ble Mr. *Moti Lal Nehru*, for the Appellant.

Mr. *R. K. Malviya*, for the Respondent.

JUDGMENT.—This is an execution first appeal, and the question raised by it is as to the interpretation of a conditional decree for redemption, dated the 13th of January 1908, and the effect of an order and decree of this Court, dated August 1st, 1910, disposing of an appeal from the said decree. It is necessary, first of all, to be quite sure what interpretation it would have been necessary to put on the decree of the first Court if it had never been modified in any way by this Court. The suit was for redemption of four mortgages and the mortgagee was in possession of the property. He was entitled under the terms of his mortgages to compound interest at Re. 1 per cent. per mensem, with six-monthly rests, but was also liable to account for the profits of the mortgaged property in his hands. A reference to the judgment of the first Court makes it clear that the intention of that Court was simply to give effect to the mutual rights and liabilities of the parties under their contract of mortgage up to the 13th of June 1908, the date

fixed for payment. The decree was unfortunately worded. In referring to the profits of the mortgagee in possession the words used in the decree were as follows:—"The defendant shall be entitled to get any further sums that may be found due to him with reference to the actual realizations up to the date of payment, together with interest at the contractual rate at Rs. 1 per cent. per mensem." I must lay stress on the fact that these words, as they stand, are scarcely susceptible of any reasonable interpretation. Either the word "defendant" has been used by an oversight for the word "plaintiff", or the words "entitled to get" have been used when the Court intended to say "liable to account for." It is because of the ambiguous and unsatisfactory wording of this paragraph of the decree that I felt justified in referring to the operative portion of the judgment in order to arrive at the mind of the Court. Reading the decree and the judgement together, I have no real doubt as to what the first Court intended to do, and must be understood to have done. The date fixed for payment was the 13th of June 1908. Up to that date the defendant-mortgagee was to be entitled to receive interest at the contractual rate, namely, one per cent. per mensem, compound interest, with six-monthly rests, but on the other hand he was to be liable to account for profits received by him by virtue of his possession over the mortgaged property, these profits being deducted from interest. After the 13th June 1908, in place of the right to receive the contract rate of interest and liability to account for the profits received, the Court allowed the defendant mortgagee simple interest at eight annas per cent. per mensem. I have no doubt that the Court of first instance did not intend that either the right to receive interest at the contract rate, or the laibility to render account for rents or profits, should continue beyond the 13th June 1908; nor do I find anything in the decree which, in my opinion, requires to be interpreted as extending either this right or this liability beyond the date fixed for payment. Now comes the other question, as to the effect of this Court's decree of August 1st 1910. The appeal before this Court was by the plaintiffs-mortgagors. That appeal was dismissed and the decree of the first Court affirmed; but the time for payment was extended to a period of six months from the date of this Court's decree, that is to say, to the 1st of February 1911. In my opinion the effect of this extension must be considered to be a substitution of this date, namely, the 1st of February 1911, for the 13th June 1908 in the decree of the first Court. The defendant-mortgagee will be entitled to interest at the contract rate upto the extended date thus fixed for payment and will be liable to account for the profits received and enjoyed by him up to that date. Beyond that period his right and liability will both cease, and in lieu of either he will retain the right to receive simple interest at eight annas per cent. per mensem. This is the principle on which the Court below has proceeded in preparing the decree absolute for sale, which has followed on the failure of the plaintiffs-mortgagors to avail themselves of the opportunity to redeem the property within the period fixed. The appeal, therefore, fails and is dismissed with costs, including fees on the higher scale. For the purpose of proper calculation of fees the appeal will be valued at Rs. 7,000.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

November 2, 1914.

Present:—Lord Dunedin, Lord Shaw, Sir John Edge and Mr. Ameer Ali.

DHIRAJ CHANDRA BOSE AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Srimati HARI DASI DEBI AND ANOTHER—PLAINTIFFS—RESPONDENTS

Bengal Land Revenue Sales Act (XI of 1859), ss. 5, 6, 33—Embankment charges, sale for, whether sale for land revenue—Collector, jurisdiction of.

A sale of an estate for arrears of embankment charges (*pulbandi*) is not a sale for arrears of land revenue, and it is not competent to a Collector to hold such a sale under Act XI of 1859.

Appeal heard *ex parte* from a judgment and decree of the High Court, dated July 4th, 1911,

reported as 7 Ind. Cas. 43, reversing a judgment and decree of the Subordinate Judge of Midnapore, dated March 29th, 1909.

FACTS of the case appear fully from the judgment of the High Court reported in 7 Ind. Cas. 43.

Mr. *Dunne*, for the Appellants, contended that the sale for arrears under Act XI of 1859 could not be set aside. The respondent had fallen into arrears and notices, dated February 16th, 1907, were duly issued under sections 6 and 13 of the Act of 1859 fixing the date of sale as March 26th. These notices were duly served under section 7 upon the *ryots* and other tenants not to pay rents to the respondent. On March 13th, 1907, a further certificate for Rs. 69-13-9 was filed in the Collectorate under Act II of 1882 for embankment charges. On March 25th, 1907, she presented a petition to the Collector for exemption of the shares in question from sale. The Collector made the order in favour of the respondent. The order was made under section 18 of Act XI of 1859, which provides that the Collector should duly record in a proceeding the reason for granting such exemption. It was a preliminary proceeding, constituting a *sine qua non* to an order for exemption being made. Under section 6 the sale was to be to the highest bidder and no payment or tender for payment made after the latest date for payment should bar or interfere with the sale either at the sale or after its conclusion. The sale took place without an order for exemption being made. On March 25th, the respondents' agent deposited Rs. 807 in respect of the various dues, which was short by Rs. 69-13-9 of the full amount required to be paid. On March 26th the matter came before the Collector, who, on the deficit being reported to him, directed that the sale must proceed. The respondent appealed to the Commissioner under section 26. The appeal was dismissed on July 26th, 1907, and the sale became final and conclusive under the Act XI of 1859, section 27, and the sale certificate granted to the purchaser under section 28. The respondent had established no irregularity in connection with the sale or one by reason of which she sustained some substantial injury. The Court had no jurisdiction under section 33 to annul the sale. The failure to deposit the arrears due was a matter for which she and her agent were entirely responsible.

[MR. AMEER ALI referred to section 3 of Act XI of 1859.]

[LORD DUNEDIN: Does the notice specify the day when money is to be paid?]

In case of arrears of revenue it took the form of sale; in other cases it was a kind of decree enforceable along with other debts.

[MR. AMEER ALI: The Collector allowed the arrears to be paid; section 18 must be read with other sections.]

[LORD SHAW: The Collector has power to grant exemption.]

[LORD DUNEDIN referred to section 33.]

[LORD SHAW: Section 33 is for arrears of revenue.]

The whole point was whether it was a sale for arrears of revenue under certificate.

[LORD DUNEDIN: If you bring it under section 33, it is hopeless. If you could show that it was a sale under section 5, the thing would be unimpeachable.]

[LORD SHAW: It must be a sale for arrears of the Government revenue. It does not include anything else. If at the time of sale, there is no arrear of revenue, the sale would be invalid. No honest Government could act in any other way.]

[MR. AMEER ALI: It is the act of the Collector whose duty it is to inform the public of the arrears.]

The Respondents did not appear.

JUDGMENT.

LORD DUNEDIN.—This is an appeal heard *ex parte*, and whenever this is the case it is a matter of considerable anxiety to the Board. But in this appeal that anxiety was certainly relieved by the exceedingly fair and candid way in which it was presented by the learned Counsel for the appellants. In the result, upon a full consideration of the circumstances, their Lodrships see no reason for interfering with the judgment of the Court below.

They will, therefore, humbly advise His Majesty to dismiss the appeal.

Appeal dismissed.

AMIR SHAH *v.* TULA PANDE.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 665 OF 1914.

April 27, 1915.

Present: —Mr. Justice Piggott.

AMIR SHAH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

TULA PANDE AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Endowed property—Mortgagee from trustee—Limitation—Limitation Act (IX of 1908), s. 10, Sch. I, Art. 134—Limitation Act (IX of 1871), s. 10.

A suit for possession of an endowed property against a person who has been holding it as a mortgagee from the trustees of the property for over 12 years, prior to the coming into force of the Limitation Act IX of 1871, on the ground that the alienation was null and void, is barred by limitation. [p. 293, col. 1.]

Jagamba Goswami v. *Ramachandra Gosvami*, 31 C. 314, followed.

Behari Lal v. *Muhammad Muttuki*, 20 A. 482; A. W. N. (1898) 123, referred to.

Second appeal from the decision of the Subordinate Judge of Ghazipur, dated the 25th of February 1914.

FACTS.—The plaintiffs, alleging themselves to be trustees of a certain shrine, brought a suit for cancellation of two mortgages executed by a former *mutwalli* on *Jeth Sudi* 10th, 1260 *Fasli* and *Magh Sudi* 2nd 1265 *Fasli* respectively, and for possession on the ground that the property mortgaged was *waqf* property. The main plea in defence was that the suit was barred by limitation. The Court of first instance held in favour of the plaintiff and found that the mortgages were without consideration and, therefore, section 10 read with Article 134 of the Limitation Act applied. On appeal the lower Appellate Court dismissed the suit, on the ground that the time began to run against the trustees when the mortgagee took possession of the property. It relied on *Behari Lal* v. *Muhammad Muttuki* (1). The plaintiffs appealed.

Mr. *Muhammad Ishaq Khan*, for the Appellants:—The Court of first instance has found in clear and express terms that the mortgages were without consideration and the lower Appellate Court is wrong in dismissing the suit without finding that the bonds were without consideration. No suit, having regard to the possession of section 10 and Article 134 of the Limitation Act, against the assign of a trustee is barred by limitation if the transfer is not supported by valuable consideration.

Mr. *Lakshmi Narayan*, for the respondants:—There are two points to be considered in this case. The *first* is whether the question of consideration can be raised now. There was no issue fixed in the Court of first instance as regards consideration. Moreover, the transferee having been in peaceable possession of the property for over fifty years, the plaintiffs, who are no parties to the transaction, cannot raise the question of consideration when they practically admit the execution of the bonds.

The other question is whether the suit is barred by limitation. The mortgages were executed in the years 1853 and 1858 and they were already barred by 12 years' rule of limitation prior to the coming into force of the Limitation Act of 1871. Section 10 of that Act is in effect the same as section 10 of the present Act and these Acts can have no retrospective effect.

He relied on *Jagamba Goswami* v. *Ramachandra Goswami* (2).

Mr. *Ishaq Khan*, in reply cited *Jewun Dass Sahoo* v. *Shah Kubeerood Deen* (3), *Shaikh Laul Mahomed* v. *Lalla Brij Kishore* (4).

JUDGMENT.—The question raised by this second appeal is whether the lower Appellate Court was justified in dismissing the suit brought by the plaintiffs-appellants now before me, on the ground that it was barred by limitation: stated somewhat more strictly, the precise point is whether the lower Appellate Court was justified in so dismissing the suit, without formally recording a certain finding of fact which, it is contended, has not been recorded. The plaint as filed was somewhat curiously drafted. The land in suit was stated to be revenue-free land appertaining to a certain *waqf* created in favour of a shrine, known as the shrine of Hazrat Shah Nandpir in the Ghazipur District. The plaintiffs claimed to be the trustees of the said shrine. They impleaded three defendants, though the allegations in their plaint are entirely directed against Tula Pande, defendant No. 1. There is no explana-

(1) 20 A. 482; A. W. N. (1898) 123.

(2) 31 C. 314.

(3) 2 M. I. A. 390; 6 W. R. 3 (P. C.); 7 Suth P. C. J. 100; 1 Sar. P. C. J. 206; 18 E. R. 348.

(4) 17 W. R. 430.

tion of the appearance of the defendants Nos. 2 and 3 on the record, beyond the remark that they have been impleaded as *pro forma* defendants. I may add that they are not impleaded in the 2nd appeal now before me. With regard to the defendant Tula, it is alleged that he was the tenant of the land specified in the plaint; but that he had succeeded without the plaintiffs' knowledge in getting himself recorded in the village papers as being in possession of a 3/5th share in the said land as mortgagee. It was said that there was no *asliat*, reality or substance, in the alleged mortgage. It was further stated that these facts came to the knowledge of the plaintiffs when they sued the said Tula for arrears of rent. Tula pleaded the mortgage and eventually, the decision was in his favour as regards the 3/5th share of which he claimed to be the mortgagee. The date of the decision of the Revenue Court against the plaintiffs on this point, namely, the 26th November 1911, was stated as the date of the origin of the cause of action. In the last paragraph of the plaint, while specifying the reliefs sought, the plaintiffs for the first time admitted in a casual sort of way that they were aware that the defandant Tula was claiming to hold under two mortgage-deeds of specified dates. The decree asked for is one for recovery of possession, on the ground that the land specified at the foot of the plaint is *muafi* land forming part of an endowment in favour of the shrine of Hazrat Shah Nandpir, which no one was entitled to mortgage, sell, or transfer in any other way. Then follows the specification of two mortgage-deeds alleged to be in themselves null and and void, and a prayer that they may be declared to be so. The dates of the mortgage-deeds are given according to the *Fasli* era. The earlier of the two is dated sometime in the year 1853 or 1854 A D. while the date of the latter, which is the more important for the purpose now before me, corresponds with 5th February 1859. The lower Appellate Court has recorded a finding that the persons who were, on the dates borne by these deeds, the trustees or managers of the shrine executed the mortgages in question in favour of Tula Pande, who thus became the mortgagee of a 3/5ths share in the land in suit, the whole of which had been his occupancy holding.

That Court also points out that the defendant's status as mortgagee to this extent was recognized at the Settlement of 1884 A.-D., and that in the years 1866 and 1890 attempts to claim from him the rent of the land in suit had been defeated to the extent of the 3/5th share held on mortgage, upon the defendant's setting up the mortgages in question. The Court below holds it clearly proved that from the year 1866 onward, if not earlier, the defendant has been successfully asserting against the managers of the shrine his right to hold possession under the mortgages now called in question. On these findings the learned Subordinate Judge has dismissed the suit as barred by the 12 years' rule of limitation, whether Article 134 or Article 144 of Schedule I to the Indian Limitation Act, No. IX of 1908, be applied. He supports himself by the decision of a Full Bench of this Court in *Behari Lal* v. *Muhammad Muttuki* (1). It is contended before me that the Court of first instance had recorded a finding to the effect that the defendant Tula had failed to prove that the mortgages in question were for valuable consideration, and that the lower Appellate Court should not have dismissed the suit without expressly reversing that finding. I have pointed out already the form in which the plaint was drawn up. The mortgage or mortgages under which the defendant Tula claimed to hold were indeed assailed as null and void, but the only reason put forward was that the property said to be mortgaged was trust property and so inalienable. The plaintiffs avoided mentioning the particular mortgage-deeds which they desired to assail until the very end of their plaint, and even then never suggested that the person or persons who had executed these mortgages had received no consideration. The point was not raised by the pleadings and the defendant was not put to proof of the passing of consideration, even supposing that he could be expected, after the lapse of 50 or 60 years, to produce any evidence on the question of consideration other than the recital in the deeds themselves. The decision of the lower Appellate Court proceeds on the assumption that there was an actual contract of mortgage between the trustees of the endowment on one side and the defendant Tula on the other, that

is to say, an actual transfer by way of mortgage which could only be called in question on the ground of the limited rights of the transferor in the property purporting to be dealt with. I think this is a reasonable view of the case on the facts as stated in the judgment of the lower Appellate Court. Apart from this, the decision of that Court has been supported before me on another ground. What the appellants now before me say is that, in the absence of an express finding that Tula was an assignee for valuable consideration from the then trustees of the *waqf*, the case is covered and limitation saved by the provisions of section 10 of the Indian Limitation Act, No. IX of 1908. The principle laid down by that section was introduced for the first time in the Limitation Act No. IX of 1871 which came into force on the 1st of July 1871. The later of the two mortgage-deeds now sought to be attacked bears a date more than 12 years prior to the coming into force of the Act above mentioned. According to the principle laid down in *Jagamba Goswami* v. *Ramachandra Goswami* (2), the present suit would in any case be barred by the fact that Tula had been in possession, holding as mortgagee from the trustees of the endowed property, for 12 full years and more, prior to the coming into force of the Limitation Act of 1871. On these grounds I hold that this appeal fails and I dismiss it with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 174 OF 1914.

March 9, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

THIRUVENKATACHARIAR—AUCTION-PURCHASER—APPELLANT

versus

THANGAYI AMMAL AND ANOTHER—PETITIONER AND INSOLVENT—RESPONDENTS.

Provincial Insolvency Act (III of 1907), ss. 20, 22—*Sale held by Receiver—Conditions of sale changed just before sale—Application to Court by creditor to set aside sale—Power of Court to set aside sale—'Person aggrieved,' meaning of.*

An Official Receiver, in whom the property of an insolvent vested under an order of adjudication, issued a proclamation for sale of certain properties, subject to two mortgages subsisting thereon. On the date fixed for the sale he varied the sale proclamation by noting that the properties would be sold free of the mortgages, and sold the properties accordingly. The respondent, a creditor of the insolvent, put in an application to the District Court to set aside the sale, on the ground that the action of the Receiver in varying the sale proclamation was irregular and that by reason of the irregularity the properties had fetched a very low price:

Held, that the Court had jurisdiction to set aside the sale inasmuch as under section 22 of the Provincial Insolvency Act it had an unfettered discretion to set aside any order passed by an Official Receiver. [p. 296, col. 1.]

Bhukhandas Lallubhai, In re, 7 Bom. L. R. 954; *Woonwalla & Co.* v. *Macleod*, 30 B. 515; 8 Bom. L. R. 40, referred to.

Though a Court does not ordinarily interfere with an order passed by a Receiver in the exercise of his discretion, it will do so where proper reasons are shown that the action of the Receiver was irregular and has prejudiced the interests of the creditors. [p. 296, cols. 1 & 2.]

Lloyd, Ex parte, Peters, In re, 47 L. T. 64, referred to.

Any person who is entitled to demand a decision of the Court in respect of the property of an insolvent and would be damnified if the decision goes against him, is a person aggrieved within the meaning of section 22 of the Insolvency Act. [p. 297, col. 1.]

In re Lamb, Ex parte Board of Trade, (1894) 2 Q. B. 805; 64 L. J. Q. B. 71; 9 R. 636; 71 L. T. 12; 1 Manson, 373; *Ex parte, Official Receiver, In re Reed*, 19 Q. B. D. 174; 56 L. J. Q. B. 447; 56 L. T. 876; 35 W. R. 660; 4 Morrell, 225, followed.

Hanseswar Ghosh v. *Rakhal Das*, 20 Ind. Cas. 683; 18 C. L. J. 359; 18 C. W. N. 366; *Ex parte Sidebotham; In re Sidebotham*, (1879) 14 Ch. D. 458; 49 L. J. Bk. 41; 42 L. T. 783; 28 W. R. 715, distinguished.

In re Langtry, Ex parte Stevenson, (1894) 63 L. J. Q. B. 570; 70 L. T. 736; 10 R. 220; 42 W. R. 496; 1 Manson, 169, referred to.

Appeal against an order of the District Court of Tanjore, in Insolvency Appeal No. 168 of 1914, in Insolvency Petition No. 13 of 1913 (in Insolvency Petition No. 90 of 1910 on the file of the Official Receiver's Court, Tanjore.)

FACTS.—This is an appeal by the auction-purchaser against the order of the District Judge of Tanjore, setting aside the sale by the Official Receiver of certain properties of the insolvent. The properties were first advertised for sale subject to encumbrances. On the date of sale he sold it free of encumbrances. Under section 22 of the Insolvency Act, one of the creditors applied to the District Court to set aside the sale on the ground

that the property would have fetched a larger price. The sale was set aside. The appeal is against that order.

Mr. *T. Rangachariar*, instructed by Mr. *R. Rangachariar*, for the Appellant, contended that the District Court had no jurisdiction to set aside the sale, on the ground that section 20 of the Insolvency Act was controlled by section 22 of the same Act, *viz.*, that the Official Receiver had absolute power to sell the property: *Woonwalla & Co.* v. *Macleod* (1). Once the Official Receiver acted *bona fide* in the matter, the District Court had no jurisdiction: *Lloyd, Ex parte, Peters, In re* (2).

Mr. *R. Kuppuswami Aiyar*, appeared for the Respondents and argued *contra*.

JUDGMENT.—The Official Receiver of Tanjore, in whom the property belonging to the insolvent vested under an adjudication order, issued a proclamation for the sale of the properties in dispute. In it he stated that the properties would be sold subject to two mortgages subsisting in favour of certain secured creditors. The sale was fixed for the 21st March 1914. On that day the Official Receiver noted in the sale proclamation, "Intending bidders present say that the properties would fetch a better price if they are sold free of mortgage . . . . . Under these circumstances in modification of the terms of the sale proclamation, I propose to sell now the properties free of encumbrance." The properties were purchased by the appellant for Rs. 22,000. This was on the 22nd March. On the 9th of April an application was made to the District Court by the respondent, who is also one of the creditors of the insolvent, for setting aside the sale on the ground that the variation in the sale proclamation was irregular, that if the properties had been advertised to be sold free of encumbrance, a larger number of bidders would have been present, that she was prejudiced by this action of the Official Receiver in directing the sale at the last moment free of encumbrance, and that there was an offer of Rs. 25,000 for the property. For the above reasons she prayed that the sale be set aside and that a fresh auction be held in respect of the properties. The District Judge was of opinion that the procedure adopted by the Official Receiver was irregular and that there was good ground for the allegation that the creditors were prejudiced by the variation in the proclamation of sale, and set aside the sale. In appeal Mr. Rangachariar raises three objections to the order of the District Judge. In the *first* place he argues that the District Judge had no jurisdiction to set aside the sale held by the Official Receiver. He draws attention to section 20 of the Provincial Insolvency Act, which gives the Receiver full discretion to sell property and to grant receipts by clauses (*a*) and (*b*), but which restricts the powers of the Official Receiver in regard to other matters in the subsequent clauses by directing that he should obtain the sanction of the Court. Clauses (*a*) and (*b*) of section 20 correspond in a general way to section 50 of the Bankruptcy Act, whereas clause (*c*) downwards have been adopted from section 57. Both these sections are subject to the general power of supervision retained by the Courts in England under section 90 of the same Act. Section 22 of our Act has a similar provision. Whereas clauses (*a*) and (*b*) of section 20 contemplate the exercise of ordinary powers which are incidental to the management of an insolvent's property, clause (*c*) onwards refer to the dealings with the insolvent's property which are calculated to throw an onerous obligation on the estate itself. It is for that reason that the previous sanction of the Court is considered necessary before the Receiver is allowed to exercise those powers. In either case, whether a power is exercised without obtaining the sanction of the Court or after obtaining its sanction, the general superintendence possessed by the Court to correct irregularities committed by an officer of the Court is not affected. Mr. Rangachariar contends that the decision of the Receiver acting under clause (*a*) is not controllable by the Court. We are unable to agree with this contention. The first clause of section 20 says: "Subject to the provisions of the Act the Receiver" shall do certain things and when we come to section 22, we see that liberty is given to "any person aggrieved by any act or decision of the Receiver to apply to the Court which may confirm, reverse or modify any act or decision complained of." It is true, as pointed

(1) 30 B. 515; 8 Bom. L. R. 40.
(2) 47 L. T. 64.

out by Mr. Rangachariar, that section 31 of the Indian Insolvency Act of 1848, prior to its amendment and consolidation with the Presidency Towns Insolvency Act of 1909, was held by the Bombay High Court in *Bhukhandas Lallubhai, In re* (3), not to enable the Court to interfere with a sale made by the Official Assignee. In that section the same unlimited power of interference which is given by section 22 of the Provincial Insolvency Act, is not to be found. But nonetheless it seems to us that even under section 31 of the Indian Insolvency Act, it was open to the Court to entertain application against a sale held by the Official Assignee if it was irregular and unauthorised. In *Woonwalla & Co.* v. *Macleod* (1), the final decision is made to rest upon the ground that the Court is not bound to interfere because it is discretionary to do so. It may be open to question whether this decision should be followed in cases arising under the Presidency Towns Insolvency Act as it stood prior to its amendment. But we have no hesitation in holding that the language of section 22 of the Provincial Insolvency Act is clear and unambiguous and gives unfettered discretion to the Court to set aside the order passed by the Official Receiver.

The *second* objection relates to the undesirability of overruling the Official Receiver in matters which are within his competency. The District Judge points out that the change in the conditions of the proclamation without giving sufficient notice of it had the effect of preventing intending bidders from coming forward. An affidavit was filed in the Court below by the respondent's agent, which says that one Srinivasa Iyer had offered to purchase the property for Rs. 25,000 and the said intending purchaser had already made a deposit of 25 per cent. of the purchase-money with the Receiver. Under these circumstances we cannot say that the District Judge on the materials before him did not exercise his discretion properly. In *Lloyd, Ex parte; Peters, In re* (2), all that was held was that discretion of a trustee will not be interfered with unless it is shown that he has acted "as no reasonable man would." It is not an authority for the proposition that where proper reasons are given by a Court for holding that the action of the Receiver was irregular and has prejudiced the general interests of the creditors, it should not set aside the order passed by the Receiver.

The *third* objection of Mr. Rangachariar is that the petitioning creditor, the respondent, is not an aggrieved party under section 22 of the Provincial Insolvency Act. He relies upon a judgment of the Calcutta High Court reported in *Hanseswar Ghosh* v. *Rakhal Das Ghose* (4). In that case a stranger, not a creditor, who had been injuriously affected by the procedure adopted by the Official Receiver was held not to come under the designation of "persons aggrieved." Mookerjee, J., quotes the language of James, L. J., in *Ex parte Sidebotham, In re Sidebotham* (5) and points out that a third party has his remedy by way of suit, and that no act of the Receiver can conclude his title; he came to the conclusion that he was not a person aggrieved under the Insolvency Act. In the present case the respondent is a creditor and the fact that she happens to be an unsecured creditor, is a point in her favour. It was pointed out in *In re Langtry, Ex parte Stevenson* (6), that a creditor, though he had not tendered his proof at the date of the order, was a person aggrieved with reference to a scheme of arrangement which injuriously affected the rights of creditors. *In re Lamb, Ex parte Board of Trade* (7), Lord Esher points out that any person who is brought before the Court to submit to a decision is, if the decision goes against him, a person aggrieved; and he refers to his own decision in *Ex parte Official Receiver, In re Reed* (8), where he explains the language of James, L. J., in *Ex parte Sidebotham, In re Sidebotham* (5), as meaning a man against whom a decision has been pronounced which has wrongfully refused him something which he had a right to demand.

(3) 7 Bom. L. R. 974.

(4) 20 Ind. Cas. 683; 18 C. L. J. 359; 18 C. W. N. 366.

(5) (1879) 14 Ch. D 458; 49 L. J. Bk. 41; 42 L. T. 783; 28 W. R. 715.

(6) (1894) 63 L. J. Q. B. 570; 70 L. T. 736; 10 R. 220; 42 W. R. 496; 1 Manson, 169.

(7) (1894) 2 Q. B. 805; 64 L. J. Q. B. 71; 9 R. 636; 71 L. T. 12; 1 Manson, 373.

(8) 19 Q. B. D. 174; 56 L. J. Q. B. 447; 56 L. T. 876; 35 W. R. 660; 4 Morrell, 225.

In the case before us, the creditor is entitled to a decision in respect of the sale of the property of the insolvent, and she is certainly a person who would be damnified if the decision goes against her. Therefore, in the language of Lord Esher, she is a person aggrieved. We must hold for these reasons that the decision of the District Judge is right and that this appeal should be dismissed with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 5 OF 1905-06 OF LUCKNOW DISTRICT.

March 15, 1906.

Present:—Mr. Hardy, S. M.

GAJRAJ SINGH—PLAINTIFF—APPELLANT

versus

Maharaja UDEY PARTAB NARAIN SINGH—DEFENDANT—RESPONDENT.

Ejectment, suit for, by lambardar—*Other co-sharers no parties—Co-sharers making separate collections*——Lambardar, *rights of, to eject* qua lambardar—*Oudh Rent Act* (*XXII of* 1886), *ss.* 108 (8), 126 (1).

A *lambardar*, though he does not make the entire collections of the village, is entitled to maintain a suit for the ejectment of a tenant, the consent or dissent of other co-sharers being immaterial. Section 126 (1) of the Oudh Rent Act is no bar to such a suit. A share-holder objecting to his action has his remedy to apply for his removal and to partition his share. [p. 298, col. 1.]

Second appeal from an order of the Commissioner of the Lucknow Division, dated the 24th August 1905, reversing that of the Assistant Collector of Lucknow District, in a case of ejectment.

JUDGMENT.—This is a second appeal in a suit contesting a notice of ejectment under section 108 (8), Oudh Rent Act. The decision in the present case will govern two connected cases.

The notice of ejectment was issued by the Maharaja of Ajudhia who is superior proprietor of the village. He also holds 15/16ths of the under-proprietory right, Nageshar Baksh being the co-sharer of the remaining 1/16th share. The Maharaja is the *lambardar* and the evidence goes to show that he has granted leases to and ejected tenants, though the cases of ejectment have not been numerous. He collects rent according to his share, the co-sharer also collecting to the extent of his 1/16th share. It does not appear whether the right of the co-sharer to collect his *quota* of rent is based on custom. The *wajib-ul-arz* is silent on the subject and it is probable that the arrangement suits the convenience of the co-sharers. But Nageshar objects to the tenant, the present appellant, being ejected and the question arises whether the *lambardar*-respondent is entitled to eject the tenant against the wish of the co-sharer.

The Assistant Collector held that under section 126 (3) of the Oudh Rent Act no custom had been proved, and that the settlement *wajib-ul-arz* did not confer on the *lambardar* the right of ejectment. He, therefore, set aside the notice.

The Commissioner held a different view. He pointed out that "collection of rent can be divided but ejectments cannot, and the fact that the co-sharer collected his *quota* of rent did not bar ejectment by the *lambardar*. The usal rule is that the *lambardar* is entitled to eject [section 126 (2), Oudh Rent Act] and it is for those who allege the contrary to prove it." There being no rebutting evidence, the Commissioner held that the *lambardar* was entitled to eject, though the evidence as to custom was not very full.

In appeal it is urged that no custom has been proved authorising the *lambardar* to eject and that the decision contravenes section 126 of the Act.

It must be admitted that evidence to prove custom, *i.e.*, that it is ancient, reasonable and certain, is not forthcoming; such evidence as there is shows that the *lambardar* has exercised powers of ejectment in the past. It remains to be decided whether the terms of section 126 (1) preclude the *lambardar* from ejecting. The section does not define the powers of a *lambardar*. It merely says that a sharer in an under-proprietary tenure in which a division of land has not been made among the sharers, shall not sue for arrears, enhance or eject except through a Manager authorised to collect rents on behalf of all the sharers. Its object was to prevent suits for arrears being brought against tenants by numerous co-sharers, and it is not a

compendium of the duties of the *lambardar* who holds his position by Statute and who "exercises his powers independently of the co-sharers, their consent or dissent 'being' immaterial." By general custom arising from the necessity of the case the *lambardar* is entitled to eject, enhance or sue for arrears of rent, a shareholder objecting to to his action being able to apply for his removal or to partition his share. The fact that in this particular case a co-sharer separately collects rent to the extent of his share does not weaken the authority of the *lambardar* in matters like enhancement or ejectment, which must be effected by the representative of the co-sharers though his authority to collect the co-sharer's *quota* of rent is probably for purposes of convenience in abeyance. The appeal is dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

March 15, 1915.

Present:—Lord Dunedin, Lord Shaw, Sir George Farwell, Sir John Edge and Mr. Ameer Ali.

V. VENKATANARAYANA PILLAY, DECEASED—PLAINTIFF—APPELLANT

versus

V. SUBBAMMAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Suit by presumptive reversioner to set aside adoption—Death of plaintiff—Right of next presumable reversioner to continue suit—Suits to impugn validity of transactions by Hindu females—Plaintiff in such suits represents all reversioners—Right of contingent reversioners to join as plaintiffs—Abatement of suit—Substitution—Limitation Act (IX of 1908), Sch. I, Arts. 118, 125, *distinction between—Civil Procedure Code (Act V of* 1908), *O. I, r.* 1.

A suit brought by a presumptive reversioner for a declaration that an alleged adoption is invalid is brought by him in a representative capacity and on behalf of all the reversioners, and on the death, therefore, of the presumptive reversioner the next presumable reversioner is entitled to continue the action begun by the deceased plaintiff. [p. 300, col. 1; p. 302, col. 1.]

The two classes of cases covered by Article 118 and Article 125 of Schedule I of the Indian Limitation Act (IX of 1908) are distinct in their scope and character and differ widely in their language. The former Article relates to status and involves the adjudication of a right *in rem*, and the latter raises the question of mere justifiable necessity. In both "the right to sue" is based on the danger to the inheritance common to all the reversioners which arises from the nature of their rights. [p. 300, col. 2.]

A remote reversioner is not precluded from joining or asking to be joined in the action brought by the presumptive reversioner, or even obtaining the conduct of the suit on proof of laches on the part of the plaintiff or collusion between him and the widow or other female whose acts are impugned [p. 301, col. 1.]

Rani Anand Kunwar v. *Court of Wards*, 8 C. L. R. 381; 6 C. 764; 8 I. A. 14 at p. 22; 4 Shome L. R. 78; 4 Sar. P. C. J. 195; 5 Ind. Jur. 161; Rafiquo & Jackson's followed.

Petition of Kuppusami Pillay for substitution of his name in place of that of the deceased appellant, and for an order of revivor of the appeal and for leave to prosecute it in the usual way.

FACTS.—The deceased appellant instituted the suit to obtain a declaration that the adoption of the second respondent by the first, the widow of V. Venkatakrishna Pillai, was invalid. Both Courts in India dismissed the suit. The plaintiff thereupon appealed to His Majesty in Council, and filed his petition of appeal at the Privy Council Office on the 6th November 1913. The appellant died on the 19th November 1913 and on the application for the substitution of the petitioner in place of the deceased appellant the High Court reported that the petitioner was the next reversioner of the late V. Venkatakrishna Pillai, and that "an objection had been taken that according to the case of *Arunachalam* v. *Vellaya* (1) the appeal abates" on this petition.

Sir *Robert Finlay, K. C.*, and Mr. *Dube*, for the Petitioner: The plaintiff, presumptive reversioner in a suit for a declaration that an alleged adoption is invalid, represents all the contingent reversioners, who would be estopped from questioning the decision in the reversioner's suit: *Rani Dharam Kunwar* v. *Balwant Singh* (2). If the petitioner is estopped from questioning the decision under appeal in any suit he might bring, the decision in *Arunachellam* v. *Vellaya* (1) relied on by the High Court is wrong.

Messrs. *De Gruyther, K. C.* and *Brown*, for the Respondent:—There is a consensus of opinion that a suit like the present suit by the presumptive reversioner does not bind the

(1) 15 Ind. Cas. 461; 12 M. L. T. 199; 23 M. L. J. 719; (1912) M. W. N. 897.

(2) 15 Ind. Cas. 673; 16 C. W. N 675; 9 A. L. J. 730; 14 Bom. L. R 485; (1912) M. W. N. 641; 12 M. L. T. 95; 16 C. L. J. 60; 34 A. 398; 23 M. L. J. 200; 39 I. A. 142 at p. 148.

other reversioners. During the life-time of a Hindu widow there is no one who has any estate vested in him. A presumptive reversioner has only a right to succeed to her deceased husband's property, if he survives her. Such a right is not even transferable under the Transfer of Property Act, 1882. A suit for a declaration is governed by Specific Relief Act, 1877, and a declaration relating to an alienation by a Hindu widow and an adoption made by her is binding only on the parties to the suit: section 42, illustrations (*e*) and (*f*), and section 43 of the Specific Relief Act, 1877. It is, therefore, submitted that the petitioner is not bound by the decision under appeal and can bring a suit questioning the adoption.

On the death of the plaintiff in the suit the right to sue has not survived. The petitioner does not derive his title or claim through his grandfather, but has his own right to sue and is, therefore, not a legal representative of the deceased plaintiff and is not entitled to be substituted for him: Code of Civil Procedure, 1908, Order XXII, rules 1, 2, 3 and 4, and section 2 (11).

A suit by a reversioner for a declaration that an alienation by Hindu widow is invalid as against his reversionary rights abates on the death of the plaintiff and cannot be continued by his legal representative: *Sakyahani Ingle Rao Sahib* v. *Bhavani Bozi Sahib*(3), *Arunachellam* v *Vellaya* (1) and *Kommeneni Chinna Veerayya* v. *Kommeneni Lakshminarasamma* (4). To show that the decision in such a suit is binding on the plaintiff and not on any other reversioner; reference was made to *Doorga Pershad Singh* v. *Doorga Konwari* (5), *Isri Dutt Koer* v. *Musammat Hunsbutti Koerain* (6), *Bhagwanta* v. *Sukhi* (7), *Govinda Pillai* v. *Thayammal* (8) and *Rani Anand Kunwar* v. *Court of Wards* (9). The petitioner and his grandfather had no causes of action in which they were jointly interested and which they could unite in the same suit, and the petitioner has not obtained his right to sue by survivorship: see Code of Civil Procedure, 1908, Order, XXII, rule 3. For the purpose of the prosecution of the suit the petitioner is not a legal representative of the deceased plaintiff and his petition should, therefore, be dismissed.

Sir Robert Finlay, K. C., replied, referring to *Muthusami Mudaliar* v. *Masilamani* (10).

JUDGMENT.

MR. AMEER ALI.—The question for their Lordships' decision arises upon a petition for substitution of the petitioner in place of the deceased appellant, Venkatanarayana, who has died since the filing of his appeal to His Majesty in Council.

Venkatanarayana brought a suit, on the 29th of July 1907, in the High Court of Madras in its ordinary civil jurisdiction to obtain a declaration that the adoption of the second defendant by Subbammal, the first defendant, was invalid and did not affect his (Venkatanarayan's) reversionary interest in the ancestral estate of one Venkatakrishna deceased. Subbammal, in her answer, alleged that the adoption which the plaintiff sought to set aside was made by her under the authority of her husband given under a Will. The plaintiff, on the other hand, contended that the authority so given was revoked by a subsequent Will. The Courts in India have held on the construction of this document that it did not amount to revocation. Venkatanarayana, after the decision of the High Court in its appellate jurisdiction dismissing his suit, applied for the usual certificate to appeal to His Majesty in Council, which was duly granted, and an appeal was filed and was pending when he died on the 19th of November 1913.

The petitioner, Kuppusami Pillay, applies to be substituted in the place of the deceased appellant and for an order for revivor of the appeal and for leave to prosecute it "in the usual way." He alleges that Venkatanarayana in his life-time was a member of a joint undivided Hindu family consisting of himself, two sons, and two grandsons, one of whom was the petitioner; and that he was

(3) 27 M. 588.

(4) 15 Ind. Cas. 213; 11 M. L. T. 184; 22 M. L. J. J. 375; (1912) M. W. N. 442; 37 M. 406.

(5) 5 I. A. 149 at p. 163; 3 C. L. R. 31; 4 C. 190 (P. C.); 3 Suth. P. C. J. 540; 3 Sar. P. C. J. 827; 2 Ind. Jur. 650; 2 Shome L. R. 21.

(6) 10 C. 324 (P. C.); 10 I. A. 150; 13 C. L. R. 418; 7 Ind. Jur. 557; 4 Sar. P. C. J. 459.

(7) 22 A. 33; A. W. N. (1899) 159.

(8) 28 M. 57; 14 M. L. J. 209.

(9) 8 I. A. 14 at p. 22; 8 C. L. R. 381; 6 C. 764; 4 Shome L. R. 78; 4 Sar. P. C. J. 195; 5 Ind. Jur. 161; Rafique and Jackson's P. C. No. 63.

(10) 5 Ind. Cas. 42; 33 M. 342; 7 M. L. T. 17; 20 M. L. J. 49.

now the sole surviving member thereof, and entitled to the reversionary interest in Venkatakrishna's ancestral properties.

The application is opposed on the ground that, as the petitioner is not the legal representative of Venkatanarayana in respect of the reversionary right claimed by him to the estate of Venkatakrishna, he cannot be substituted in place of the deceased appellant. It is contended on the authority of certain decisions of the High Court of Madras that where a transaction by a Hindu female taking a limited estate in the inheritance of the last male owner is impugned by the next or presumptive reversioner as invalid and beyond her competency, any adjudication against him does not operate as *res judicata* against the contingent reversioners, and consequently on the death of the presumptive reversioner the others have each, in order of succession, a separate right of suit, and cannot claim to prosecute an action brought by the deceased reversioner as they do not derive their right through him.

Their Lordships think this argument proceeds on an obvious fallacy. Under the Hindu Law the death of the female owner opens the inheritance to the reversioners, and the one most nearly related at the time to the last full owner becomes entitled to possession. In her life-time, however, the reversionary right is a mere possibility or *spes successionis*. But this possibility is common to them all, for it cannot be predicated who would be the nearest reversioner at the time of her death. The Indian Law, however, permits the institution of suits in the life-time of the female owner for a declaration that an adoption made by her is not valid, or an alienation effected by her is not binding, against the inheritance. The two Articles of the Indian Limitation Act (IX of 1908) which deal with these two classes of suits differ widely in their language; Article 118, Schedule I, contains no restriction as to the person entitled to sue; whilst in Article 125 the suit is contemplated to be by the person "who, if the female died at the date of instituting the suit, would be entitled to possession." But it does not follow from these words that the suit brought in the latter case by the nearest reversioner is for his personal benefit, for the object is to remove a common apprehended injury to the interests of all the reversioners, presumptive and contingent alike. Of course, the two classes of suits covered by these two Articles are distinct in their scope and character: one relates to status and involves the adjudication of a right *in rem*; the other raises a question of mere justifiable necessity. But in both "the right to sue" is based on the danger to the inheritance common to all the reversioners which arises from the nature of their rights.

In the present case Venkatanarayana sued for a declaration that the adoption of the second defendant was invalid. Such a suit brought by the presumptive reversioner is in a representative capacity and on behalf of all the reversioners. The act complained of is to their common detriment, just as the relief sought is for their common benefit. On the death, therefore, of the presumptive reversioner the next presumable reversioner would clearly be entitled to continue the action instituted by the deceased plaintiff, unless there is anything in the Procedure Law of India to preclude him from so doing.

The Madras High Court has drawn a distinction between a suit brought to challenge an adoption and one to declare an alienation by a qualified owner as not binding beyond the life-time of the alienor. In the first class of cases it has been recognised that the presumptive reversioner's suit is in a representative character; in the other, however, chiefly on the ground that the adjudication relating to an alienation in the suit of the presumptive reversioner does not operate as *res judicata* against contingent reversioners, it has been held that these have no right to continue an action brought by him. Although, no doubt, as their Lordships have already remarked, there is great difference in the character of the two classes of suits, the position of the plaintiffs in both instances, when closely examined, will be found, so far as the point for decision is concerned, to be the same. The test of *res judicata* applied by the Madras High Court seems, therefore, to be irrelevant to the inquiry whether the petitioner is entitled to continue the action commenced by his grandfather.

What has to be considered is "whether the right to sue," in the words of the

Statute, "survives," and if it does, who can continue the action to obtain the relief that is sought?

For the purposes of this application it must be assumed that the facts stated in the petition, which their Lordships note are not controverted, are true, and that Venkatanarayana was the nearest reversioner when he brought his suit, and that the present petitioner was at the time only a contingent reversioner. In the case of *Anund Koer* v. *The Court of Wards* (9) this Board gave expression to the principles applicable to suits by reversioners to impugn the validity of transactions by Hindu females. They said that :—

"As a general rule such suits must be brought by the presumptive reversioner, that is to say, by the person who would succeed if the widow were to die at that moment."

But in laying down this broad rule their Lordships pointed out in clear terms that under certain circumstances the "next presumable reversioner would be entitled to sue."

There is nothing to preclude a remote reversioner from joining or asking to be joined in the action brought by the presumptive reversioner, or even obtaining the conduct of the suit on proof of laches on the part of the plaintiff or collusion between him and the widow or other female whose acts are impugned. It is the common injury to the reversionary rights which entitles the reversioners to sue. Apart, therefore, from the question "whether the next presumable heir" is "the legal representative" of the deceased presumptive reversioner, there remains the outstanding fact of identity of interest on the part of the general body of reversioners, near and remote, to get rid of the transaction which they regard as destructive of their rights.

Rule 1, Order XXII, in the new Civil Procedure Code of India (Act V of 1908), which corresponds with section 361 of Act XIV of 1882, declares that "the death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives." Rule 3, clause 1, provides that—

"Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit."

The words "legal representative" have for the first time been defined in sub-section 11, section 2, of Act V of 1908, which runs thus :—

"'Legal representative' means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued."

Sub-section 11 was embodied in Act V of 1908 with the object of putting in statutary language the results of the decisions of the Indian Tribunals on the meaning of the words "legal representative;" but it is not clearly worded and has already been the subject of criticism by at least one of the High Courts in India. The phraseology of sub-section 11, in their Lordships' opinion, is fairly open to the contention that the suit was brought by the deceased plaintiff as representing, in his reversionary right, the estate of the last male owner, and that on his death such right devolved on the petitioner. They think, however, that his right to be substituted in place of the deceased appellant rests on a broader ground.

Rule 1, Order I, of Act V of 1908, which brings the Indian practice into line with the English rule, provides as follows :—

"All persons may be jointed in one suit as plaintiffs, in whom any right to relief in respect of, or arising out of, the same act or transaction, or series of acts or transactions, is alleged to exist, whether jointly, severally, or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise."

It seems to their Lordships that under this rule the contingent reversioners may be joined as plaintiffs in the presumptive reversioner's suit. The right to relief on the part of the reversioners

exists severally in order of succession, and arises out of one and the same transaction impugned as invalid and not binding against them as a body; and the dispute involves a common question of law, *viz.*, the validity of the act challenged as incompetently done. If the contingent reversioners may be joined as plaintiffs in the presumptive reversioner's action, it follows that on his death the "next presumable reversioner" is entitled to continue the suit begun by him. Their Lordships are of opinion that in this case the right to sue survives, and that the petitioner is clearly entitled to the order asked for. The costs of this application will be costs in the appeal.

Petition allowed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER No. 23 OF 1915.

April 21, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

UMRAO KUNWAR AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BADRI—PLAINTIFF—RESPONDENT.

Hindu Law—Will executed by widow—Reversioner's suit for declaration, whether maintainable.

A suit by a reversioner for a declaration that a Will executed by a Hindu widow in respect of her husband's property is void and not binding upon him, is not maintainable, as there is no alienation by the widow.

Ram Bhajan Kunwar v. *Gurcharan Kunwar*, 1 A. L. J. 468; A. W. N. (1904) 150; 27 A. 14; *Jaipal Kunwar* v. *Indar Bahadur Singh*, 26 A. 238, 31 I. A. 67; 8 C. W. N. 465; 6 Bom. L. R. 495; 14 M. L. J. 1490, referred to.

First appeal from an order of the District Judge of Meerut.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Appellants.

Mr. *S. M. Sulaiman*, for the Respondent.

JUDGMENT.—This was a suit by a plaintiff claiming to be the next reversioner under the Hindu Law to the estate of one Dewa. The said Dewa died leaving a widow, Umrao Kunwar. This lady has executed a Will bequeathing the property in her hands as widow of Dewa to one Tika Ram, son of Naidar, brother of the said Dewa. In the Will there is a recital to the effect that the bequest is made in accordance with oral directions given by Dewa. The plaintiff sought a declaration that the Will in question is void and ineffectual as against his interest and that Tika Ram, who was impleaded as defendant No. 2, will acquire no rights under the said Will. The Court of first instance dismissed the suit upon a preliminary point, holding that there had been no alienation by Umrao Kunwar of the property in her hands and that under the circumstances the mere execution of a Will would not afford a sufficient reason for granting a declaratory decree. It supported itself by a quotation from Mulla's Principles of Hindu Law. The learned District Judge on appeal has reversed the finding on the preliminary point and remanded the case for trial on the merits. He bases his decision upon the reported case of *Jaipal Kunwar* v. *Indar Bahadur Singh* (1). It is obvious that in that case their Lordships of the Privy Council maintained the decision of the Courts in India with considerable reluctance and carefully guarded themselves against being understood to hold that the execution of a Will, under such circumstances as the present, would afford a cause of action for a declaratory suit on the part of the nearest reversioner. It is certainly not the practice of this Court to encourage such suits, vide *Ram Bhajan Kunwar* v. *GurcharanKunwar* (2). The learned District Judge, moreover, while purporting to follow the Privy Council ruling quoted by him, has really departed from the spirit of that ruling by interfering with the decision of the Court of first instance. We think that the learned Additional Subordinate Judge was right in refusing to grant the declaration sought by the plaintiff and gave good reason for his decision. We set aside the order of the Court below and restore the decree of the Court of first instance dismissing the suit. The defendants-appellants will get their costs in this Court and in the lower Appellate Court.

Appeal decreed.

(1) 26 A. 238; 31 I. A. 67; 8 C. W. N. 465; 6 Bom. L. R. 495; 14 M. L. J. 1490.

(2) 1 A. L. J. 468; A. W. N. (1904) 150; 27 A. 14.

MOOLCHAND *v.* ALWAR CHETTY.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 65 OF 1914.

March 23, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

MOOLCHAND AND ANOTHER—DEFENDANTS—APPELLANTS

versus

P. ALWAR CHETTY—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 44—Joint judgment-debtors—Release of one, release of other—Amount paid by one—Protan to *reduction of liability.*

The release of a joint judgment-debtor does not operate as release of the others. It confers on them no higher rights than they would have had prior to the judgment, but they can claim the benefit of the amount actually paid by the released judgment-debtor. [p. 305, col. 1.]

Gurusami Chetti v. *Samurti Chinna Munnar* and *Gurusami Chetti* v. *Sadasiva Chetti*, 5 M. 37, dissented from.

In re E. W. A., a Debtor, (1901) 2 K. B. 642; 70 L. J. K. B. 810; 85 L. T. 31; 49 W. R. 642; 8 Manson, 250; *Sheo Churn Lall* v. *Ram Sarun Sahoo*, 16 W. R. 49; *Nunkoo Lall* v. *Musammat Dhunesh Kooer*, 17 W. R. 496; *Ram Ratan Kapali* v. *Aswini Kumar Dutt*, 6 Ind. Cas. 69; 14 C. W. N. 849; 11 C. L. J. 503; 37 C. 559; *Bhawani Koer* v. *Darsan Singh*, 11 Ind. Cas. 450; 14 C. L. J. 354; *Ramanjulu Naidu* v. *Aramudu Iyengar*, 5 Ind. Cas. 735; (1910) M W. N. 35; 7 M. L. T. 373; 33 M. 317, referred to.

Appeal from the judgment of the Honorable Mr. Justice Kumaraswami Sastri, in the Ordinary Original Civil Jurisdiction, in Execution Application in Civil Suit No. 176 of 1909.

Mr. *G. Annaji Row*, for the Appellants.

Mr. *C. P. Ramaswami Aiyar*, for the Respondent.

JUDGMENT.

NAPIER, J.—This appeal is from an order passed by Mr. Justice Kumaraswami Sastri. It was made on the application by the plaintiff in execution of the decree in Civil Suit No. 176 of 1909. The decree is as follows: "That Kastoor Chand, Nattoji, Mulchand and Omed Mull, the defendants herein, do pay to the plaintiff the said sum of rupees twenty-three thousand," etc. Subsequently to the decree a petition was put in under Order XXI, rule 2, of the Civil Procedure Code by the 1st and 2nd defendants and not opposed by the decree-holder for a certificate by the Court of the adjustment of the decree as against them, and an order was passed "that the plaintiff herein do enter up satisfication of the decree herein in full as against the 1st and 2nd defendants herein as agreed to by him by the said agreement." Latter when the execution application above referred to as against the other defendants was put in, objection was taken that the decree had been fully satisfied by the adjustment referred to, on the ground that the discharge of one of several joint promisors discharges the others as well. Mr. Justice Kumaraswami Sastri overruled the objection and ordered execution to issue.

It is contended before us that the learned Judge was wrong on two grounds, (1) that satisfaction having been entered up nothing remains, and (2) that the release of one judgment-debtor operates in favour of all.

On the *first* point it is only necessary to observe that the term "satisfaction," although used in the order, is not one contemplated by the Civil Procedure Code. The words of Order XXI, rule 2 are: "The decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree and the Court shall record the same accordingly." Admittedly the decree has been adjusted by payment so far as the 1st and 2nd defendants are concerned, but there has been no satisfaction, although that word appears in the order.

The *second* point is one of more substance. It is argued that although section 44 of the Indian Contract Act provides that a release of one or more joint promisors does not discharge the other joint promisor or joint promisors, that has reference only to obligations arising out of contract and does not apply to judgment debts; that under the English Law a release of one promisor of a contractual joint debt, or of one judgment-debtor in respect of a judgment joint debt does discharge the co-obligor, that in the original civil jurisdiction of the High Court the law as administered in England prevails, and that, therefore, there being no statutory provision as to a judgment debt the English Law of discharge still obtains. In my opinion this argument is fallacious. Admitting that according to the English Law the fact that a debt is a judgment debt makes no difference and that release in favour of one judgment-debtor operates in favour of the others, it is only necessary to see

the basis on which this doctrine is founded to establish the fallacy in the argument. In *In re E. W. A, a Debtor* (1) (in the Court of Appeal) it was contended that where the foundation of the obligation was a judgment, the doctrine of release did not apply. Lord Justice Collins overrules this contention in the following words: "I cannot see any foundation in principle for the distinction, for under any judgment or other obligation creating a joint liability, there is only one debt and that being so, the rule that the release of one of the joint debtors gets rid of the debt, applies equally whether the obligation arises on a judgment or on any other security. It is too late now to question the law that, where the obligation is joint and several, the release of one of two joint debtors has the effect of releasing the other." The view of the Court is clear, namely, that, where a right to release arises on the original contractual liability, the fact that a liability under a judgment has been substituted for that original liability, cannot increase the burden or deprive the debtor of the right given to him by the substantive law. It necessarily follows that where a substantive law has been altered, as has been done by the Indian Contract Act, and the benefit of the doctrine of release has been taken away from a joint debtor, the basis of the rule disappears. I do not think it necessary to discuss the soundness of the decision of this Court in *Gurusami Chetti* v. *Samurti Chinna Munnar* and *Gurusami Chetti* v. *Sadasiva Chetti* (2) that in an appeal from the original side the English Law has to be administered, but I must not be taken to accept the correctness of that conclusion. On principle I am clear that just as the debtor cannot in England be deprived of this right which attaches to his contract by reason of the fact that the contract debt has merged in a judgment debt, so in India the creditor cannot be deprived of his statutory right to proceed against a joint debtor in spite of a release by reason of the fact that the contractual debt has merged in a judgment debt. It is notitceable that the English Law was not accepted by the Courts in India in dealing with cases from the mofussil even prior to the Contract Act. For in two cases, *Sheo Churn Lall* v. *Ram Sarun Sahoo* (3) and *Nunkoo Lall* v. *Musammat Dhunesh Kooer* (4), respectively, it was held that a judgment-creditor is entitled to realize his debt from any one of the debtors and that by proceeding against one, he does not relieve the other debtors from their joint liability to him. In *Ram Ratan Kapali* v. *Aswini Kumar Dutt* (5) and *Bhawani Koer* v. *Darsan Singh* (6), the point was considered at great length by Mookerjee, J. He relies on the two Calcutta cases above referred to as establishing the law outside the provisions of the Contract Act and bases the variance from English Law on the obvious grounds of justice, equity and good conscience, and he points out that in England there has been a tendency to restrict the operation of the Common Law by a refined distinction between a release and a covenant not to sue. That this distinction exists is clear from the language of Romer, L. J., in *In re E. A. W. a Debtor* (1), the case above referred to. For in that case the learned Lord Justice expresses a doubt whether "having regard to the form of the document and the surrounding circumstances there was not a discharge of the debt, but only a discharge of a particular debtor from the liability as against himself personally: in other words, an *agreement by the Bank not to sue him*". It is clear, therefore, that even in England the Courts will favour the construction of a document in a manner beneficial to the creditor. Sir Frederick Pollock in dealing with the result of section 43 of the Indian Contract Act says:

"We think it the better opinion that the enactment should be carried out to its natural consequences, and that, notwithstanding the English authorities founded on a different substantive rule, a judgment against one of several joint promisors, remaining unsatisfied, cannot in British India be held to be a bar to a subsequent action against the other promisor or promisors." This view was adopted by this Court in *Ramanjulu*

(1) (1901) 2 K. B. 642; 70 L. J. K. B. 810; 85 L. T. 31; 49 W. R. 642; 8 Manson, 250.
(2) 5 M. 37.
(3) 16 W. R. 49.
(4) 17 W. R. 496
(5) 6 Ind. Cas. 69; 37 C. 559; 14 C. W. N. 849; 11 C. L. J. 503.
(6) 11 Ind. Cas. 450; 14 C. L. J. 354.

Naidu v. *Aramudu Iyengar* (7), where it was argued that the omission in a previous suit against one of several joint promisors of a part of the cause of action was a bar under section 43 of the Civil Procedure Code to a subsequent suit against a joint promisor for the balance so omitted. Krishnasami Iyer, J., in an elaborate judgment after considering all the authorities, declined to limit the logical result of the operation of section 43 of the Contract Act by the language of section 43 of the Civil Procedure Code. I adopt the reasoning of the very eminent jurist referred to and of the learned Judge in that case, which, in my opinion, applies with equal force to section 44, namely, that you must look to the substantive law and must give full effect to it; and in that view it seems to me clear that a release of a judgment-debtor can give his co-judgment-debtor no higher rights than he would have had prior to the judgment and that full effect must be given to the substantive law laid down in section 44.

That being so, there is no force in the last contention for the appellant, that the release enures for the proportionate amount of the debt. Reliance is placed on language to be found in the judgment of Mookerjee, J., in *Bhawani Koer* v. *Darsan Singh* (6) and I agree that where consideration for the release is not the payment of a definite portion of the debt but an adjustment otherwise than by payment, within the meaning of Order XXI, rule 2, difficulties may arise in ascertaining the amount of the balance remaining due; and that, therefore, it may be necessary to hold that the adjustment operated to the extent of the proportionate liability of the released judgment-debtor as between him and his co-judgment-debtors. But whereas in this case the amount received by the judgment-creditor was a specific sum, I am clear that as the liability of the other judgment-debtors is for the whole amount of the debt, they can only claim the benefit of the amount actually paid by the judgment-debtor who has been released. In my view, therefore, this appeal fails and must be dismissed.

(7) 5 Ind. Cas. 135; (1910) M.W. N. 35; 7 M. L. T. 373; 33 M. 317.

SADASIVA AIYAR, J.—I entirely agree. I only wish to add the following remarks: (1) If the passage (at page 46) in the judgment of Muthusami Iyer, J., in *Gurusami Chetti* v. *Samurti Chinna Munnar* and *Gurusami Chetti* v. *Sadasiva Chetti* (2) was intended to lay down that the High Court on its original side is bound to decide questions like the one in controversy on the basis of English precedents and English Common Law procedure, even though the following of such precedents and procedure may be against "justice and right" or the "justice, equity and good conscience" which are the true guides to be followed according to the Charter Acts, I respectfully differ from the observation in that passage. The doctrine that the release of one joint debtor releases the others is an artificial doctrine not consonant with "justice and right." (2). It was decided in *Bhawani Koer* v. *Darsan Singh* (6), that the decree-holder in that case ought to give credit to the proportionate sum due by the released judgment-debtor, on the basis that all the judgment-debtors were liable equally among themselves to pay the decree amount. That decision is (if I may say so), no doubt, justifiable on the facts of that case. But it could not, in my opinion, be extended as a support to the very broad proposition that even if the creditor realized only a definite and lesser proportionate amount from the released joint debtor or debtors, he has not got the right to go against the other debtors for the whole of the remaining balance but only what would be found to be the latter's proportionate share if the decree amount was equally divided between all the debtors, including the released debtor or debtors.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 570 OF 1912.

April 13, 1915.

Present:—Mr. Justice Shah Din and Mr. Justice Chevis.

HARDIT SINGH—DEFENDANT—APPELLANT

versus

BEHARI LAL AND OTHERS—PLAINTIFFS AND OTHER DEFENDANTS—RESPONDENTS.

Sale, oral—Receipt of earnest money—Out-and-out

HARDIT SINGH *v.* BEHARI LAL.

sale—Incorrect entry of mortgage amount on that property, effect of—Failure of prompt execution and registration of sale-deed, effect of—Purchaser of property under registered deed with notice of prior oral sale, right of—Mortgage—Equity of redemption, sale of—Purchaser, right of, to redeem.

Where a receipt of earnest money for the sale of equity of redemption of a house distinctly mentions an out-and-out sale as having been effected, the mere fact that it goes on to say that a sale-deed will be drawn up does not show that the sale contract is incomplete, nor is an incorrect entry of the amount of a mortgage on that property an indication of the incompleteness of the sale. [p. 307, col. 2.]

The fact that such a receipt is not promptly followed by the execution and registration of a formal sale-deed is not sufficient to warrant a finding that the intention of the parties was that title should not pass until the consideration money had been paid in full. [p. 307, col. 2.]

A subsequent purchaser of the equity of redemption of a mortgage under a registered deed, having notice of a prior oral sale of the same property, acquires no title and has no right to redeem the mortgage. [p. 308, col. 1.]

Second appeal from the decree of the Additional Divisional Judge, Amritsar Division, at Jullundur, dated the 29th January 1912, modifying that of the Subordinate Judge, first Class, Amritsar, dated the 21st August 1911, decreeing claim on payment of Rs. 4,700.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Appellant.

Mr. *Manohar Lal* and Bhagat *Gobind Das*, for the Respondents.

JUDGMENT.—This judgment will cover the two connected Appeals Nos. 602 and 733 of 1912.

The facts are as follows. Lal Chand mortgaged his house for Rs. 1,500 to Narain Singh on 23rd October 1887. Lal Chand is now dead. Bhagat Ram, his heir, sold the house to Behari Lal and Sant Ram by sale-deed executed on 20th December 1910 and registered on 3rd January 1911. These vendees now sue to redeem. Apart from disputes as to the amount of money payable in redemption and as to the mortgage being really a sale—disputes into which for reasons which will presently appear we need not enter—the defence is that the plaintiffs have no title, Bhagat Ram having sold the equity of redemption to Ganpat Rai prior to the transaction with the plaintiffs. Ganpat Rai was added as a co-defendant.

In support of the alleged sale to Ganpat Rai, a receipt bearing a one-anna stamp was put in. This receipt is for Rs. 99 earnest money. It is dated 10th December 1910, and states that the sale had been effected on the previous day. The first Court regarded the date of this receipt as doubtful, thinking it had been fabricated subsequently and antedated in order to defeat the plaintiffs' claim. The first Court further held that at the outside this document was merely an agreement to sell. So the first Court, after discussing rent, interest, improvements, etc., gave the plaintiffs a decree for redemption on payment of Rs. 4,700.

The learned Divisional Judge differed from the first Court as to the receipt being antedated, but was not satisfied that any title had passed to Ganpat Rai. The Divisional Judge held that there were strong indications that the intention of the parties was that title should not pass till a sale-deed had been drawn up, and the balance of the sale price had been paid before the Sub-Registrar. The Divisional Judge further held that even if there had been a genuine and unabandoned agreement to sell to Ganpat Rai, the plaintiffs' registered deed must be awarded the preference, as there was no reliable evidence that plaintiffs had ever had notice of the earlier contract. So the Divisional Judge upheld the decree of the first Court, but he reduced the amount of money to be paid by the plaintiffs to Rs. 3,500.

There are three appeals to this Court:

(1) The plaintiffs appeal, claiming to redeem on payment of Rs. 1,500 only.

(2) Ganpat Rai appeals, urging that by reason of the prior sale to him the plaintiffs have no rights in the house.

(3) Hardit Singh, son of Narain Singh, who is now the mortgagee, appeals, urging (*a*) that plaintiffs have no rights in the property, the house having previously been sold to Ganpat Rai, and (*b*) that the plaintiffs should, if they have any right to redeem, pay a larger sum than that fixed by the Divisional Judge.

With reference to the latter plea, Mr. Shafi states that he claims the Rs. 1,200 which is the difference in the redemption money as fixed by the two lower Courts, plus interest at the rate of (Rs. 135 less Rs. 84) Rs. 51 per annum. This works

out to about Rs. 2,577, so we have had the stamps on this appeal made up to Rs. 155.

The *first* question to consider is the genuineness of the receipt put forward by Ganpat Rai. This receipt was registered on the 21st February 1911. There is oral evidence as to the sale to Ganpat Rai, but we could not regard this evidence as reliable unless there were some corroboration in the shape of documentary evidence. If the receipt was really executed on the 10th December 1910, we think it must be regarded as first class corroboration of the oral evidence as to the sale, for it is utterly improbable that a sham receipt should have been executed on the 10th December 1910 in order to defeat a sale which had not then taken place. If, however, the receipt was not written until *after* the sale to the plaintiffs it is obviously a mere fraud.

The first Court in its judgment has made a mistake in saying that there is no entry relating to this receipt in the register of the deed-writer. The Divisional Judge noted this mistake, but apparently never saw the register. The register was not in this Court on the first day of hearing, but on our intimating that it should be produced, if possible, a messenger was sent to Amritsar and the register was produced the following day. The deed-writer, Hari Singh, is now dead, so the register was obtained from a relation. We found the register in good order, and neither we nor Counsel for the plaintiffs could, on examination, find any ground for suspecting that the register had been tampered with in any way. The deed-writer was a man who had a fair amount of work to do. There are over 900 entries in his register for the year 1910. The entry in question is No. 826 in the register. It begins near the foot of one page and is concluded on the following page. Above it are two entries, one of the 8th December, and one of the 9th. It is followed by entries of the 12th, 13th, 14th, 16th, 18th December, and so on. Serial numbers follow in proper order, and we fail entirely to see how this entry can have been interpolated subsequently unless the binding of the book was tampered with and a page changed, which so far as we can see has not been done. The mere fact that the serial number of the entry in the register is not quoted on the receipt we regard as of no importance whatever. In fact if the receipt were a subsequent fabrication, it would be perfectly easy to enter the serial number on the receipt. We hold the receipt to be genuine, and accept the evidence as to the sale to Ganpat Rai.

We cannot for a moment accept the contention that the transaction was merely an agreement to sell. The receipt distinctly mentions an out-and-out sale as having been effected on the previous day, and the mere fact that it goes on to say that a sale-deed will be drawn up is, in our opinion, no good ground for holding that the sale contract was incomplete. Nor do we regard the fact that the receipt incorrectly puts the amount of the mortgage money due to Hardit Singh as Rs. 1,300, as an indication that the sale contract was incomplete. The essential point is that the equity of redemption was sold for Rs. 850, the vendee being left to arrange redemption with the mortgagee, who might, of course, claim a good deal more than the principal mortgage debt, though the new owner would naturally wish to redeem as cheaply as possible. That the receipt was not promptly followed by the execution and registration of a formal sale-deed is, so far as we can see, the only fact which can be pointed to as telling in any way against Ganpat Rai, and this we do not regard as at all sufficient to warrant a finding that the intention of the parties was that title should not pass until the consideration money had been paid in full.

Then it is urged that under section 48 of the Registration Act the plaintiffs' registered deed must be given the preference as the sale to Ganpat Rai was not accompanied by delivery of possession. But it is owned that this section will not help the plaintiffs if they had notice of the prior sale to Ganpat Rai. There is oral evidence to the effect that they had notice. Sham Das says Sant Ram said in his presence, with reference to the former sale, that a writing on a one-anna stamp was no good. Narain Singh also says he mentioned the prior sale to

Sant Ram. Karm Chand says he went to Sant Ram at Bhagat Ram's request to ask Sant Ram not to make him execute a deed, as he had already written a document in favour of Ganpat; but that Sant Ram said a writing on a one anna stamp was of no avail. Bishen Das says he warned Sant Ram of the prior sale. No doubt it may be said that oral evidence of this sort can easily be produced. Karm Chand's sister is married to Bhagat Ram, and Bishen Das has been convicted of criminal breach of trust. But we must look at probabilities. The wives of Bhagat Ram and Sant Ram are cousins. Unless Sant Ram knew of the prior sale there would be no need for him to enter into negotiations with Bhagat Ram secretly, and if he entered into negotiations in the usual manner, it is natural enough to suppose that neighbours and others would get to hear of what was going on and that Sant Ram would be warned of the prior sale. The part played by Bhagat Ram was clearly a double one, and it is to be noted that on 23rd December 1910 the plaintiffs applied for the sale-deed to be registered compulsorily, though Bhagat Ram raised no objections apparently before the Sub-Registrar when the sale-deed was registered on 3rd January 1911. We see no sufficient reason for rejecting the evidence as to notice. Possibly plaintiffs were already negotiating with Bhagat Ram before the sale to Ganpat Rai, but whether this were so or not it appears to us that Sant Ram, thinking that a sale evidenced only by a receipt on a piece of paper bearing a one-anna stamp could easily be disregarded, induced Bhagat Ram to enter into a fresh sale.

The result is that we find that the prior sale to Ganpat Rai must be recognized and that the plaintiffs, having no title, cannot redeem.

We accept the appeals of Hardit Singh and Bhagat Ram and dismiss the appeal of plaintiffs. The plaintiffs' suit is dismissed, and they will pay costs in both the lower Courts, and in all three appeals in this Court.

Appeal accepted.

CALCUTTA HIGH COURT.

CIVIL RULE *Nisi* No. 1137 OF 1914.

March 23, 1915.

Present:—Mr. Justice N. Chatterjea and Mr. Justice Mullick.

NOBIN CHANDRA CHOWDHURY AND OTHERS—PETITIONERS

versus

BEPIN CHANDRA ROY CHOWDHURY —OPPOSITE PARTY.

Bengal Tenancy Act (VIII of 1885 amended by Act I of 1908), s. 153, proviso and explanation, scope of—Sale—Irregularity—Question relating to title or some interest in land - Civil Procedure Code (Act V of 1908), O. XXI, r. 90, order under, whether appealable—Irregularity and fraud in publishing or conducting a sale.

Per *N. Chatterjea, J.*—Under Explanation to section 153 of the Bengal Tenancy Act, (Eastern Bengal and Assam Tenancy Act) a question as to the regularity of the proceedings in publishing or conducting a sale in execution of a decree for arrears of rent is not a question relating to title to land or to some interest in land as between parties having conflicting claims thereto. [p. 309, col. 1.]

The question whether, or not, a case comes under the proviso to section 153, Bengal Tenancy Act, is to be determined by the Appellate Court not with reference to the question which may be raised in appeal, but with reference to the question decided by the order of the Subordinate Court. [p. 309, col. 2.]

An order setting aside or declaring to set aside a sale in execution of a decree for rent (where the decree-holder is the purchaser) is an order deciding a question relating to title to land as between parties having conflicting claims thereto, and falls within the proviso to section 153 of the Bengal Tenancy Act, and is, therefore, appealable, though there could be no appeal from the decree in the suit on account of the prohibition contained in the section. [p. 309, col. 1.]

Kali Mandal v. *Ramsarbaswar Chakravarti*, 32 C. 957 (F. B.); 1 C. L. J. 476; 9 C. W. N. 721, followed.

An irregularity of the proceedings in publishing or conducting a sale is not the same as fraud in publication or conduct of the sale. [p. 310, col. 1.]

Section 153, Explanation, applies only to cases where there is a question as to irregularity in publishing or conducting a sale. [p. 310, col. 1.]

An application to set aside a sale made by a person (who prior to the sale had purchased the holding) more than a month after the sale comes within section 47 of the Civil Procedure Code and is not time-barred, section 18 of the Limitation Act being applicable to the circumstances of the case. [p. 310, col. 2.]

Arjun Das v. *Gunendra Nath Basu*, 27 Ind. Cas. 294; 20 C. L. J. 341; 18 C. W. N. 1266, referred to.

A question as to fraud in publishing or conducting a sale is not covered by the Explanation to section 153 of the Bengal Tenancy Act. [p. 310, col. 2.]

Per *Mullick, J.*—An irregularity in publishing or conducting a sale may be accompanied with or without fraud. [p. 311, col. 1.]

NOBIN CHANDRA *v.* BEPIN CHANDRA ROY.

Section 153, Explanation, does not expressly exclude from its scope an irregularity tainted by fraud. [p. 311, col. 1.]

In the matter of Miscellaneous Appeal No. 40 of 1914 of the Court of the District Judge of Rangpur.

Babu *Atul Chandra Gupta*, for the Petitioner.

Babu *Mohini Mohan Chakravarti*, for the Opposite Party.

JUDGMENT.

N. CHATTERJEA, J.—The question raised in this Rule is, whether an appeal lay against an order of the Munsif refusing to set aside a sale held in execution of a decree passed in a suit for recovery of rent, in which the amount claimed did not exceed fifty-rupees, the Judicial Officer, who passed the decree and order, having been empowered to exercise final jurisdiction under section 153 of the Bengal Tenancy Act.

The determination of the question depends upon whether the order of the Munsif has decided a question relating to title to land or to some interest in land as between parties having conflicting claims thereto, within the meaning of section 153 of the Act.

Now, the Full Bench in the case of *Kali Mandal* v. *Ramsarbaswar Chakrvarti* (1) held that an order setting aside or declining to set aside a sale in execution of a decree for rent (where the decree-holder is the purchaser) is an order deciding a question relating to title to land as between parties having conflicting claims thereto, and falls within the proviso to section 153 of the Bengal Tenancy Act, and is, therefore, appealable, though there could be no appeal from the decree in the suit on account of the prohibition contained in the section.

The Explanation which has been added to section 153 of the Bengal Tenancy Act, by the Amending Act I of 1908 (Eastern Bengal and Assam Tenancy Act) lays down that "a question as to the regularity of the proceedings in publishing or conducting a sale in execution of a decree for arrears of rent is not a question relating to title to land or to some interest in land as between the parties having conflicting claims thereto." The learned District Judge held that the real question in this case was whether there was any material irregularity in publishing the sale, and that such a question according to the explanation to section 153 is not a question relating to title to land or to some interests in land as between parties having conflicting claims thereto. He accordingly held that no appeal lay to him and rejected the appeal.

The allegations, however, made in the application to set aside the sale are to the effect that no processes of attachment or proclamation were served upon the properties, and that the decree-holder, fraudulently and in collusion with the peon, got all the said processes suppressed and false returns to be submitted and thus brought about the sale. The sale, therefore, was sought to be set aside not merely on the ground of material irregularity as contended on behalf of the opposite party, but also on the ground of fraud in publishing the sale, if not on the latter ground alone.

The application, it appears, was made more than 30 days after the sale, and the Munsif refused to set aside the sale on the ground that there was no such fraudulent concealment of the execution proceedings on the part of the decree-holder as to bring the case within section 18 of the Limitation Act. He did not decide any question as "to the regularity of the proceedings in publishing or conducting the sale." It is to be observed that the question whether, or not, a case comes under the proviso to section 153, is to be determined not with reference to the question which may be raised, but with reference to the question *decided* by the order.

The Explanation, therefore, to section 153 of the Bengal Tenancy Act has no application to the present case, and an appeal lay against the order of the Munsif under the Full Bench decision referred to above. But even if it be held that the Munsif's order by implication decided a question as to fraud in publishing the sale, we have to see whether a question as to fraud in publishing a sale is "a question as to the regularity of the proceedings in publishing or conducting a sale" within the meaning of the explanation to section 153 of the Bengal Tenancy Act, and whether the effect of the Full Bench decision has been nullified by the said explanation as contended on behalf of the opposite party.

(1) 32 C. 957; 1 C. L. J. 473; 9 C. W. N. 721.

Now a sale may be set aside under Order XXI, rule 90, of the present Code of Civil Procedure, on the ground of material irregularity *or* on the ground of fraud in publishing or conducting a sale. Order XXI, rule 90, of the present Code of Civil Procedure, therefore, covers a case of material irregularity provided for by section 311, as well as a case of fraud coming under section 244 of the Civil Procedure Code of 1882. The distinction between an *irregularity* in publishing a sale and *fraud* in publishing a sale was well defined under the old, and is so under the present, Code, and I do not think that the Legislature by using the words "a question as to the regularity of the proceedings in publishing or conducting a sale" meant to include not only cases where a question arises as to the irregularity in publication or conduct of the sale, but also cases where there is a question of fraud in publishing or conducting the sale. An irregularity of the proceedings in publishing or conducting a sale is not the same as fraud in publication or conduct of the sale, and I think that if it was the intention of the Legislature to bar an appeal in cases where a question as to fraud in publishing or conducting a sale is decided, it would have expressed itself clearly by stating that "a question as to fraud or as to the regularity of the proceedings in publishing or conducting a sale" is not a question of title relating to title to land, etc. It seems to me that the Explanation applies only to cases where there is a question as to irregularity in publishing or conducting a sale, and that the effect of the Full Bench decision has been restricted to that extent only.

I am fortified in the view I take by the case of *Arjun Das* v. *Gunendra Nath Basu Mallik* (2). In that case proceedings to execute a decree for rent having been started more than a year after the judgment-debtor's death, writ of attachment and proclamation of sale were issued in his name and returns were filed that processes had been duly served, and the decree-holder himself purchased the holding at the sale which followed. In an application to set aside the sale by a person (who prior to the sale had purchased the holding) more than a month after the sale, it was held that the application came within section 47 of the Civil Procedure Code, and was not time-barred, section 18 of the Limitation Act being applicable to the circumstances of the case, and the sale was set aside. The learned Judges (Mookerjee and Beachcroft, JJ.,) observed: "We may finally add that although the application must be deemed to have been made under section 47 of the Code of 1908, a second appeal may at first seem barred under section 153 of the Bengal Tenancy Act, as the claim in the suit for rent was under Rs. 100 [*Shyama Charan Mitter* v. *Debendra Nath Mukerjee* (3)] but a second appeal does apparently lie in this case on the authority of the decision of the Full Bench in *Kali Mandal* v. *Ramsarbaswar Chakravarti* (1), the effect of which, as explained in *Beni Madhab* v. *Biseswar* (4), has not been completely nullified by the explanation added to section 153."

It was contended that we should not refer to the distinction between irregularity and fraud in the Code of Civil Procedure in construing a section of the Bengal Tenancy Act. But the provisions of the Civil Procedure Code, for setting aside a sale either on the ground of fraud or irregularity in publishing or conducting a sale, are applicable to sales held under the Bengal Tenancy Act, and the words "regularity of the procedure in publishing or conducting a sale" in the Explanation to section 153 evidently refer to such a ground for setting aside a sale under the Civil Procedure Code, and I am accordingly justified in referring to the provisions of that Code on the point.

I am of opinion that a question as to fraud in publishing or conducting a sale is not covered by the Explanation to section 153 of the Bengal Tenancy Act, and that the Full Bench decision still applies to a case where such a question is decided. Assuming, therefore, that the Munsif's order decided a question as to fraud in publishing the sale, I think that an appeal lay in this case against the order of the Munsif under the proviso to section 153 of the Bengal Tenancy Act.

(2) 27 Ind. Cas. 294; 18 C. W. N. 1266; 20 C. L. J. 341.

(3) 27 C. 484; 4 C. W. N. 269.

(4) 15 Ind. Cas. 436; 16 C. L. J. 542.

The Rule is accordingly made absolute, the order of the District Judge set aside, and the case is remanded to the lower Appellate Court for the hearing of the appeal on the merits. Costs of this Rule, one gold *mohur*, will abide the result.

MULLICK, J.—The petitioners, who consist of two judgment-debtors and a purchaser from a judgment debtor after the rent decree but before the sale, applied to the Munsif to set aside the sale on the ground of material irregularity and fraud. The Munsif found that the application was made more than 30 days after the sale and that the petitioners were not entitled to the benefit of section 18, Limitation Act, inasmuch as they had failed to show that they had been kept by the fraud of the opposite party from knowing about the sale and applying within time. This was not a finding upon a question as to the irregularity of the proceedings in publishing or conducting the sale and the Explanation to section 153, Bengal Tenancy Act, does not apply. An appeal, therefore, was competent having regard to the decision in *Kali Mondal* v. *Ram Sorbeswar Chakravorti* (1).

I agree, therefore, with my learned brother that the District Judge's order holding that no appeal lay was an order wrongly declining jurisdiction, and that the Rule should be made absolute with costs.

But with that part of my learned brother's judgment in which he expresses the opinion that an irregularity in conducting and publishing a sale caused by fraud is not covered by the Explanation to section 153, I respectfully venture to express a doubt. An irregularity in publishing or conducting a sale may be accompanied with or without fraud. The Explanation under consideration does not expressly exclude from its scope an irregularity tainted by fraud and there is nothing in the Civil Procedure Code of 1882, and much less in the Code of 1908, which compels us to limit the generality of the terms of the explanation and to give to it a meaning different from its apparent meaning.

The Rule, however, must be made absolute on the first ground and the appeal sent down to be heard on its merits.

Rule made absolute.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1849 OF 1912.

May 5, 1915.

Present:—Mr. Justice Shah Din and Mr. Justice Rossignol.

Musammat JEO—DEFENDANT—APPELLANT

versus

JAIMAL SINGH—PLAINTIFF—RESPONDENT.

Registration Act (*XVI of* 1908), *s.* 17 (2) (*i*)—*Civil Procedure Code* (*Act V of* 1908), *O. XXIII, r.* 3—*Compromise of suit*—Razinama, *if requires registration*—*Evidence, admissibility of* razinama *in.*

A *razinama* presented to a Court setting forth the terms on which the parties had come to terms does not require registration and is as such admissible in evidence. [p. 312, col. 2.]

Khair-ul-Nissa v. *Bahadur Ali*, 27 P. R. 1906; 11 P. L. R. 1906, followed.

Second appeal from the decree of the Additional Divisional Judge of the Shahpur Division at Sargodha, dated the 9th August 1912, varying that of the Subordinate Judge, Lyallpur, dated the 21st of February 1911, decreeing the claim.

Mr. *Muhammad Saleem*, for the Appellant.

Mr. *Jai Gopal Sethi*, for the Respondent.

JUDGMENT.—The learned Counsel for the appellant states at once in opening this appeal that he drops all other points, and confines his appeal to the one ground that the *razinama* on which the present suit was brought is inadmissible because it is unregistered. The facts of the case are clearly given in the judgments of the Courts below. Briefly put, one Hira Singh had property in Amritsar and also a square of land in Lyallpur. He bequeathed the whole of his property by a written Will to Jaimal Singh, plaintiff. Jaimal Singh sued *Musammat* Jeo and *Musammat* Jindan, who are both widows of Hira Singh, for possession of the Amritsar property. A counter-suit was brought by Ram Singh, step-son of Hira Singh, at about the same time for a declaration that the Will propounded by Jaimal Singh was invalid. Both suits were terminated by a compromise in accordance with which Ram Singh and Jaimal Singh were to share both the Amritsar and the Lyallpur properties equally. The present suit has been brought by Jaimal Singh to secure possession of his moiety of the Lyallpur property and it is based on the aforesaid compromise. The lower Appellate Court has held that the compromise was not a

conveyance but was merely a petition setting forth for the information of the Court, to which it was presented, the details of the settlement on which it asked the Court to dispose of the suit. Before us some details of resemblance between this *razinama* and the usual conveyance have been pointed out, but we think it quite unnecessary to mention these points in detail. In fact, it is urged that the *razinama* is a formal document by which one half share in the Lyallpur property was conveyed to the plaintiff. *Pranal Anni* v. *Lakshmi Anni* (1) and *Patha Muthammal* v. *Esup Rowther* (2) have been relied upon by the appellant. For the respondent it has been contended that the *razinama* now sued upon was not a formal conveyance nor an agreement, but is only a recital of the terms on which the parties had come to settlement, and after due consideration we have no doubt that this contention must prevail. In our opinion, the case reported as *Khair-ul-Nissa* v. *Bahadur Ali* (3), is very analogous to the present case. The so-called *razinama* is headed by the names of the parties in the manner which is usually employed in writing a petition. The language of the document is not of that formal nature which usually characterises a conveyance. In short, on the face of it the *razinama* is a petition and was clearly intended to be presented to the Court as such.

The petition was presented to the Court and the parties made statements with reference thereto. Although the parties were not questioned with reference to the Lyallpur portion of the property in dispute, it is quite clear to us that the settlement was intended by the parties to bring both cases to a termination, and the failure of the Court to question the parties concerning the Lyallpur property is intelligible when it is remembered that no decree could be granted to Jaimal Singh in respect of the Lyallpur property in the suit in which he was then a plaintiff. The reason for this was that he had not sued in that suit in respect of the Lyallpur property and, therefore, the decree could not cover any property which had not been included in the plaint.

(1) 22 M. 508; 26 I. A. 101; 3 C. W. N. 485; 9 M. L. J. 147.
(2) 29 M. 365.
(3) 27 P. R. 1906; 11 P. L. R. 1906.

On these grounds we hold that the *razinama* did not require registration and was admissible in the present suit to prove the plaintiff's claim. The appeal fails and is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 2519 TO 2525 OF 1912.

March 15, 1915.

Present:—Mr. Justice Chapman and Mr. Justice Walmsley.

IN NO. 2519 OF 1912

GURAI KAR AND OTHERS—PLAINTIFFS—APPELLANTS

IN NO. 2520 OF 1912

SUNDAR DUTT—PLAINTIFF—APPELLANT

IN NO. 2521 OF 1913

SURJAN GIRI—PLAINTIFF—APPELLANT

IN NO. 2522 OF 1912

BHIM AICH—PLAINTIFF—APPELLANT

IN NO. 2523 OF 1912

UJHAL KINLA—PLAINTIFF—APPELLANT

IN NO. 2524 OF 1912

SURJA PAUL AND OTHERS—PLAINTIFFS—APPELLANTS

IN NO. 2525 OF 1912

SAMP MANNA—PLAINTIFF—APPELLANT

versus

Srimati Rani KUARMONI SINGHA MANDHATA—DEFENDANT—RESPONDENT

IN ALL.

Bengal Tenancy Act (*VIII of* 1885), *s.* 106—*Tenant's right to cut and appropriate trees—Custom, reasonableness of—Question of law—Reasonableness, test for.*

The question whether a custom is reasonable or not is a question of law and not one of fact. [p. 313, col. 2; p. 314, col. 1.]

Bradburn v. *Foley*, 3 C. P. D. 129 at p. 135; 47 L. J. C. P. 331; 38 L. T. 421; 26 W. R. 423, followed.

It is wrong to hold that a custom is unreasonable in so far as it permits the appropriation of timber trees on a holding by the tenant. [p. 314, col. 1.]

Moult v. *Halliday*, (1898) 1 Q. B. 125; 67 L. J. Q. B. 451; 77 L. T. 794; 46 W. R. 318; 62 J. P. 8; 14 T. L. R. 109, referred to.

Where there is nothing unfair or dishonest or contrary to the public good in a custom, the custom is not unreasonable. [p. 314, col. 1.]

Appeals against the decrees of the District Judge, Midnapur, dated the 21st of December 1911, modifying those of the Revenue Officer, Rohini Camp, dated the 23rd of June 1908.

GURAI KAR *v.* KUARMONI SINGHA.

Babus *Mohindra Nath Roy*, *Monmatha Nath Mookerjee* and *Satindra Nath Mookerjee*, for the Appellants.

Babu *Bankim Chandra Mookerjee*, for Babu *Kali Kinkar Chakrabarti*, for the Respondent.

JUDGMENT.—These are appeals by the plaintiffs. The suits were brought under section 106 of the Bengal Tenancy Act for declarations that the tenants had the right to cut and appropriate trees. The Assistant Settlement Officer decreed the suits. The landlord appealed. The District Judge, in the course of his judgment, came to a finding that the custom had been established, but that it was unreasonable in so far as it permitted the appropriation of timber trees. By an oversight, however, the learned Judge recorded an order dismissing the landlord's appeal thus preserving the judgment of the Assistant Settlement Officer intact. Upon an *ex parte* application by the landlord, the learned Judge amended his judgment and converted his order dismissing the appeal into an order directing that the decree of the Assistant Settlement Officer should be modified, in accordance with his finding that the custom should not be upheld so far as timber trees are concerned. The tenants, thereupon, appealed to this Court. They relied in their grounds of appeal both on the contention that the learned Judge was wrong in holding that the custom was unreasonable and upon the contention that it was not open to the learned Judge to alter his judgment. The learned Judges who disposed of the appeal dealt in their judgment with the latter contention only and directed that the judgment should be restored to its original condition. The learned Judges proceeded to say that it would be open to the respondent landlord to apply for a review. Thereupon, the landlord applied for a review of this judgment and on that application for review, the learned Judge amended the judgment again, altering it into a judgment modifying the decree of the Assistant Settlement Officer in accordance with the finding that the custom was unreasonable so far as timber trees were concerned.

In appeal to this Court, the tenants take three grounds. The *first* ground is that the application for review was barred by limitation. The judgment which was sought to be amended by that application for review was dated the 23rd August 1911, that is, the judgment in the form in which it stood after the restoration made in it in accordance with the order passed by the learned Judges of this Court in second appeal. The application for review of this judgment was made on the 20th September 1911, and was within time. The appellants' contention that this application for review must be held to relate to the original judgment of the 7th April 1909, cannot he sustained, although there are certain expressions in the judgment of the learned District Judge now appealed against which might support their contention.

The *next* contention in appeal is that the learned Judge had no jurisdiction to entertain this application for review. The judgment purports to pass the order under section 151 of the Code of Civil Procedure, holding that the judgment, the review of which was applied for, was the judgment of his predecessor and that, therefore, he had no jurisdiction to deal with the application under Order XLVII. We are of opinion, however, that the learned Judge fell into an error in the view which he took, that the judgment the review of which was applied for was the judgment of his predecessor. It is true that the original judgment delivered on the 7th April 1909 was the judgment of the learned Judge's predecessor, Mr. Forrester. But the judgment, which in law was the judgment which had to be reviewed, was not that judgment but the judgment dated the 23rd August 1911, which was the result of the alteration made by the learned Judge, Mr. Cornes, himself. It was his judgment made under the order of the High Court. That was the judgment which had to be reviewed and the learned Judge had jurisdiction under Order XLVII, rule 1, to review that judgment on account of what he held, and rightly held, to be a mistake on the face of the record.

The appellants, however, contend that the judgment is wrong, upon the ground that the learned District Judge was not justified in holding that the custom was unreasonable in so far as it permitted the tenants to appropriate timber trees. The respondent argued that the question whether a custom

is reasonable or not is a question of fact and not of law. We need only to refer to the judgment of Lord Lindley in the case of *Bradburn* v. *Foley* (1), for authority for saying that the reasonableness or unreasonableness of a custom is a question of law. The respondent then argued that this point having been taken in the grounds of appeal to this Court at the time when this case came up before this Court on the previous occasion, it must be held that the point was then decided against the appellants and cannot now be re-argued. We are, however, satisfied that the learned Judges of this Court did not then decide this point. The appellants then succeeded on the technical ground which they took and whether this point was argued or not, we are of opinion that it is open to them to argue it now. The learned Judge upheld the findings of the Assistant Settlement Officer upon the question whether the custom of appropriating trees by the tenants had been established. The learned Assistant Settlement Officer held upon the facts that this custom covered a large number of trees of different kinds which are mentioned in this connection and the Assistant Settlement Officer recorded the finding that the custom covered all classes of trees. This finding was upheld by the learned Judge in appeal. The learned Judge gives no reasons for holding that this custom was unreasonable in so far as it permitted the appropriation of timber trees, and we are unable to agree with him that there was any unreasonableness in the custom. As was said by Channell, J., in *Moult* v. *Halliday* (2): "There can be very few cases, where a custom has been sufficiently proved, in which a Court could hold that it was unreasonable, for that it must be convenient is shown by the fact that it has been established and followed." There is nothing unfair or dishonest or contrary to the public good in the custom and we are unable to say that it was unreasonable.

The result is that this appeal is allowed, the judgment of the learned District Judge set aside and the judgment and decree of the Assistant Settlement Officer restored. The appellants are entitled to their costs. They are allowed three sets of costs for the seven appeals in this Court.

Appeal allowed.

(1) 3 C. P. D. 129 at p. 135; 47 L. J. C. P. 331; 38 L. T. 421; 26 W. R. 423.

(2) (1898) 1 Q. B. 125; 67 L. J. Q. B. 451; 77 L. T. 794; 46 W. R. 318; 62 J. P. 8; 14 T. L. R. 109.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1124 OF 1912.

April 17, 1914.

Present:—Mr. Justice Wallis and Mr. Justice Sadasiva Aiyar.

PASUMARTI PAYIDANNA—DEFENDANT No. 3—APPELLANT

versus

GANTI LAKSHMINARASAMMA AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1, 2, 4 AND 5—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47—Execution of decree—Sale—Minor widow brought on record as legal representative of her deceased husband, judgment-debtor—Court kept in ignorance of minority of widow—An earlier and higher bid for same property in another suit concealed—Sale void—Suit for declaration competent without regard to s. 47—Fraud—Limitation Act (IX of 1908), Sch. I, Arts. 12, 166 applicability of.

In a suit for a declaration that the sale in execution of a decree was not binding on the plaintiff, the main objection to the sale was that at the time when the plaintiff and the 2nd defendant, the co-widow, were brought on the record as the legal representatives of the judgment-debtor, their deceased husband, and at the date of the sale, the plaintiff was a minor, while the other widow, the 2nd defendant, had ceased to have any interest in the estate of her deceased husband. The plaintiff was admittedly impleaded as a major, though the 1st defendant-decree-holder and the 3rd defendant, the auction-purchaser, both knew that she was a minor. The Court was wilfully kept in ignorance of the fact of the plaintiff's minority and of the offer of the Court-auction-purchaser in another suit (the decree in which was simultaneously executed) of three times the purchase-money for which it was ultimately knocked down:

Held, that the plaintiff, who had no guardian *ad litem* at all, had not been a party to the suit, and that she was entitled to bring the present suit to declare it as not binding on her without regard to the provisions of section 47, Civil Procedure Code; [p. 316, col. 2; p. 318, col. 2.]

that the plaintiff not having been a party to the suit and not having been sufficiently represented by any one who was a party, inasmuch as the other widow also had ceased to have any interest in the estate, the sale was not binding on the plaintiff, and did not require to be set aside; [p. 316, col. 2; p. 319, col. 2.]

that the plaintiff was entitled to a decree as the Court-auction sale was brought about by the fraud of the decree-holder and Court-auction-purchaser; [p. 317, col. 2.]

that the declaratory suit having been brought within three years of the plaintiff's attainment of majority was not barred, Articles 166 and 12 of the Limitation Act being alike inapplicable. [p. 317, col. 1; p. 319, col. 2.]

Second appeal from the decree of the Court of the Temporary Subordinate Judge of Vizagapatam in Appeal Suit No. 205 of 1911, preferred against that of the Court of the District Munsif of Rajam in Original Suit No. 407 of 1909.

Messrs. *K. Srinivasa Aiyangar* and *V. Ramesam*, for the Appellant.

Mr. *B. N. Sarma*, for the Respondents.

JUDGMENT.

WALLIS, J.—This is a second appeal from the decree of the lower Courts declaring that the sale in execution of the decree in Original Suit No. 559 of 1903 on the file of the District Munsif of Vizagapatam was not binding on the plaintiff. The present plaint was presented as a petition in that suit, but was registered as a plaint in a separate suit under the new provision in section 47, Civil Procedure Code.

The facts may be briefly stated. The present 1st defendant had obtained decrees against plaintiff's husband in two suits Nos. 555 and 559 of 1903, and after his death his two widows, the plaintiff and the 2nd defendant, were brought on as his legal representatives by the Court of the District Munsif of Rajam, to which the decrees had been transferred for execution. One of the grounds taken by the plaintiff is that the Court to which the decrees had been transferred for execution was not the proper Court to bring on legal representatives of a deceased party, as decided by the Full Bench in *Swaminatha Ayyar* v. *Vaidyanatha Sastri* (1), and that the order was a nullity. It is, however, unnecessary to consider this point, as the sale has been held not to be binding on another ground. The main objection to the sale is that, as found by the lower Courts, at the time when the plaintiff and the 2nd defendant, the co-widow, were brought on the record and at the date of the sale on 19th October 1906 the plaintiff was a minor, only attaining her majority in July 1907, while the other widow, the 2nd defendant, had ceased to have any interest in the estate of her deceased husband. The plaintiff was admittedly impleaded as a major though, according to the findings, the 1st defendant-decree-holder and the 3rd defendant, the auction, purchaser, both knew she was a minor. The attached properties which were subject to mortgages were first put up for sale by the 1st defendant in execution of his decree in Original Suit No. 555 of 1903 on the 15th October 1906. The properties were put up at Rs. 600 and the sale list, Exhibit H, shows that there were no bidders on the 15th, 16th and 17th and that on the 18th the present 3rd defendant bid Rs. 601. This sale was stopped at the instance, it is said, of the 3rd defendant because certain other decree-holders had applied for rateable distribution in the suit, a matter which was no business of his; and on the following day, the 19th, the 1st defendant applied orally to the District Munsif in the other Suit, No. 559 of 1903, and, on the plea that there were no bidders, got the reserve price reduced to Rs. 200, without telling the District Munsif of the sale in Original Suit No. 555 of 1903 and the bid of Rs. 601 by the 3rd defendant. The properties were then put up to sale in Original Suit No. 559 of 1903 and knocked down to the 3rd defendant for Rs. 201.

The Subordinate Judge has found, in my opinion, rightly, that this was a fraud upon the plaintiff. The properties should have been sold in execution of the decree in Original Suit No. 555 of 1903 in which they were first put up for sale, then the 1st defendants, as decree-holder in Original Suit No. 559 could, if so minded, have applied for rateable distribution of the sale proceeds; and the conduct of the 1st defendant and the 3rd defendant in proceeding with the sale in the second suit and getting the reserve price reduced by suppressing from the Court what had happened at the first sale amounted to a fraud upon the plaintiff. This fraud is not without some bearing on the main issue in the case, because, in view of what had happened in the absence of any proper representation of the judgment-debtor, it cannot be said that the plaintiff was not prejudiced by the omission to bring her properly on the record.

The respondent relies on two decisions of the Privy Council in *Khiarajmal* v. *Daim* (2), and *Rashid-un-Nisa* v. *Muhammad*

(1) 28 M. 466 (F. B.); 15 M. L. J. 116.

(2) 32 C. 296 at p. 314; 1 C. L. J. 584; 2 A. L. J. 71; 9 C. W. N. 201; 7 Bom. L. R. 1; 32 I. A. 23.

Ismail Khan (3), to show that the sales are wholly void against the plaintiff because she was not properly represented, while the appellant relies on the decision of the Privy Council in *Malkarjun* v. *Narhari* (4) and on certain observations in *Kadir Mohideen Markkayar* v. *Muthukrishna Ayyar* (5). In my opinion the decision in *Malkarjun* v. *Narhari* (4) has no bearing on the present case. In that case a party who was brought on as legal representative objected that he was not the legal representative, but the Court decided that he was; and their Lordships held that, in view of this decision which was within the jurisdiction of the Court, the sale could not be treated as a nullity even against the real representatives of the deceased who afterwards came forward. Their Lordships also held that, if the suit could be regarded as one to set aside the sale, it was barred by Article 12 of the Limitation Act.

On the other hand in *Khiarajmal* v. *Daim* (2), one Amirbaksh, a minor, the legal representative of one Naurez, was sued by his guardian one Alahnawaz, who was not his guardian in fact, and had not been appointed his guardian *ad litem*, and the Court held that Court sales in execution of the decrees obtained in these suits were not binding on the estate of the deceased Naurez or the minor, but were without jurisdiction and null and void. In the course of the judgment, their Lordships no doubt say that the absence from the record of one of the legal representatives of a deceased judgment-debtor is not always sufficient reason for disturbing judicial sales which otherwise have been properly conducted. "The Indian Courts," their Lordships say, "have properly exerised a wide discretion in allowing the estate of a deceased debtor to be represented by one member of the family, and in refusing to disturb judicial sales on the mere ground that some members of the family, who were minors, were not made parties to the proceedings, if it appears that there was a debt justly due from the deceased, and no prejudice is shown to the absent minors." But these observations do not cover such a case as the present in which according to the findings, the other widow who was brought on the record had ceased to have any interest in her husband's estate, and the sale itself was a fraudulent one. An endeavour has been made to distinguish that case from the present, on the ground that the decrees themselves were nullities owing to the minor defendant not having been properly represented, whereas in the present case the decrees were duly obtained against the deceased judgment-debtor. The still more recent decision of their Lordships in *Rashid-un-Nisa* v. *Muhammad Ismail Khan* (3) shows that there is no substance in this distinction. In that case, as in the present, the suit was brought to declare the nullity as against the plaintiff of certain sales in execution of decrees against a deceased person, in which the minor plaintiff had been brought on as legal representative of the deceased judgment-debtor.

In two instances she had been represented by a woman who, as such, was not qualified to act as guardian *ad litem*, and in the third by another person whose interests were adverse.

Their Lordships held that the plaintiff had never been a party to any of these suits in the proper sense of the term. They further held that a minor brought on in this defective manner was not a party to the suit within the meaning of section 244—now section 47—Civil Procedure Code, and did not come within the operation of that section.

It follows from this decision that the minor here, who had no guardian *ad litem* at all, was not a party to the suit in which the sale was made, and that she was entitled to bring the present suit to declare it not binding without regard to the provisions of section 47, Civil Procedure Code. It follows also from the two decisions last mentioned that the plaintiff, not having been a party to that suit and not having been sufficiently represented by any one who was a party, seeing that the other widow had ceased to have any interest in the estate, the sale was not binding on her, and does not require to be set aside. What has been already said disposes of the

(3) 3 Ind. Cas. 864; 31 A. 572 (P. C.); 6 A. L. J. 822; 6 M. L. T. 279; 13 C. W. N. 1182; 10 C. L. J. 318; 11 Bom. L. R. 1225; 36 I. A. 169.

(4) 25 B. 337 (P. C.); 5 C. W. N. 10; 10 M. L. J. 368; 2 Bom. L. R. 927; 27 I. A. 216.

(5) 26 M. 230; 12 M. L. J. 368.

question of limitation as the new Article 166 and Article 12 are alike inapplicable, and the suit which was instituted within three years of the plaintiff's attainment of majority is not barred. The appeal is dismissed with costs.

SADASIVA AIYAR, J.—The 3rd defendant is the appellant. The plaintiff is the principal respondent. The material facts might be shortly stated thus: –

The plaintiff is the 2nd widow of the judgment-debtor in Original Suit No. 559 of 1903. The decree in that suit was transferred from the Vizianagaram District Munsif's Court to the Rajam District Munsif's Court for execution. The Rajam District Munsif's Court on the application of the decree-holder (the present 1st defendant) allowed execution against the plaintiff (junior widow) and the 2nd defendant (senior widow). Under section 234 of the old Code (section 50, clause 1, of the present Code), it was the Court which passed the decree to which the application by the decree-holder to execute the decree against the widows of the judgment-debtor ought to have been made and it is that Court which ought to have passed the order allowing execution. However, the Rajam District Munsif's Court somehow passed the order.

Another defect in that order was that, while the two widows jointly represented the estate of the deceased judgment-debtor (each of them representing half the said interest) the decree-holder, admitting this fact and knowing that the plaintiff (junior widow) was a minor, represented to the Rajam District Munsif's Court that she was a major, brought her on record as a major, and conducted execution proceedings against her and brought to sale the plaint properties including her moiety of the interest therein as if she was a major. The 3rd defendant purchased the two moieties of the two widows in the Court-auction sale, he also knowing that she (the plaintiff) was a minor. The purchaser (3rd defendant) and the decree-holder (the 1st defendant) were also guilty of some other fraudulent acts (as found by the lower Appellate Court) in connection with this Court-auction sale.

The sale took place on 19th October 1906 and it was confirmed on the 23rd January 1907. The present suit was brought on the 13th March 1909 praying for the following reliefs: (*a*) that the Court-auction sale of 19th October 1906 may be set aside, (*b*) that it may be declared invalid, (*c*) that such further or other reliefs might be granted, (*d*) that costs might be awarded.

The lower Courts have granted the reliefs prayed for by the plaintiff. I ought to have mentioned that the plaintiff asked for the above reliefs, not by a plaint in a regular suit, but by an application put in under section 47 of the Civil Procedure Code, which application was converted into a suit by the District Munsif's Court of Rajam.

So far as the merits are concerned, I need only say that on the findings of the lower Appellate Court the plaintiff was entitled to a decree, as the Court-auction sale was brought about by the fraud of the decree-holder and the Court-auction purchaser—a fraud having two branches, one directed against the plaintiff, the junior widow of the judgment-debtor, the other directed against the executing Court, which was wilfully kept in ignorance of the fact of the plaintiff's minority and of the offer of the Court-auction purchaser in another suit (the decree in which was simultaneously executed) of three times the purchase-money for which it was ultimately knocked down. The plaintiff also relied on the contention that the District Munsif's Court of Rajam had no jurisdiction to allow execution against her as the legal representative of her husband, as that Court was not the Court which passed the decree. Having regard, however, to the decision of Benson and Miller, JJ., in *Thamboo Pillai* v. *Sriramulu Naidu* (6), to the effect that an order of the executing Court allowing execution against the legal representatives of the judgment-debtor is not void, in other words, that the defect of jurisdiction in the executing Court is not such a defect as makes its order wholly ineffectual, I do not think that the plaintiff is entitled to succeed on that technical ground alone.

Another ground on which the plaintiff (respondent) asks us to uphold the decision of the lower Court is that as the plaintiff was not represented by a guardian in the execution proceedings, she was no party at all to the proceedings and the sale thereunder, that it is only a person who was a

(6) 17 M. L. J. 300.

party to the execution proceedings that is obliged to set them aside and that a person in the position of a stranger to the proceedings need only obtain a declaration that the proceedings have not affected her rights. Though the plaintiff also prayed in her plaint for setting aside the sale, that prayer may be treated as a surplusage and the suit may be treated as a mere suit for a declaration of the invalidity of the sale as against the plaintiff's rights in her husband's properties.

In answer to this contention of the plaintiff, the appellant urged that according to the decision of the Privy Council in *Malkarjun* v. *Narhari*(4), the legal representative of a deceased judgment-debtor ought to have the execution sale set aside by proper proceedings, even though he was not made a party to the execution proceedings and even though a wrong party has been joined as such legal representative; that on similar reasoning, a minor who was brought in as legal representative, but for whom a guardian was not appointed, must also have the sale set aside by proper proceedings and should not be allowed to treat it as invalid as against her without a positive cancellation of the sale and that this rule of law applies *a fortiori* in a case like the present where a co-widow, one of the legal representatives, was a major and was on the record. The rejoinder of plaintiff to this contention of appellant is that though, in the absence of fraud or collusion, where a Court and a decree-holder treat a person who is not the legal representative of the deceased judgment-debtor, as such legal representative or treat one of several legal representatives as the sole legal representative and conduct execution proceedings, such execution proceedings ought first to be set aside by the true legal representative or by those legal representatives who had not been added as such by proper proceedings, yet that rule does not apply to a case where the decree-holder and the Court did purport to bring in the proper legal representative (or one of the proper legal representives) who was a minor as representing repectively the whole (or a portion) of the estate of the deceased judgment-debtor, but had not put him or her properly on the record by appointing a guardian to act for him or her in the execution proceedings, and that this non-applicability of the rule laid down in *Malkarjun* v. *Narhari* (4) to such a case becomes more pronounced as in this case, it was through the decree-holder's fraud and not through his mere ignorance that the minor legal representative was not represented by a guardian. I think that this contention of the plaintiff in rejoinder ought to be accepted. In the Privy Council case in *Rashid-un-Nisa* v. *Muhammad Ismail Khan* (3), not only the *decrees* obtained against a minor without a proper guardian having been appointed for her, but even Court-auction sales held against the interests belonging to a minor legal representative (among the several legal representatives of a deceased jugdment-debtor) were treated and declared invalid in the suit brought by the said legal representative. Mr. V. Ramesam, who partly argued the appellant's case with acuteness and persistence, contended that that case in *Rashid-un-Nisa* v. *Muhammad Ismail Khan* (3), did not decide that even such a minor legal representative need not have the sale set aside by proper legal proceedings and need only sue for the declaration of the invalidity of the Court-auction sales as against her interests. I have carefully read through that judgment. In the Court of first instance in that case, the suit seems to have been brought (see the report at page 572) for a declaration that the decrees and sales were invalid and also for the relief that they should be set aside so far as the plaintiff was concerned. Thus, as in the present case, there seem to have been prayers for a declaration of invalidity and also for setting aside. It is not, of course, surprising that plaintiffs in such cases are not clear in their own minds as to whether there is a necessity for a positive cancellation through Court of such sales and decrees or whether mere declaration will do, when learned gentlemen of the Bar are able to put forward plausible arguments for both views. In the present case the plaintiff has been careful to add also a prayer for "further and proper reliefs which the Court may deem fit." In that Privy Council case in *Rashid-un-Nisa* v. *Muhammad Ismail Khan* (3), the Subordinate Judge seems to have given both the reliefs (see page 575)

which reliefs are, however, spoken of by the reporter as "the relief she" (the plaintiff) "claimed." Their Lordships of the Privy Council do not make any definite pronouncement on the question whether the sales were *void* as against the plaintiff and need not, therefore, be set aside and whether, therefore, a mere declaration of the invalidity will do or whether they were *only voidable* by the plaintiff as regards her interests and whether, therefore, she should ask in the suit for a relief as to their cancellation. At page 583, their Lordships simply restore the decree of the Subordinate Judge.

While in the case in *Malkarjun* v. *Narhari* (4) the estate of the deceased judgment-debtor could be treated (owing to the wrong order of the Court which had jurisdiction to pass that order) as sufficiently represented in execution proceeding by the wrong legal representative, and hence that the right legal representative should have the sale set aside by taking proper proceedings and could not treat such a sale as completely void, a legal representative who was a minor not represented by a guardian and who could, therefore, not act at all in the proceedings for the protection of the interests of the estate, should be treated as *no party at all to the proceedings*, that the interest in the estate representated by her should also be treased as not put in a position to be legally dealt with by the proceedings in the executing Court and that such a minor legal representative need not bring a suit to have execution proceedings set aside and might properly content herself with a prayer for declaration of the invalidity of the execution proceedings as against her and as against the interests she possessed in the deceased judgment-debtor's estate.

I have to deal finally with the contention that the plaintiff's only remedy was by an application under Order XXI, rule 90 (old section 311), of the Civil Procedure Code to have the execution sale set aside and that that application is barred by limitation as not having been brought within the 30 days allowed for that purpose by Article 166 of the Limitation Act. As I have remarked before in this case, an application was put in by the plaintiff under section 47 of the Civil Procedure Code and this suit arose out of the transformation of that application into a plaint. Before section 311 of the Civil Procedure Code was amended and re-enacted as Order XXI, rule 90, of the Civil Procedure Code, applications to set aside execution sales for fraud were treated as coming under section 244, and not under section 311. By the amended provisions in Order XXI, rule 90, an application to set aside an execution sale for fraud was put on the same footing as an application to set aside an execution sale *on the ground of material irregularity*. It seems no doubt hard upon a judgment-debtor whose properties have been sold for a song by the fraud of the decree-holder, that he should be compelled to come in within 30 days though he might not have known of the fraud till after the 30 days had expired. Section 18 of the Limitation Act would not help him in getting an extension of the 30 days unless, after the date of the fraudulent sale, the decree-holder and the purchaser kept him by fraud from the knowledge of his right to make an application, especially where the Court-auction purchaser has joined the decree-holder in bringing about a fraudulent sale. It does seem a denial of justice to hold that the judgment-debtor should apply within 30 days of the sale to have it set aside, but I do not see my way to get over the plain words of Article 166 of the Limitation Act and I feel myself constrained to hold that if this suit is treated as an application to set aside the sale as distinguished from a suit for a declaration of the invalidity of the sale as against the plaintiff's rights, it must be treated as barred by limitation. So far as the suit is for the declaration of the invalidity of the sale, it is of course not barred by limitation. The decretal portion of the judgment of the District Munsif (see page 15 of the printed pleadings) and the decree of the District Munsif (see page 38) merely give such a declaration and there is no decree directing the sale to be set aside and hence the decree seems to me to be quite correct. As regards those hard cases which I just now referred to, if the fraud was only on the part of the decree-holder and not of the Court-auction purchaser, I think the Legislature intended that a *bona fide* Court-auction-purchaser should be protected

after 30 days, and that an application to set aside the sale should be brought within 30 days of the sale, even though the judgment-debtor was ignorant of the sale and of the decree-holder's fraud which brought about the sale. The judgment-debtor in such a case ought to be left to his remedy for damages caused to him by the decree-holder's fraud.

The case where both the decree-holder and the Court-auction purchaser have been guilty of fraud raises a question of greater difficulty and nicety. Is it reasonable to hold that even in such a case the judgment-debtor should only sue them for damages for the fraud after the expiry of the 30 days and cannot get back his property which had been sold in the Court auction through the fraud of both the decree-holder and the purchaser? After anxious consideration and with great diffidence I am inclined to hold that the judgment-debtor even in such a case cannot apply under Order XXI, rule 90, after the expiry of the 30 days for setting aside that sale. As regards the relief for the setting aside of the sale, the procedure pointed out by the Legislature is only by an application under Order XXI, rule 90. It may be that other appropriate reliefs, which in justice are due to the judgment-debtor to get rid of the effects of the fraud practised by the Court-auction purchaser, may be open to him by instituting a suit praying for such other reliefs. I do not wish to hold that the Courts are powerless to imagine, invent, and grant other appropriate reliefs in such cases. It may be that the Court without setting aside the sale can give an injunction to the Court-auction purchaser to reconvey the property to the judgment-debtor. Such injunction would have an effect similar to the effect of a decree for specific performance of a contract to sell. The hands of Courts of Justice are not tied in these matters simply because, to support the grant of a particular appropriate relief, no exact precedent could be quoted. As regards a suit for such other appropriate reliefs that suit would be governed by Article 95 of the Limitation Act, which gives three years from when the fraud becomes known to the party wronged. In the result I would also dismiss the appeal with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 15 OF 1909-10 OF BENARES DISTRICT.

November 26, 1910.

Present:—Mr. Porter, S. M., and Mr. Baillie, J. M.,

SHAHDEO—APPELLANT

versus

MAHARAJA OF BENARES—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 22—Succession—Collateral sharing in cultivation in part of holding, right of, to inherit whole holding.

A person who shares in the cultivation of any part of a holding shares in the cultivation of the holding and is entitled to inherit the entire holding.

Second appeal from an order of the Commissioner of the Benares Division, dated the 4th May 1910, reversing that of the Assistant Collector in a case of ejectment.

JUDGMENT.

BAILLIE, J. M., (*November 7th*, 1910).—The facts are undisputed. Appellants are collateral relatives of the deceased tenant and shared with him in the cultivation of one of the numbers included in the holding at the time of his death. The other numbers are in the possession of the mortgagees. The Commissioner has held that the deceased tenant's interest in the holding devolved on the appellants in regard to the one number which was in their cultivation, and did not devolve in regard to those numbers which were cultivated by the mortgagees. In this finding the Commissioner has taken a view contrary to that which is usually accepted. It appears to me that a person who shares in the cultivation of any part of a holding shares in the cultivation of the holding and that the holding must be dealt with as a whole. I would find, therefore, that the interest of the deceased tenant has devolved on the appellant and that he is not liable to ejectment from any part of the holding as a tenant holding from year to year.

I would allow the appeal with costs on respondent.

PORTER, S. M.—I concur.

Appeal allowed.

CALCUTTA HIGH COURT.
CRIMINAL REFERENCE No. 36 OF 1914.
CRIMINAL APPEAL No. 983 OF 1914.
January 14, 1915.
Present:—Mr. Justice Fletcher and
Mr. Justice Beachcroft.
EMPEROR—PROSECUTOR
versus
MOHAR ALI SHEIKH—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 374, 376 (b)—Reference—Capital charge—Accused undefended—Re-trial, order of—High Court, power of.

When an accused appears before a Judge on a Capital charge, he ought not to be allowed to go undefended, the custom being for the Judge to appoint or request any member of the Bar to conduct the defence of the accused.

Under section 376 (*b*), Criminal Procedure Code, the High Court has jurisdiction to order a new trial on the same or an amended charge.

Reference made by the Additional Sessions Judge of Mymensingh under section 374, Criminal Procedure Code.

Mr. *Orr* (Deputy Legal Remembrancer), for the Crown.

Babu *Birbhusan Dutt*, for the Accused.

JUDGMENT.—This case comes before us on a reference made by the learned Additional Sessions Judge of Mymensingh under the provisions of section 374, Code of Criminal Procedure, and also on appeal by the accused. The accused was tried before the learned Additional Sessions Judge with the aid of a Jury on two charges; *first* of all, with having murdered one Jamir Sheikh and *secondly*, with voluntarily causing hurt by a cutting instrument to one Kocha. The present case is one that has caused us considerable anxiety, because the accused was undefended before the learned Sessions Judge. That is a course which ought not to be adopted in cases where the accused is tried on a capital charge. There has been a practice long established and well-recognised that when an accused appears before the Judge on a capital charge, the Judge is accustomed to request a member of the Bar who practises before him to undertake the defence of the accused. That obligation has, so far as I am aware, always been recognized by the profession, who always have willingly undertaken the defence of the accused so charged at the request of the presiding Judge. However, the learned Judge in the present case did not appoint or request any member of the profession to conduct the defence of the accused, the result being that the case has been tried practically *ex parte* and the difficulties that appear on the evidence have not been cleared up in the course of the cross-examination either by the accused himself or by the learned Judge. The evidence, as it stands on the record, is such that we are unable to confirm the sentence passed on the accused. What the points of difficulty transparent to any person who has any knowledge of the value of evidence are, it is not our duty to state at present nor do we think it right that at the present moment we shall enumerate which are the points that have pressed upon us. The only question is, what ought we to do in the present circumstances? If the story relied upon by the prosecution be true, an exceedingly cruel murder has been perpetrated and public safety requires that, if possible, the person who has perpetrated that murder should be brought to justice. Section 376 (*b*), Code of Criminal Procedure, gives us jurisdiction to order a new trial on the same or an amended charge. That being so, we consider that in this case, we are bound to send the case back to the learned Judge with a direction that the accused be re-tried on the same charges that have already been framed against him and we would request the learned Judge to see that, in the new trial, some gentleman represents the accused before him.

We, therefore, decline to confirm the sentence of death passed on the accused and send the case back to the learned Judge for the accused being re-tried.

Re-trial ordered.

MADRAS HIGH COURT.
CRIMINAL REVISION CASE No. 438 OF 1914.
CRIMINAL REVISION PETITION No. 368 OF 1914.
March 15, 1915.
Present:—Mr. Justice Ayling.
THE MAHARAJA OF VENKATAGIRI—PETITIONER
versus
AMBARKANA SRINIVASA ROW—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 146—Attachment of property—Duration of attachment—Adjudication of rights of parties by competent Court—Magistrate, duty of, to withdraw attachment.

JAI DEBI KUAR *v.* EMPEROR.

An order of attachment of property under section 146 of the Criminal Procedure Code remains in force until withdrawn, but it is the duty of the Magistrate to withdraw it and release the attachment as soon as it is brought to his notice that a competent Court has determined the rights of the parties thereto or of the person entitled to possession.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Sub-Divisional Magistrate of Gudur, dated 28th February 1914, in Miscellaneous Case No. 3 of 1910.

Mr. *S. Subramania Iyer*, for the Petitioner.

Mr. *P. R. Grant*, for the Public Prosecutor.

Mr. *I. V. Ramanuja Row*, for the Respondent.

ORDER.—An order of attachment of property under section 146 of the Criminal Procedure Code remains in force until withdrawn, but it is the duty of the Magistrate to withdraw it and release the attachment, as soon as it is brought to his notice that a competent Court has determined the rights of the parties thereto, or the person entitled to possession The only question is whether that has been done in the present case. The finding of the District Judge on the first issue in Original Suit No. 3 of 1902 concludes the question of title between the parties to that suit. The fact that he was unable to determine the question of possession and that this Court remarked in its appeal judgment that defendant's (the present petitioner's) evidence of *enjoyment* was equally weak, is immaterial.

The continuance of the attachment is illegal and it should be released at once.

Ordered accordingly.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 146 OF 1915.

April 21, 1915.

Present:—Justice Sir P. C. Banerji, Kt.

JAI DEBI KUAR—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 500—Defamatory statement—Publication of libel.

The accused made certain defamatory statements against a Government Official in her petition to the Lieutenant Governor, and on inquiry she repeated the same statements before two Magistrates on different occasions:

Held, that the statements made before the two Magistrates were the publication of the original defamatory statements made in the memorial to the Lieutenant-Governor and the accused was guilty of three separate publications of the libel.

Application in revision against an order of the Sessions Judge of Moradabad.

Mr. *S. C. Mukerji*, for the Applicant.

The *Assistant Governme l Advocate*, for the Crown.

JUDGMENT.—This is an application for the revision of the order of the learned Sessions Judge of Moradabad, affirming the conviction of the applicant for an offence under section 500 of the Indian Penal Code. It appears that the applicant, *Musammat* Jai Debi, presented an application to His Honour the Lieutenant-Governor in which she charged the complainant, Mr. Krishna Chandra Joshi, Deputy Collector, with instigating her opponent, Kaliyan Rai, to bring false charges against her. An inquiry was ordered and Mr. Nanavati, the Collector of Budaun, sent for the applicant and she appeared before him and repeated what she had said in her memorial, and added that Mr. Krishna Chandra Joshi had asked for a bribe from her which she had refused to pay. A further inquiry was held by Mr. Ingram, the successor of Mr. Nanavati, and before him also she apparently repeated what she had stated in her memorial to His Honour the Lieutenant-Governor. It was in regard to these statements that she was prosecuted, and she has been convicted on three separate charges, namely (1) of the statement made in the memroial to His Honour the Lieutenant-Governor, (2) the statement made before Mr. Nanavati, and (3) the statement made before Mr. Ingram.

It is urged that she could not be convicted on three different charges, because the state-

ments made before Mr. Nanavati and Mr. Ingram cannot be demeed to be a publication of the libel inasmuch as she made the statements in answer to question put to her. I am unable to agree with this contention. There was no obligation on the applicant to make any statement to Mr. Nanavati imputing dishonesty and bribery to Mr. Krishna Chandra Joshi, and there was equally no obligation on her to make defamatory statements in regard to that officer before Mr. Ingram. The statements made by her were clearly publications of the original defamatory statement made in the memorial to the Lieutenant-Governor and there were thus three separate publications of the libel. The case does not fall within any of the exceptions to section 499 of the Indian Penal Code. As the learned Sessions Judge has pointed out, exception (2) has no application as there was no expression of opinion. As to exception (8), there was nothing to show that she acted in good faith. The applicant was, therefore, rightly convicted on three different charges, and I see no reason to interfere with the decision of the Court below.

I accordingly dismiss the application.

Application dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION NO. 113 OF 1915.

March 11, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

EMPEROR—APPLICANT

versus

GANGUA—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 339—Approver—Pardon forfeited—Power of Sessions Judge to direct prosecution—Plea not taken before Committing Magistrate taken before Sessions Judge, legality of.

In a case of dacoity one of the accused *G* was given a conditional pardon. The Sessions Judge, being of opinion that he had not spoken the truth, directed his prosecution under section 397 of the Penal Code. *G* pleaded pardon before the Sessions Judge, but not before the Magistrate:

Held, that the Sessions Judge had no authority to direct the prosecution of *G* on any specific charge and that if he came to the conclusion that the approver had wilfully concealed anything essential or given evidence on any point which was positively false, he was entitled to record an opinion to that effect and to invite the attention of the District Magistrate to his opinion or possibly to suggest the propriety of his prosecution. [p. 324, col. 1.]

Emperor v. *Kothia*, 30 B. 611; 8 Bom. L. R. 740 4 Cr. L. J. 346; *Kullan* v. *Emperor*, 2 Ind. Cas. 343. 9 Cr. L. J. 571; 32 M. 173; *Aligiriswami Naicken. In re*, 5 Ind. Cas. 831; 7 M. L. T. 121; 11 Cr. L. J. 251 (1910) M. W. N. 5; 33 M. 514; *Emperor* v. *Aban. Bhushan Chuckerbutty*, 8 Ind. Cas. 741; 11 Cr. L. J. 702; 37 C. 845, referred to.

Held, further, that *G* was entitled to plead pardon before the Sessions Judge, although he had not done so before the Committing Magistrate. [p. 324, col. 2.]

Criminal revision against an order of acquittal of the Sessions Judge of Mainpuri.

Mr. *R. Malcomson*, for the Crown.

JUDGMENT.—In this case it appears that one Gangua was suspected of having taking part in a serious dacoity, committed at a village called Manpore in the Etawah district on the 23rd of October 1913. He made a confession before a Magistrate and received a conditional promise of pardon. He was produced before the Sessions Judge as a witness against Abadua and others (Sessions Trial No. 8 of 1914, Etawah Sessions). The learned Sessions Judge who tried that case came to the conclusion that Gangua had not given true evidence. We have examined the judgment in that case, and in some points we find it a little difficult to follow the reasoning of the learned Sessions Judge. Apparently, however, he was of opinion that Gangua had in any case, whether he was actually concerned in the dacoity or not, made false statements regarding a certain pair of earrings produced as one of the Exhibits in the case. He concluded his order, after directing the acquittal of the accused persons then before him, with the following words:—"The approver has not spoken the truth and he will, therefore, forfeit his pardon. The confession made by him may be sufficient for his own conviction on the original charge of dacoity, though it is valueless without corroboration as against his associates. I direct the prosecution of Gangua on a charge under section 397." In accordance with this order proceedings were taken against Gangua and he was committed for trial. In the Committing Magistrate's Court Gangua did not plead the pardon, and it was apparently taken for granted that the Sessions Judge's order of May 26th, 1914, quoted above, was conclusive on this point. When Gangua was placed on his trial before the successor of the learned Sessions Judge who had passed

the order of May 26th, 1914, he did plead that he had not broken any of the conditions on which pardon had been tendered him and, therefore, had not forfeited his pardon. Upon this the learned Sessions Judge appears to have called upon the Pleader employed to conduct the prosecution in that particular case to state what evidence he relied upon in order to prove that Gangua had forfeited his pardon. He made a note of various statements on this point made by the Pleader and thereupon passed an order, accepting the prisoner's plea that he had not broken the conditions of his pardon, acquitting him and directing his immediate release. The record was called for by this Court on a perusal of the Sessions statements for the district of Etawah for the month of November 1914, and is before us in order that we may consider the propriety of the above proceedings.

We have examined a number of reported cases, in which the question of the change in the law effected by the substitution of the word "forfeited" for the word "withdrawn" in section 339 of the Code of Criminal Procedure has been considered by various High Courts. We may refer to *Emperor* v. *Kothia* (1), *Kullan* v. *Emperor* (2), *Aligiriswami Naicken, In re* (3), *Emperor* v. *Abani Bhushan Chuckerbutty* (4). We are satisfied that the Sessions Judge's order of May 26th 1914 was irregular and has given rise to the difficulties experienced by the Magistrate and the Sessions Judge in dealing with this matter. The Sessions Judge before whom Gangua gave evidence at the trial of Abadua and others had, no doubt, authority to pronounce his opinion as to the truthfulness or otherwise of the whole or any part of Gangua's evidence, apart from the question whether it was sufficient for the conviction of any of the accused persons then on their trial. If he came to the conclusion that Gangua had wilfully concealed anything essential, or given evidence on any point which was positively false, he was entitled to record an opinion to that effect and to invite the attention of the District Magistrate to his opinion, or possibly to suggest the propriety of Gangua's prosecution. He had no authority to direct the prosecution of Gangua on any specific charge. When the Committing Magistrate took up this matter it was open to Gangua to have pleaded his pardon in that Court, precisely as he did afterwards before the Court of Session. If he had done so, the Magistrate would have been bound to inquire into the matter, at least to the extent of satisfying himself that there was *prima facie* ground for holding that Gangua had forfeited his pardon, and to include in his commitment order a statement of the evidence on which he relied as establishing this fact. Probably the form of the order passed by the Sessions Judge at the trial of the case against Abadua and others prevented the committing Magistrate from looking at the matter from this point of view. When the case against Gangua came before the Sessions Court, Gangua was entitled to plead his pardon, and the Sessions Judge was right in recording the plea and in asking the Pleader, employed to conduct the prosecution, what evidence he intended to offer in disproof of the same. Ordinarily, in our opinion, the proper course to have followed in such a case would be, first of all, to have put in evidence the record of the statement made by Gangua as a witness at the former trial, together, if necessary, with evidence as to the identity of the person making that statement. In order to form an opinion whether in the course of that statement Gangua had given false evidence, or had wilfully concealed anything essential, it might very possibly have been necessary for the learned Sessions Judge to have recorded evidence in the case, or at any rate the evidence particulary bearing on the question of the recovery of the pair of earrings already alluded to. In passing an order of acquittal without taking any evidence, and without any withdrawal of the prosecution by a Public Prosecutor properly authorized to withdraw the same under section 494 of the Code of Criminal Procedure, the learned Sessions Judge adopted, in our opinion, an irregular procedure. At the same time, under the circumstances of this particular case, we are not disposed to interfere. The fact of the matter is, as already pointed out, that the Courts concerned, and we have no doubt also the District Magistrate, were

(1) 30 B. 611; 8 Bom. L. R. 740; 4 Cr. L. J. 346.
(2) 2 Ind. Cas. 343; 9 Cr. L. J. 571; 32 M. 173.
(3) 5 Ind. Cas. 831; 7 M. L. T. 121; 11 Cr. L. J. 254; (1910) M. W. N. 5; 33 M. 514.
(4) 8 Ind. Cas. 721; 11 Cr. L. J. 702; 37 C. 845.

placed in a difficulty by the irregular order passed by the Sessions Court on May 26th, 1914. Apparently, in the opinion of those responsible for conducting the prosecution, Gangua had not given false evidence, either in respect of this pair of earrings or in any other matter of importance. Consequently when the learned Pleader instructed by the District Magistrate was called upon to inform the Sessions Judge what evidence there was on which he relied as showing that Gangua had forfeited his pardon, he was unable to state that evidence to the satisfaction of the Sessions Court. It would seem that this prosecution ought never to have been instituted and would never have been instituted but for the Sessions Judge's order of May 26th 1914.

For these reasons we decline to interfere in this matter, and merely order that the record be returned. If Gangua is under arrest he should be at once released ; otherwise his security is hereby discharged.

Record returned.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION PETITION NO. 95 OF 1914.

June 15, 1914.

Present:—Mr. Stanyon, A. J. C.

SAIYYAD RAHIM—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Master and servant—Criminal acts of servants—Master, liability of, conditions of—Forest Act (VII of 1878), s. 25 (d), *applicability of—Licensee under Forest Act, liability of, for agent's acts—Statute, construction of—"Intention of the Legislature", meaning of.*

A master is not criminally responsible for the acts of his servants, unless he expressly commands or personally co-operates with them or unless the criminal liability is imposed by Statute upon him as regards the acts or omissions of his servants. [p. 326, col. 2, p. 327, col. 1.]

In the cases where a master is held liable for the criminal acts of his servants under a Statute, the question is whether upon the true construction of the Statute in question, the master is intended to be made criminally liable for the acts of his servants done within the scope or in the course of their employment. [p. 327, col. 2.]

A licensee under the Indian Forest Act (VII of 1878) would be liable *criminaliter* for every act of his agent, done in carrying on the business delegated to him, which amounts to a breach of the condition of the license made criminally punishable by the Act or any rule thereunder. [p. 328, col. 1.]

Where the owner of a certain number of cattle entrusted them to a grazier who took them into a forest reserve to afford them better pasturage:

Held, that the owner was not criminally liable, though he was civilly liable. [p. 328, col. 2.]

Held, further, that the words of section 25 (*d*) of the Indian Forest Act (VII of 1878) clearly apply only to the person who does any of the acts mentioned therein. [p. 328, col. 2.]

Semble. Statutes passed for the benefit of the public health and sanitation are construed in the same way as licensing Acts. [p. 327, col. 2.]

Nothing is to be regarded within a Penal Statute which is not clearly and intelligibly described in the very words of the Statute itself [p. 328, col. 2.]

The phrase "intention of the Legislature" cannot be extended to cover a speculative opinion as to what the Legislature probably would have meant although there has been an omission to enact it. [p. 329, col. 1.]

Criminal revision against the conviction and sentence passed by the Extra Assistant Commissioner and Magistrate, first Class, Chanda, dated the 23rd December 1913.

Mr. *M. R. Bobde*, for the Applicant.

Mr. *G. P. Dick*, for the Opposite Party.

JUDGMENT.—The facts of the case are beyond dispute. The applicant is the owner of a certain number of sheep and goats. He entrusted these animals to one Kanna, a grazier, who undertook to graze them together with sheep and goats entrusted to him by other persons for the same purpose. Kanna had also some animals of his own. The entire flock of about 115 sheep and goats was found on the 14th September 1913 grazing under the control of Kanna without license in a Government reserved forest. There is nothing to show that the present applicant instigated or connived at or permitted that trespass. He has been held criminally liable for the act of his grazier Kanna and fined Rs. 50. Against that conviction and sentence, which were arrived at by way of summary trial by a Magistrate of the first Class, the applicant has applied to this Court for revision, on the ground that he is not criminally responsible for the act of his agent or servant, the grazier. A Rule to show cause issued to the District Magistrate, who has responded thereto, and the learned Government Advocate has been heard in support of the conviction. His argument, shortly put, is this, that the accused is criminally liable for breaches of the Forest Law

committed by his servant, because he is under a statutory liability to see that his animals do not enter a reserved forest without a license. In other words this is claimed to be one of many exceptions to the general rule, that a master is not criminally liable for the acts of his servant, unless he expressly command or personally co-operate in them.

The learned District Magistrate is less confident of the soundness of the conviction. He writes:—

"I have little doubt but that the applicant connived at the illicit grazing of his cattle, and that his defence is false; but in the absence of proof of his active connivance his criminal liability is somewhat doubtful. Such practices are very common in this and other districts, and it is advisable to stop them if it can be done. But the legal liability of the owner is not a settled fact."

(Apparently by "legal liability" the learned District Magistrate means "criminal responsibility").

On behalf of the accused reliance is placed upon a case which is directly in point, namely, the case of *Queen-Empress* v. *Kristnayyan* (1) in which it was held: "The owner of cattle found grazing in a forest reserve cannot be convicted under Madras Forest Act, section 21 (*d*), in the absence of evidence that he either pastured the cattle or permitted them to trespass in the reserve." The enactment above mentioned is in the same terms as section 25 (*d*) of the Indian Forest Act, which has been applied to this case. The latter makes punishable "Any person who, in a reserved forest, trespasses or pastures cattle, or permits cattle to trespass." On the other hand, filed with the record is an unreported case in which the Bombay High Court refused to interfere—without giving any reason for such refusal—with concurrent findings by the lower Courts convicting a master under section 25 (*d*) aforesaid for a trespass by his cattle into a forest reserve, though the immediate responsibility lay with his grazier. That Court, however, held in that case that there had been an overt act by the master, in that he had permitted a single boy of tender years to look after his cattle in the vicinity of the Government forests. In the present case, there is no allegation that there was any negligence by the applicant which contributed to the trespass, or that Kanna was not a competent grazier. Therefore, the Bombay case cannot be said to be in conflict with the Madras ruling and affords no authority for the proposition put forward by the learned Government Advocate in the present case.

The question is not free from difficulty. The general rule of law that a master is not criminally responsible for the acts of his servants, unless he expressly command or personally co-operate in them, is well established. In criminal cases they must each answer for their own acts, and stand or fall by their own behaviour (Compare Smith's 'Master and Servant,' 5th Edition, page 266, and authorities there cited). In *Cooper* v. *Slade* (2) Lord Wensleydale, in giving judgment, said: "I take the law to be clear that a man cannot be guilty by his agent of an illegal act, and be held responsible for that act, unless he has given the agent authority, express or implied, to do that illegal act. I know that the law of agency in such cases has been much extended by Committees of the House of Commons, but I take it to be a clear proposition of law that if a man employs an agent for a perfectly legal purpose, and that agent does an illegal act, that act does not affect the principal, unless a great deal more is shown: * * * * I conceive that the rule of law is * * * that *no man who is an agent for a legal purpose can make the principal responsible for an illegal act, unless the principal has in some way directly or indirectly authorized it.*" There is a general presumption that *mens rea*, and evil intention, or a knowledge of the wrongfulness of the act, or some blameworthy condition of mind, is an essential ingredient of every offence: *Sherras* v. *De Rutzen* (3),

(1) 15 M. 156; 1 Weir 763.

(2) (1857) 6 H. L. Cas. 746 at p. 793; 10 E. R. 1488; 27 L. J. Q B. 449; 4 Jur. (N.S.) 791; 6 W. R. 461; 108 R. R. 292.

(3) (1895) 1 Q. B. D. 918; 64 L. J. M. C. 218; 15 R. 388; 72 L. T. 839; 43 W. R. 526; 18 Cox. C. C. 157; 59 J. P. 440.

Coppen v. *Moore* (4); *Chisholm* v. *Doulton* (5). The mere fact that the master may be liable *civiliter* does not make him liable *criminaliter* for an offence, illegal act or tort by his servant: *Laycock's* case (6); *Sanderson* v. *Baker* (7); *Woodgate* v. *Knatchbull* (8); *Bagge* v. *Whitehead* (9).

This general rule of English Law is also the law of British India, and has been followed in these Provinces: *Suffer Ally Khan* v. *Golam Hyder Khan* (10); *Uttam Chand* v. *Emperor*(11); *Local Government* v. *Lakhmichand* (12).

But there are exceptions to this general rule. In some cases criminal liability is imposed by Statute upon the master as regards the acts or omissions of his servants, both in England and in India. In some enactments provision to that effect is expressly made *e. g.*, the Pawnbrokers Act, 1872 (35 and 36 Vic., Chapter 93), section 8, whereunder anything done or omitted by the servant, apprentice, or agent of a pawnbroker, in the course of, or in relation to, the business of pawnbroker; shall be deemed to be done or omitted (as the case may be) by the pawnbroker; the Merchant Shipping Act (39 & 40 Vict., Ch. 80), section 28, whereof imposed a penalty on any owner of a British ship who should allow the ship to be overloaded; and sections 154 and 155 of the Indian Penal Code, whereby owners and occupiers of land are made criminally responsible for omissions by their servants and agents, even though they may be ignorant of such defaults: *Queen-Empress* v. *Prayag Singh*(13), followed in *Kazi Zeanuddin Ahmed* v. *Queen-Empress* (14). In the cases of other enactments, principals have been held criminally liable for the illegal acts of their agents by virtue of constructions placed by the Courts on the language of the Statutes concerned. But in all such cases the question is whether upon the true construction of the Statute in question, the master is intended to be made criminally liable for the acts of his servants, done within the scope or in the course of their employment. The master is relieved from criminal responsibility if he shows that he acted in good faith and had done all that was reasonably possible to do to prevent the commission by his agents and servants of offences against the Statute. Similarly, if a servant does that for which he is not employed, or if he acts for his own personal benefit, the master will not be liable: *Boyle* v. *Smith* (15); *Anglo-American Oil Company, Limited* v. *Manning* (16). License cases form a class by themselves in which the master is generally held responsible by reason of his contractual undertaking to use his license in a particular manner and to avoid acts which are penal and on the occurrence of which, the licensee becomes liable to the penalties imposed: *Massey* v. *Morris* (17); *Brooks* v. *Mason* (18); *Emary* v. *Nolloth* (19); *Mullins* v. *Collins* (20); *Commissioners of Police* v. *Cartman* (21); *Queen-Empress* v. *Tyab Alli* (22): *Emperor* v. *Haji Shaik Mahomed* (23); *Empress* v. *Shrikissen* (24); *Emperor* v. *Rustomji Pestonji* (25). Statutes passed for the benefit of the public health and sanitation are construed in the same way as licensing Acts: *Brown* v. *Foot* (26)—a case under the Sale of Food and Drugs

(4) (1898) 2 Q. B. D. 306; 62 J. P. 453; 67 L. J. Q B. 689; 78 L. T. 520; 14 T. L. R. 414; 46 W. R. 620.
(5) (1889) 22 Q. B. D. 736; 58 L. J. M. C. 133; 60 L. T. 966; 37 W. R. 749; 16 Cox. C. C. 675; 53 J. P. 550.
(6) Latch 187.
(7) 3 Wils. 309.
(8) 2 T. R. 148; 1 R. R. 449; 100 E. R. 80.
(9) (1892) 2 Q. B. D. 355; 61 L. J. Q. B. 778; 66 L. T. 815; 40 W. R. 472; 56 J. P. 548.
(10) 6 W. R. Cr. 60.
(11) 15 Ind. Cas. 1007; 39 C. 344; 16 C. W. N. 551; 15 C. L. J. 401; 13 Cr. L. J. 591.
(12) 8 C. P. L. R. 19.
(13) 12 A. 550; A. W. N. (1890) 176.
(14) 28 C. 504; 5 C. W. N. 771.
(15) (1906) 1 K. B. 432; 75 L. J. K. B. 282; 54 W. R. 519; 70 J. P. 115; 21 Cox. C. C. 84; 22 T. L. R. 200; 94 L. T. 30.
(16) (1908) 1 K. B. 536; 98 L. T. 570; 6 L. G. R. 299; 72 J. P. 35; 24 T. L. R. 215; 77 L. J. K. B. 205.
(17) (1894) 2 Q. B. 412; 63 L. J. M. C. 185; 10 R. 342; 70 L. T. 873; 42 W. R. 638; 7 Asp. M. C. 586; 58 J. P. 673.
(18) (1902) 2 K. B. 743; 72 L. J. K. B. 19; 88 L. T. 24; 67 J. P. 47; 20 Cox. C. C. 464; 51 W. R 224; 19 T. L. R. 4.
(19) (1903) 2 K. B. 264; 72 L. J. K. B. 620; 89 L. T. 100; 52 W. R. 107; 67 J. P. 354; 20 Cox. C. C. 507; 19 T. L. R. 530.
(20) (1874) 9 Q. B 292; 43 L. J. C. 67; 29 L. T. 838; 22 W. R. 297.
(21) (1896) 1 Q. B. 655; 65 L J. M. C. 113; 74 L. T. 726; 44 W. R. 637.
(22) 24 B. 423; 2 Bom. L. R. 52.
(23) 32 B. 10; 9 Bom. L. R. 1059; 7 Cr. L. J. 238.
(24) 7 C. P. L. R. 41.
(25) 1 N. L. R. 81; 2 Cr. L. J. 959.
(26) (1892) 66 L. T. 649; 61 L. J. M. C. 110; 17 Cox. C. C. 509; 56 J. P. 581.

Act, 1875; *Collman* v. *Mills* (27), under the Public Health Act, 1891. The same principle of construction is followed in respect of enactments dealing with revenue matters: *Attorney-General* v. *Siddon* (28). So also in the case of public nuisances, press libels and the like, where the object of the Legislature would be defeated if the person really responsible, whether as a licensee or vendor or custodian of the public health, comfort, or safety, could avoid responsibility by delegating to servants and agents the control of the licensed business, the sale of food or drugs, the carrying on of offensive or dangerous trades, the protection of revenue against smuggling, or the like. The principle governing all these cases is that by Statute or by contractual undertaking there is some *public* duty legally binding upon the master, for the breach of which a criminal liability is imposed on him, whether such breach is committed by him personally or by persons whom he chooses to employ in the discharge of that obligation: subject to this that the acts of the servants fall within the scope of their authority. If it is shown that the principal directed the agent to do the illegal act, or really meant he should so act, or afterwards ratified the illegal act, or that he appointed one to be agent to do both legal and illegal acts, to do everything in short which he might think proper to support the interests of the principal, then responsibility can be fastened on the principal: *Cooper* v. *Slade* (2). Applying this principle, I am perfectly clear that a licensee under the Indian Forest Act would be liable *criminaliter* for every act of his agent, done in carrying on the business delegated to him, which amounts to a breach of the conditions of the license made criminally punishable by the Act or any rule thereunder. But in the present case the applicant had not bound himself by any contractual obligation to use or abstain from using the reserved forests in a particular way or to perform any other duty for the breach of which by another, albeit his agent or servant, *criminal* responsibility could be imposed on him. It cannot be said that because he was under a general obligation to obey the Forest Law, therefore, he was also personally liable *criminaliter* to see that all his agents and servants obeyed it. For if this proposition were correct, the principal could be liable for every crime committed by his agent. The applicant was bound to see that his flock did not trespass on reserved forests: and he must be taken to have discharged that obligation when he entrusted the control of that flock to a grazier who was competent to keep the animals from committing such trespass. It is true that when the grazier took them into a forest reserve he did so for the benefit of the applicant, to afford them better pasturage. This fact makes the applicant liable *civiliter*, but I do not think it can be used to strain the law so as to impose criminal responsibility upon him.

The words of section 25 (*d*) of the Indian Forest Act clearly apply only to the person who does any of the acts mentioned therein. Supposing the language to be ambiguous, it must be construed in the manner most favourable to the liberties of subjects: *Reg.* v. *Bhista* bin *Madanna* (29). Nothing is to be regarded as within a Penal Statute which is not clearly and intelligibly described in the very words of the Statute itself: *Empress* v. *Kola Lalang* (30). It is for the Legislature, not the Court, to define a crime and ordain its punishment. It is unquestionably a reasonable expectation that if the Legislature had intended to fasten upon owners such responsibility as has been laid upon the applicant in this case—forming as it does an exception to the general rule of law that a person's criminal responsibility is confined to his own acts—it would not have left its intention to be gathered by mere doubtful inference, or have conveyed it in "cloudy and dark words" only, but would have made it manifest with reasonable clearness. The liability is expressly declared in the rules under which grazing licenses are issued by the Forest Department, and the tendency is to make clear by express words or necessary implication the exceptional cases where a principal is criminally responsible for offences committed by his agent without his knowledge and connivance. The phrase

(27) (1897) 1 Q. B. 396; 66 L. J. Q. B. 170; 75 L. T. 590; 18 Cox. C. C. 481; 61 J. P. 102.

(28) (1830) 1 C. & J. 220; 1 Tyr. 41; 9 L. J.(o. s.) Ex. 7; 35 R. R. 701.

(29) 1 B. 308 at p 311.

(30) 8 C. 214; 10 C. L. R. 155.

"intention of the Legislature" cannot be extended to cover a speculative opinion as to what the Legislature probably would have meant although there has been an omission to enact it: *Salomon* v. *Salomon and Company* (31).

For these reasons I think that *Queen-Empress* v. *Kristnayyan* (1) was correctly decided, and following it I hold that the conviction of the applicant in this case was illegal. It is, therefore, set aside, and the fine, if paid, must be refunded.

Conviction set aside.

(31) (1897) A. C. 22; 65 L. J. Ch. 35; 75 L. T. 426; 45 W. R. 193; 4 Manson, 89.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 155 OF 1913.
CRIMINAL REVISION PETITION No. 133 OF 1913.

August 1, 1913.

In re SUBRAMANIA AYYAR—ACCUSED—PETITIONER.

Criminal Procedure Code (Act V of 1898), s. 530—Bench of Magistrates—Conviction—Some not having heard evidence, effect of.

A conviction by a Bench of Magistrates some of whom have not heard the evidence is vitiated and must be set aside.

Petition, under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898), praying the High Court to revise the judgment of the first Class Sub-Divisional Magistrate of Mayavaram, in Criminal Appeal No. 3 of 1913 (Special Tribunal No. 620 of 1912 on the file of the Stationary Second Class Magistrate of Mayavaram).

Mr. *T. S. Rajagopala Ayyar*, for the Petitioner.

Mr. *J. C. Adam*, for the Public Prosecutor, on behalf of the Government.

ORDER.—In this case the petitioner was convicted by a Bench of five Magistrates, one of whom had not heard all the evidence. This vitiates the conviction—*vide* section 530 of the Criminal Procedure Code, and *Hardwar Singh Lal* v. *Khega Ojha* (1) [followed in *Queen-Empress* v. *Basappa* (2)] and *Damri Thakur* v. *Bhowani Sahoo* (3). The conviction and sentence are set aside, and a re-trial is ordered.

Re-trial ordered.

(1) 20 C. 870.
(2) 18 M. 394; 2 Weir 17.
(3) 23 C. 194.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 275 OF 1915.

April 30, 1915.

Present:—Mr. Justice Piggott.

RAM RAJA DAT—APPELLANT

versus

SHEO DAYAL—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 195 (6)—Sanction to prosecute—Superior Court—Jurisdiction to re-consider whole case.

A Court of superior jurisdiction whose jurisdiction is invoked under section 195 (6) of the Code of Criminal Procedure should re-consider the entire matter on the merits and while allowing all reasonable weight to the opinion of the Court below, it should nevertheless re-consider the question of the propriety of the order of sanction on its merits upon a complete review of the entire facts. [p. 329, cols. 1 & 2.]

Appeal, under section 195, Criminal Procedure Code, against an order of the Sessions Judge, Banda, dated the 27th February 1915, directing the prosecution of the appellant under section 193, Indian Penal Code.

Mr. *P. L. Banerji*, for the Appellant.

Mr. *R. K. Sorabji*, for the Respondent.

JUDGMENT.—This is an application under the sixth clause of section 195 of the Code of Criminal Procedure, asking this Court to revoke an order passed by the Sessions Judge of Banda sanctioning the prosecution of one Ram Raja Dat for having committed the offence of giving false evidence in a deposition made by him on the 12th of August 1914 in the Court of a Magistrate subordinate to that Court. The case came before the Sessions Judge in appeal and hence he has dealt with the application for sanction. He was fully empowered to do so; but it is worth noticing that the evidence given by Ram Raja Dat was believed and acted upon by the Magistrate who heard it. I wish also to note that I look upon an application under section 195, clause (6), as standing on a very different footing from an application in revision. The right conferred by the clause above mentioned may not be exactly a right of appeal, but it is strongly analogous to such right. I think the Legislature intended that a Court of superior jurisdiction whose jurisdiction was invoked under section 195, clause (6), of the Code of Criminal Procedure, should re-consider the entire matter on the merits and while allowing all reasonable weight to the opinion of

the Court below, should nevertheless re-consider the question of the propriety of the order of sanction on its merits upon a complete review of the entire facts. The proceedings out of which the matter now before me has arisen have been of considerable duration and occupied the attention of several Courts. It appears that a dispute arose on the death of one *Musammat* Beni Bai, who was a tenant holding lands as an ex-proprietor, as an occupancy tenant and also as a tenant-at-will. The dispute which arose on her death was as to whether she had or had not left any heir entitled to succeed to her interests as ex-proprietary tenant, occupancy tenant and non-occupancy tenant under the provisions of the Agra Tenancy Act (Local Act II of 1901). The applicant Ram Raja Dat was a collateral of Beni Bai and was a possible successor to her tenancy, provided that he had shared in the cultivation of the tenancy at the time of the lady's death. In the village papers he stood recorded as a sub-tenant of the holding. A dispute between Ram Raja Dat and the *zemindar* Chaudhri Baldeo Prasad, was fought out in the Court of an Assistant Collector of the first Class upon an application for mutation of names under the Land Revenue Act. The enquiry resulted in a clear finding in favour of Ram Raja Dat, whose name was ordered to be recorded in place of *Musammat* Beni Bai deceased in all *khalas*, and with same rights as the deceased lady. That order was never appealed against, nor does it appear that any attempt has been made up to the present to get the question re-litigated by means of any proceedings under the Agra Tenancy Act. What happened was that the Assistant Collector formed a very unfavourable opinion with regard to certain evidence given by Sheo Dayal, *patwari* of the village, in the course of the inquiry before him. He directed the prosecution of Sheo Dayal upon charges of forgery and of giving false evidence. It was before the Magistrate enquring into these charges that Ram Raja Dat made a statement in respect of which it is now sought to prosecute him. Sheo Dayal was convicted in the Magistrate's Court in respect of a charge under section 193, Indian Penal Code, but was acquitted by the Sessions Judge on appeal. He is now the applicant in favour of whom the sanction in question before me has been granted. The statement in respect of which Ram Raja Dat has been orderded to be prosecuted is in the following words: "I did not pay any rent to *Musammat* Beni Bai. I was not her sub-tenant. The word 'sub-tenant' against my name in the coupon of the money order as to 1319 *Fasli* was written by *dhoka*." It may be explained at once that, for three consecutive years, rent due from *Musammat* Beni Bai on account of her holding or holdings was remitted by Ram Raja Dat direct to the *zamindar* by means of money orders. In filling up the prescribed form for one of these money orders, namely, that one by which rent for 1319 *Fasli* was remitted, Ram Raja Dat described the rent as due from *Musammat* Beni Bai, tenant, paid through Ram Raja Dat, sub-tenant. Apart from this document it would seem that the only evidence available to support the charge in respect of which the prosecution of Ram Raja Dat has been sanctioned is to be found in the oral evidence which may be expected to be given by Sheo Dayal *Patwari* and by the two witnesses who were produced by the said Sheo Dayal as his defence witnesses when he himself was on his trial: that is to say, the two witnesses in question were not heard of during the enquiry before the Assistant Collector and appeared in evidence for the first time in Sheo Dayal's defence, after Ram Raja Dat as well as other witnesses had been examined for the prosecution in the case in which Sheo Dayal was accused. From the records before me it appears that what Sheo Dayal and his two witnesses are prepared to assert is something as follows: that a certain sum of Rs. 23-4 5, which happened to be rent due from *Musammat* Beni Bai to her *zamindar*, was paid by Ram Raja Dat to that lady in the presence of the *patwari*, was entered by the latter in his papers as a payment from a sub-tenant to the tenant-in chief and that the thumb-impression of *Musammat* Beni Bai was thereupon taken on the *patwari's siyaha*, in order to attest this payment. The money itself, however, was there and then handed back by *Musammat* Beni Bai to Ram Raja Dat, with a request that he should forward it by money order to the *zamindar*, in payment of the rent due to the latter from *Musammat* Beni Bai herself. So far as the papers before me show, no explanation

has yet been suggested as to why the payment Ram Raja Dat is supposed to have made as a sub-tenant should have amounted to precisely the rent due for the year from the tenant-in-chief to the *zamindar*. It is clear also that, once Sheo Dayal and his fellow-witnesses coming to Court with this story, they will be faced by the fact that the thumb-impression taken on the *patwari's siyaha* has already been judicially examined and found not to be what they said it was, namely, the impression of the left thumb of *Musammat* Beni Bai. This statement of the facts is sufficient to show that the evidence available on behalf of the prosecution as against Ram Raja Dat is not particularly strong or free from suspicion. It is necessary also to consider what are precisely the statements in respect of which it is desired to prosecute Ram Raja Dat. He said, first of all, "I did not pay any rent to Beni Bai" beyond the fact that he three times sent rent due from that lady to the *zemindar* direct to the latter, the only evidence forthcoming to show that this statement was false is that of the witnesses who deposed to the incident already described. Now Ram Raja Dat made this statement as a prosecution witness against Sheo Dayal. Assuming as it seems proper to assume, that the two witnesses subsequently produced in Sheo Dayal's defence were not invented after the charge had been framed, then the facts to which they were prepared to depose must have been known to Sheo Dayal and his legal adviser while Ram Raja Dat was in the witness-box and subject to cross-examination. From the point of view of the defence the statement, "I did not pay any rent to Beni Bai," was a quibble or evasion, intended to keep the actual facts as to payment of rent for 1319 *Fasli*, if possible, from the knowledge of the Court. If it was intended to make that statement hereafter the basis of a prosecution for perjury, it was highly incumbent on the defence to cross-examine the witness in such a manner as would close all avenues of escape behind him, if he was wilfully lying, or would bring the facts clearly to his recollection if he was speaking hastily and in forgetfulness of the precise facts. The importance of paving the way for a subsequent prosecution by a careful and intelligent use of the right of cross-examination seems to be very imperfectly understood in many Subordinate Courts in this country. Ram Raja Dat's *next* statement requiring to be considered is, "I was not her sub-tenant." This is not altogether a pure statement of fact. From one point of view it is a mixed proposition of fact and of law. One thing known for certain at the present stage of this litigation is that the only Court competent by law to pronounce on the correctness of this proposition, which has hitherto dealt with the matter, has given a decision in Ram Raja Dat's favour. The *third* statement to be considered is that on the money order coupon already referred to Ram Raja Dat wrote himself down as a sub-tenant "*dhoka se*," that is to say, by mistake, or through some misunderstanding. From any possible point of view this assertion seems to me to be not a false statement, but a plain truism. I do not think this is a suitable case for a prosecution and I revoke the order of sanction passed by the Court below.

Order revoked.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 168 OF 1915.
CASE REFERRED No. 15 OF 1915.
April 9, 1915.
Present:—Mr. Justice Oldfield and Mr. Justice Napier.
C. KRISHNAMACHARI—ACCUSED
versus
MESSRS. SHAW WALLACE AND COMPANY—COMPLAINANT.

Criminal Procedure Code (Act V of 1898), ss. 179, 181—Charge of criminal breach of trust—Jurisdiction—Special and general provisions—Interpretation.

According to the ordinary canons of construction, a special provision should ordinarily receive effect unqualified by the general. [p. 333, col. 1.]

Section 179 of the Criminal Procedure Code can be applied only to cases in which the consequence necessary to constitute the offence ensues in some place other than that in which the accused's act is done. [p. 333, col. 2.]

It is the Court within whose jurisdiction the primary loss takes place that can take cognizance of the offence of criminal breach of trust. [p. 334, col. 1.]

Where, therefore, the accused was appointed agent for the sale of the complainant's oil at Nandyal and used to send periodical reports to his principal at Madras showing the quantity of oil sold and the amount of money received, but after a certain time ailed to do so and left his place of business and made away with the money:

Held, that inasmuch as the misappropriation was only of the money received and the loss primarily ensued to the complainant as a consequence of the accused's conduct at Nandyal, the Court of the Presidency Magistrate at Madras had no jurisdiction to try the case. [p 334, col. 1.]

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the third Presidency Magistrate, George Town, in his letter R.O.C. No. 132 of 1915.

FACTS.—Messrs. Shaw, Wallace and Co., instituted a complaint before Mr. Narayana Menon, Presidency Magistrate, George Town, for criminal breach of trust against C. Krishnamachari, alleging that he had misappropriated a sum of Rs. 11,000 and odd as their sub-agent at Nandyal for the sale of Messrs. Best and Co.'s kerosene oil. It was found by the Court that the oil was entrusted to the accused at Nandyal, and not at Madras as alleged in the complaint. The Counsel for the accused then contended that the Courts in Madras had no jurisdiction to try the case.

The Presidency Magistrate, after hearing the arguments of the Hon'ble Mr. T. Richmond for the prosecution and Mr. R. N. Aiyangar, for the accused made a reference on the point to the High Court under section 432, Criminal Procedure Code, stating that he was inclined to agree with Mr. R. N. Aiyangar and felt considerable doubt as to whether section 181 (2) was intended to be subsidiary to section 179.

The Hon'ble Mr. *T. Richmond*, for the Complainant:—As the loss took place in Madras and the agent had to render account at Madras and remit money to Madras, the Presidency Magistrate's Court had jurisdiction to try the case. He referred also to section 179, Indian Penal Code, and to the cases in *Rajani Binod Chakravarti* v. *All India Banking Company* (1) and *Rambilas, In re* (2).

Mr. *R. N. Aingar*, for the Accused:—Section 181, sub-section 2, Criminal Procedure Code, was quite clear and section 179 should be subject to section 181 (2). The loss occurred at Nandyal and therefore, only the Court at Nandyal had jurisdiction over the offence.

The *Crown Prosecutor*, for the Government, supported Mr. *R. N. Aiyangar*.

JUDGMENT.

OLDFIELD, J.—The question on this reference is whether the third Presidency Magistrate has jurisdiction to try the accused for an offence punishable under section 406 or 409 of the Indian Penal Code, or whether he should return the complaint for presentation to a competent Court at Nandyal, Karnool District.

The circumstances are set out in the complaint only generally. But the material allegations appear, from the evidence already taken and the statements of complainant's Counsel, to be that the accused was appointed agent for the sale of complainant's oil at Nandyal, that his periodical reports showed a certain quantity of oil sold and a certain sum of money received and (after deduction of commission, etc.) to be accounted for and that, when called on to account, the accused failed to do so, leaving Nandyal after locking up his place of business and secreting his books, the inference being that he had made away with the funds in his charge. No suggestion is made that any oil entrusted to him has been converted to his use or dealt with otherwise than in accordance with complainant's instructions; that is, by sale to customers. The misappropriation relied on is accordingly not of the oil, but only of the money received for it; and we can, therefore, dismiss from consideration what seems to have been thought material before the Magistrate, the allegations as to the origin of the oil whether it came from Madras or Cocoanada. The fact that the accused was appointed agent by an order sent from Madras is also without significance in a criminal case. The only ground, which we have to consider as justifying the jurisdiction of the Madras Court, is that loss ensued there to the complaintant firm as a consequence of the accused's conduct at Nandyal and that the case is, therefore, covered by section 179, Criminal Procedure Code, not by section 181 only, in which offences

(1) 22 Ind. Cas. 192; 17 C. W. N. 1207; 15 Cr. L. J. 48.

(2) 26 Ind. Cas. 136; (1914) M. W. N. 894; 15 Cr. L. J. 688; 16 M. L. T. 505.

under sections 406 and 409 are specially dealt with. In accordance with the ordinary canons of construction the special provision should ordinarily receive effect unqualified by the general. Clear reason must, therefore, be shown in the wording of section 179 or otherwise before complainants' contention can be accepted.

That contention has been endorsed and negatived in different decisions ; but, though in some of them attempts have been made to state the principle applicable in more or less general terms, the weight of such statements is impaired by the fact that either the allegations before the Court and the exact relations between the parties are not stated fully in the reports or the conclusion may have been influenced by uncertainty regarding the place in which the money or property concerned was received or converted by the accused. *Rajani Binod* v. *All India Banking Company* (1) is an instance of the former class of cases, and *George Langridge* v. *Grace Atkins* (3) of the latter.

In this Presidency *Assistant Sessions Judge of North Arcot* v. *Ramaswami Asari* (4), no doubt, supports both the propositions which the prosecution has to establish, that (1) the offence is constituted by the accused's dishonest conversion and the loss which ensued as its consequence, and (2) such loss ensues not only where and when the conversion takes place, but also where the complainant ordinarily receives the accused's accounts and remittances. In the case of *Rambilas, In re* (2), however, two other learned Judges did not feel compelled to treat this as a considered ruling on the point ; and with all due deference we follow them so far. Their decision, however, negatived the first of the propositions above stated, on the ground that the existence of dishonest intention, not the ensuing of loss, was the essential element in the offence of criminal breach of trust and that there was, therefore, no question of any consequence or of the application of section 179 ; and we respectfully dissent from this view. For, we are unable to conceive, and the learned Counsel has been unable to suggest, any case in which more than mere preparation or attempt could be held established but no loss whatever, it may be only a temporary or highly insignificant one, could be found to have been caused. Our conclusion is in fact that the loss ensues immediately on the conversion, because by it the property of the principal, entrusted to the agent, is diminished in the latter's hands. It is the complainant firm's case that accused's collections (less commission) belonged to it from the date of receipt, and it is not alleged that any appropriation was necessary to change their ownership. The date of conversion may be uncertain and susceptible of no more definite statement than as prior to the proper date for remittance. That, however, cannot alter the fact that the firm's funds in Nandyal were diminished. It follows that primarily at least it suffered wrongful loss there.

Complainant's *second* proposition stated above is clearly essential to his contention. For section 179 can be applied only to cases in which the consequence necessary to constitute the offence ensues in some place other than that in which the accused's act is done. It has been supported with reference to the present case on the ground that, although the firm's loss at Nandyal may have been a primary consequence, the loss at Madras the firm's head-quarters where its funds are kept, was a secondary one and was sufficient to attract the operation of the section. This distinction is not recognised explicitly in the majority of the cases relied on before us, perhaps because, as already observed, the place where loss was primarily sustained was uncertain. But it is referred to in *George Langridge* v. *Grace Atkins* (3) as the foundation of the decision in *Ganeshi Lal* v. *Nand Kishore* (5) on which the accused relies; and it was not drawn in the former case, because the assessments in the complaint did not support it. Its validity was moreover endorsed directly in *Sirdar Miru* v. *Jethabhai Amirbhai*(6), where the act in question was a complete causing of

(3) 17 Ind. Cas. 792; 35 A. 29; 10 A. L. J. 431; 13 Cr. L. J. 856.

(4) 22 Ind. Cas. 991; (1914) M. W. N. 324; 26 M. L. J. 235; 1 L. W. 302; 15 Cr. L. J. 207.

(5) 15 Ind. Cas. 319; 10 A. L. J. 45; 13 Cr. L. J. 479; 34 A. 487.

(6) 8 Bom. L. R. 513; 4 Cr. L. J. 54.

grievous hurt and it was held that complainant's consequent incapacity for the statutory period in another jurisdiction would not affect the venue. We follow these authorities and hold that the complainant firm's secondary loss at Madras will not give the third Presidency Magistrate jurisdiction. He must return the complaint for presentation to a competent Magistrate having jurisdiction over Nandyal.

NAPIER, J.—I concur.

Petition allowed.

PRIVY COUNCIL.

APPEAL FROM THE PUNJAB CHIEF COURT.

March 3, 1915.

Present:—Viscount Haldane, Lord Dunedin, Lord Atkinson, Sir George Farwell and Mr. Ameer Ali.

BALMOKUND AND OTHERS—PETITIONERS

versus

EMPEROR—RESPONDENT.

Practice—Criminal proceedings—Application for special leave to appeal—Staying execution of sentence of death—Jurisdiction.

As the Judicial Committee of the Privy Council is not a Court of Criminal Appeal, the tendering of advice to His Majesty as to the exercise of his prerogative of pardon is a matter for the Executive Government and is outside the province of the Judicial Committee. [p. 335, cols. 1 & 2.]

Their Lordships were, therefore, unable to make any order on an application to stay execution of a sentence of death while an appeal to the Board was pending. The Executive Government, if notified, would, said their Lordships, no doubt, give due weight to the fact that such an appeal was pending, and consider the circumstances, but the Board would express no opinion as to whether the sentence ought to be suspended. [p. 335, col. 2.]

Application to postpone sentences of death passed upon the petitioners pending the the hearing of their petition for special leave to appeal and their appeal to His Majesty in Council.

FACTS.—The facts as appearing from the petition were as follows:—

The four petitioners, Balmokund, Basant Kumar, Amir Chand and Avad Bihari, and others were arrested in connection with the death, on the 17th May 1913, of one Rampadarath, as the result of an explosion of a bomb with which he came in contact in the Lawrence Gardens in Lahore. All the accused persons were charged with a number of offences, and an inquiry into the charges was held by Mr. Connolly, Magistrate of the first Class of Delhi, who tendered a pardon to two of the accused, Dina Nath and Sultan Chand. Both approvers thereupon gave evidence. The petitioners together with certain other accused were charged with conspiring to murder under section 302, read with section 120B of the Indian Penal Code. Two of the petitioners, Amir Chand and Avad Bihari, were also charged with offences under sections 4, 5, and 6 of the Explosives Act, 1908, and three of the petitioners, Avad Bihari, Amir Chand and Balmokund, and another accused were further charged under section 124 A of the Indian Penal Code. There were in all eleven separate charges against the accused persons. By an order, dated the 12th May 1914, the Magistrate committed the petitioners, together with seven others, to the Court of the Sessions Judge, Delhi, for trial.

At the trial, which took place before Mr. H. H. Harrison, Special Sessions Judge, Delhi, with the aid of three Assessors, the main charge against the accused was under sections 120B and 302 of the Indian Penal Code. But the petitioners objected at the trial that the charge was bad in law, inasmuch as they could not be charged with an offence under section 120B of the Indian Penal Code, which came in force on the 27th March 1913 under the provisions of Act VIII of 1912. The petitioners and other accused also objected that the Trial Judge had no jurisdiction to try some of them, and that the trial was bad for misjoinder of charges. On the 6th October 1914 the Special Sessions Judge convicted the petitioners and two of the other accused persons, and sentenced the petitioner Basant Kumar to transportation for life under section 302 read with section 120B of the Indian Penal Code and the other three petitioners to death.

The petitioners appealed to the Chief Court of the Punjab against the said conviction and sentences, and the Crown applied to that Court in revision for enhancement of the sentence passed on the petitioner Basant Kumar. The Chief Court delivered

judgment about the 2nd week of February 1915,* dismissing the petitioners' appeal and confirming the sentences of death passed on three of the petitioners, and enhancing the sentence inflicted upon the petitioner Basant Kumar from transportation for life to sentence of death.

The petitioners submitted that the only evidence on which they had been convicted was that of the approver Dina Nath, who made several statements about the case, that his evidence was not corroborated in material particulars by any independent evidence, and that his statements were inconsistent and untrue and absolutely unworthy of credit. The petitioners Amir Chand and Balmokund also submitted that there was no evidence upon the record to justify their conviction for murder. The petitioners further submitted that the Trial Judge admitted in evidence a large mass of irrelevant evidence which prejudiced their trial, and caused a gross miscarriage of justice. They, therefore, submitted that their conviction had been contrary to the principles of natural justice.

The petition also stated that the petitioners' legal advisers were instructed by cable and had not then received a transcript of the evidence and the proceedings but were compelled to draw up the petition on such material as were available to them, and that they were not in a position to deal fully with the case at that stage.

Sir *Robert Finlay*, *K. C.* (with him Mr. *Dube*), for the Petitioners, applied under the circumstances of the case for the hearing of the petition to be adjourned for at least a month after the arrival of the necessary documents, and for stay of execution of the sentence of death while the hearing of the petition was pending.

Mr. *Dunne*, for the Respondent, was not heard.

JUDGMENT.

VISCOUNT HALDANE, L. C.—Their Lordships are unable to advise His Majesty to make any order on the petition for special leave to appeal at this stage.

With regard to staying execution of the sentence of death, their Lordships are unable to interfere. As they have often said, this Board is not a Court of Criminal Appeal. The tendering of advice to His Majesty as to the exercise of his prerogative of pardon is a matter for the Executive Government, and is outside their Lordships' province. It is, of course, open to the petitioners' advisers to notify the Government of India that an appeal to this Board is pending. The Government of India will, no doubt, give due weight to the fact, and consider the circumstances. But their Lordships do not think it right to express any opinion as to whether the sentence ought to be suspended. No order made.

Solicitors for the Petitioners: *Messrs. Barrow, Rogers* and *Nevill.*

Solicitors for the Respondent: *The Solicitor, India Office.*

*See 28 Ind. Cas. 738—*Ed.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 144 OF 1915.

March 24, 1915.

Present:—Mr. Justice Piggott.

MUKHTAR AHMAD AND ANOTHER—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 323, 332—Excise Inspector searching house—Irregularities—Public servant—Discharge of duty—Hurt caused to Inspector—Offence.

An Excise Inspector in searching the house of the applicant on the suspicion that he might find there cocaine committed a number of irregularities in conducting this search. He had no warrant authorizing him to make the search. He brought with him only one search witness and directed a constable to scale the outer wall of the house. The accused caused hurt to the Inspector and the constables:

Held, that the Inspector and the constables were not acting in the discharge of their duties as public servants and that, therefore, the accused were not guilty under section 332 but only under section 323 of the Penal Code. [p. 336, col. 1.]

Criminal revision against an order of the Sessions Judge of Saharanpur.

Mr. *G. P. Boys*, for the Petitioners.

Mr. *R. Malcomson*, Assistant Government Advocate, for the Crown.

JUDGMENT.—Mukhtar Ahmad and Amir Ahmad have been convicted by a Magistrate on the charge of having caused hurt to an Excise Inspector, one Mr. D. D. C. Das, and certain constables in the discharge of their

In re CHERUKATH MAMMAD.

duties as public servants, and have been sentenced to imprisonment and fine. The conviction and the sentences have been affirmed by the Sessions Judge on appeal. It seems to me that the Courts below have assumed, but cannot be said to have judicially determined, that the persons who were hurt were acting at the time in the discharge of their duties as public servants. They have dealt with the plea of private defence set up on behalf of the accused persons, and have excluded that plea by reason of the provisions of section 99 of the Indian Penal Code. This finding implies that the Excise Inspector and the constables were resisted at a time when they, being public servants, were acting in good faith under colour of their office. That is not the same thing as a finding that they were acting in the discharge of their duties as public servants. The distinction was pointed out by a Bench of this Court in *Queen-Empress* v. *Dalip* (1). So far as my examination of the record goes, I do not find myself able to arrive at the conclusion that the Excise Inspector and the constables were acting in the discharge of their duties as public servants. Mr. Das, who was engaged in searching the house of Mukhtar Ahmad, accused, on suspicion that he might find there cocaine, committed a number of irregularities in conducting this search. He had no warrant authorising him to make this search; he brought with him only one search witness (section 103 of the Code of Criminal Procedure), and nothing in sections 102/48 of the same Code justified him in directing a constable to scale the outer wall and effect a burglarious entry into the house. Following the precedent set by the reported decision of this Court, which I have already quoted, I set aside the conviction of Mukhtar Ahmad and Amir Ahmad under section 332 of the Indian Penal Code and in lieu thereof convict them of the offence of causing hurt under section 323 of the same Code. I reduce the sentence to one of imprisonment for such period as they may have already undergone, together with a fine of Rs. 15 each. Any fine in excess of this amount which has been paid by the applicants will be refunded. The accused need not surrender and their bail-bonds are discharged.

Order modified.

(1) 18 A. 246; A. W. N (1896) 48.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 790 OF 1914.
CRIMINAL REVISION PETITION NO. 655 OF 1914.
April 15, 1915.

Present:—Mr. Justice Kumaraswami Sastri.

In re CHERUKATH MAMMAD AND OTHERS ACCUSED—PETITIONERS.

Criminal Procedure (Act V of 1898), ss. 367, 424—Judgment—Several accused—Appellate Court, duty of.

Where there are several accused who have appealed, it must appear from the face of the judgment that the case against each of the accused has been taken into consideration and reasons should be given, as far as may be necessary, to show that the Appellate Court has devoted judicial attention to the case of each of the accused.

Jamail Mullick v. *Emperor*, 35 C. 138; 12 C. W. N. 134; 6 Cr. L. J. 427; *Farkan* v. *Somsher Mahomed*, 22 C. 241, followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate of Tellicherry Division, in Criminal Appeal No. 77 of 1914, preferred against that of the second Class Magistrate of Karmharanand Taluq, in Calendar Case No. 151 of 1914.

The Hon'ble Mr. *T. Richmond*, for the Petitioners.

Mr. *P. R. Grant*, for the Government.

ORDER.—The Joint Magistrate has not considered the question of possession, or found that the accused had any common object. There were 20 accused; but the Joint Magistrate has not considered the case of each accused or evidence. The whole case is disposed of in two short paragraphs. In *Jamail Mullick* v. *Emperor* (1) it was held that when there are several accused, "it must appear on the face of the judgment that the case against each of the accused has been taken into consideration and reasons should be given, as far as may be necessary, to show that the Appellate Court has devoted judicial attention to the case of each of the accused". *Farkan* v. *Somsher Mahomed* (2) is also in point.

I set aside the judgment of the Appellate Court and direct that the appeal be re-tried and judgment written according to law.

Conviction set aside; Case remanded.

(1) 35 C. 138; 12 C. W. N. 134; 6 Cr. L. J. 427.
(2) 22 C. 241.

RAMESHWAR MALIA *v.* JIU THAKUR.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 7 OF 1912.

March 18, 1915.

Present:—Mr. Justice Fletcher and Mr. Justice Teunon.

Kumar RAMESHWAR MALIA AND OTHERS —DEFENDANTS NOS. 9, 13, 14, 15 —APPELLANTS

versus

Sri Sri JIU THAKUR, BY HIS *Shebait*, *Mahant Sri Sri* RAM CHANDRA ACHARJYA GOSWAMI AND OTHERS— PLAINTIFFS—RESPONDENTS.

Permanent lease, grant of, by shebait—*Legal necessity —Limitation Act (XV of* 1877), *Sch. II, Art.* 134, *scope of—Limitation Act (IX of* 1908), *s.* 30, *applicability of —Usufructuary mortgage by* shebait, *effect of.*

The grant of a permanent lease without legal necessity is in excess of the powers of the *shebait* who grants the lease. [p. 337, col. 2.]

Article 134 of the second Schedule to the Limitation Act of 1877 only applies to the purchase of an absolute interest and not to the grant of a permanent lease. [p. 338, col. 1.]

Abhiram Goswami v. *Shyama Charan Nandi*, 4 Ind. Cas. 449; 36 C. 1003; 10 C. L. J. 284 (P. C.); 6 A. L. J. 857, 11 Bom. L. R. 1234; 19 M. L. J. 530; 14 C. W. N. 1; 36 I. A. 148 and *Ishwar Shyam Chand Jiu* v. *Ram Kanai Ghose*, 10 Ind. Cas. 683; 38 C. 526; 9 M. L. T. 448 (P.C.); 15 C. W. N. 417; 8 A. L. J. 528; 13 Bom. L. R. 421; 14 C. L. J. 238; (1911) 2 M. W. N. 81; 21 M. L. J. 1145; followed.

Damodar Das v. *Lakhan Das*, 7 Ind. Cas. 240; 14 C. W. N. 889; 7 A. L. J. 791; 12 Bom. L. R. 632; 12 C. L. J. 110; 8 M. L. T. 145: 20 M. L. J. 624; 37 C. 885 (P. C.); (1910) M. W. N. 303; 37 I. A. 147, re-to.

In the Limitation Act IX of 1908 the word "transferred" was deliberately inserted in place of the word "purchased", in view of the decisions on the meaning of the word "purchased" in Article 134, Schedule II, of the Limitation Act of 1877. [p. 338; col. 2.]

The grant of a permanent lease at a considerable annual rent is a transfer for valuable consideration. [p. 338, col. 2.]

Currie v. *Misa*, (1875) 10 Ex. Cases 153; 1 App. Cas. 554, referred to.

Section 30 of the Limitation Act, 1908, only applies where there is a period of limitation "prescribed," both by the Act of 1877 and the Act of 1908. Where the plaintiff cannot bring his case under section 30 the suit is barred by limitation under Article 134 of the first Schedule to the Limitation Act of 1908. [p. 339, col. 1.]

In a usufructuary mortgage of a *debuttar* property in favour of the Raja of Pacheto the validity of the mortgage was not questioned:

Held, that it was not open to the *shebait* to determine, without the Raja's consent, the lease to the defendants, the benefit of which had been expressly assigned by the *shebait* to the Raja in the usufructuary mortgage to him, and the receipt of rent by the Raja after the institution of the suit proved the existence of the lease at least in the mind of the Raja. [p. 339, cols. 1 & 2.]

Appeal against the decree of the Subordinate Judge, Bankura, dated the 21st of September 1911.

Babus *Dwarka Nath Chakravarti* and *Bankim Chandra Mukherjee*, for the Appellants.

Dr. *Rash Behary Ghose*, Dr. *Dwarka Nath Mitter*, Babus *Bijoy Kumar Bhattacharyya* and *Hem Chandra Mukherjee*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal by the defendants Nos. 9 and 13 against the judgment of the learned Subordinate Judge of Bankura dated the 21st September 1911.

The suit was brought by the plaintiff, an idol, through his *shebait* to recover possession of the properties mentioned in the plaint, on the ground that they formed part of the *debuttar* estate of the idol and that a *putni* settlement, dated the 29th of *Baisakh* 1261, granted by a former *shebait* in favour of the predecessors of the defendants Nos. 1 to 13 was invalid.

On the present appeal it was not argued by the appellants that the idol had no interest in the properties in suit. Having regard to the evidence which has been considered at great length by the learned Subordinate Judge, it is clear that the endowment is an ancient one. It was, however, argued before us, though somewhat faintly, that the properties were the private property of the *shebait*, subject nevertheless to a charge for the maintenance of the worship of the idol. On the evidence before us I think we can come to only one conclusion, namely, that there was an absolute dedication of the properties in favour of the idol.

The next question is, whether the present suit is barred by limitation.

The grant of a permanent lease without legal necessity was in excess of the powers of the *shebait* who granted the lease. The *shebait* who granted the lease died in the year 1859. Next came an infant who held the office until the year 1863. His adoptive mother then held the office for a few months and was succeeded by the father of the present *shebait*. The present *shebait's* father died on the 28th of July 1893 and since

that date the present *shebait* has held the office. The rent has been duly paid.

Now the question as to whether a suit of the present nature is barred after 12 years from the date of the permanent lease under Article 134 of Schedule II of the Limitation Act (XV of 1877), has been considered in two judgments of the Privy Council in the cases of *Abhiram Goswami* v. *Shyama Charan Nandi* (1) and *Ishwar Shyam Chand Jiu* v. *Ram Kanai Ghose* (2). The facts in those two cases cannot be distinguished from the facts in the present case. The view that the Privy Council took with regard to Article 134 of the Schedule II to the Act of 1877 was that the Article only applied to the purchase of an absolute interest and not to the grant of a permanent lease. This view of the law was expressed in the case of *Abhiram Goswami* v. *Shyama Charan Nandi* (1). It is, however, to be noticed that the judgment in the case of *Ishwar Shyam Chand Jiu* v. *Ram Kanai Ghose* (2) was delivered by their Lordships after an application for a review of judgment [See *Ishwar Shyam Chand Jiu* v. *Ram Kanai Ghose* (3)]. And in delivering their judgment their Lordships made the following remarks:—"The only question remaining depends on the law of limitation. On this point attention has been called to the case of *Abhiram Goswami* v. *Shyama Charan Nandi* (1) decided by this Board in July 1909. It is impossible to distinguish that case from the present. Whatever might have been the inclination of their opinion if the matter had been *res integra* it seems to their Lordships that they would not be justified in reviewing on an *ex parte* application the considered judgment of the Board delivered after full argument. They will, therefore, simply follow the decision in *Abhiram Goswami* v. *Shyama Charan Nandi* (1). They do so with the less hesitation because the language of the Article under discussion in that case and in this has been altered by subsequent legislation."

Another authority was also relied upon in the course of the argument. That authority was the decision by the Privy Council in the case of *Damodar Das* v. *Lakhan Das* (4). That decision did not, however, turn on Article 134 of the Schedule to the Act of 1877. There was nothing in that case to show that the property was vested in the *chela* as trustee for the idol. Their Lordships found agreeing with this Court that the property belonged to the idol and that the possession of the junior *chela* had become adverse to the idol.

So far as the evidence goes in this case, it appears that the property was vested in the *shebait* in trust for the idol. The original grant is not forthcoming but subsequent documents appear to have recognised it. The question of limitation must, therefore, be considered with reference to Article 134 of Schedule I of the Limitation Act (IX of 1908). The wording of that Article is as follows:—"To recover possession of immoveable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration." It will be noticed that the Article in the present Act has been substantially altered from the Article as it appeared in the Act of 1877. Presumably the word "transferred" was deliberately inserted in place of the word "purchased," in view of the decisions on the meaning of the word "purchased" in Article 134, Schedule II, of the Act of 1877.

The learned Subordinate Judge has found that the grant of a permanent lease was a "transfer". In that view I agree. He has, however, come to the conclusion that it was not a transfer for valuable consideration. In the opinion of the learned Judge a transfer for valuable consideration in a case such as the present could only take place when a fine or premium was paid for the grant of lease. The learned Judge, also found that there was no proof that the premium was paid for the grant of the *putni* in the present case. It may, however, be doubted whether evidence of the actual payment of the premium could, at this time, be produced. But whether that be so or not, I think that a grant of a permanent lease at a considerable annual rent is a transfer for valuable consideration. As was

(1) 4 Ind. Cas. 449; 36 C. 1003; 10 C. L. J. 284 (P. C.); 6 A. L. J. 857; 11 Bom. L. R. 1234; 19 M. L. J. 530; 14 C. W. N. 1; 36 I. A. 148.

(2) 10 Ind Cas. 683; 38 C. 526; 9 M. L. T. 448 (P. C.); 15 C. W. N. 417; 8 A. L. J. 528; 13 Bom. L. R. 421; 14 C. L. J. 238; (1911) 2 M. W. N. 28; 21 M. L. J. 1145.

(3) 14 C. W. N. ccxliv.

(4) 7 Ind. Cas. 240, 37 C. 885; 14 C. W. N. 889 (P. C.); 7 A. L. J. 791; 12 Bom. L. R. 632; 12 C. L. J. 110; 8 M. L. T. 145; 20 M. L. J. 624; (1910) M. W. N. 303; 37 I. A. 147.

remarked by the Exchequer Chamber in the case of *Currie* v. *Misa* (5), "a valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."

In my opinion the grant of the permanent lease in the present case was a transfer for valuable consideration and the present suit is barred under Article 134 of the Schedule I to the Act of 1908, unless the plaintiff can bring his case under section 30 of the Act.

The learned Vakil for the respondent in the present appeal, however, based his main argument on this branch of the case not on the ground stated in the judgment of the learned Subordinate Judge, but on section 30 of the Limitation Act, 1908. But that section does not, in my opinion, apply. Section 30 only applies when there is a period of limitation "prescribed" both by the Act of 1877 and the Act of 1908. The decisions of the Privy Council show that no period of limitation was "prescribed" for a suit of the present nature under the Act of 1877.

The present suit is, I think, barred by limitation.

Another point that raises a difficulty in the way of the respondent is the usufructuary mortgage in favour of the Raja of Pachete. The respondent on the 8th of August 1909 granted to the Raja a usufructuary mortgage of (amongst other properties) the property in suit for a term that had not expired at the institution of the present suit. Whether that mortgage was binding on the idol we do not know, the Raja not being a party to this suit. The mortgage is, however, expressed to be made for legal necessity and is treated by the learned Judge in his judgment as being a valid transaction. On the 9th of September 1909 notice to quit was served on the defendants. But on the 15th of November 1910, that is after the institution of the present suit, the Raja received and granted a receipt for rent part of which accrued due after the institution of the suit. In the absence of the Raja we cannot determine whether the mortgage to the Raja was a valid transaction, but assuming, as the learned Judge did, that the mortgage was valid, then it was not open to the *shebait* to determine without the Raja's consent the lease to the defendants, the benefit of which had been expressly assigned by the *shebait* to the Raja in the usufructuary mortgage to him. Moreover, the receipt of rent by the Raja, after the institution of the suit, would seem to show that at the date of the receipt the Raja considered the lease as in existence. Further, under the terms of the decree the defendants are liable to pay mesne profits as from the date of the expiry of the notice to quit, although they have paid rent to the Raja to a date subsequent to the institution of the present suit under an assignment of the rents to the Raja under the terms of a document executed by the *shebait*, which the learned Judge treats as a valid transaction in his judgment. Clearly the Raja ought to have been a party to the present suit and if his usufructuary mortgage is a valid one, then the defendants have paid rent to him to a date subsequent to the suit and are not liable to ejectment.

I think we ought to reverse the decision of the learned Judge in the Court below and allow the present appeal. The plaintiff-respondent must pay to the appellants their costs both in this Court and the Court below.

The defendants Nos. 14 and 15, who are co-appellants with the defendants Nos. 9 and 13 in this appeal, have, it is represented, settled their disputes with the plaintiff. Their appeal is, therefore, allowed to be withdrawn.

TEUNON, J.—I agree.

Appeal allowed.

(5) (1875) 10 Ex. Cas. 153; 1 App. Cas. 554.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION No. 348 OF 1914.

February 11, 1915.

Present:—Mr. Batten, A. J. C., and Mr. Stanyon, A. J. C.

BHARGAVA COMMERCIAL BANK, LTD., AT JUBBULPORE—DECREE-HOLDER—PLAINTIFF

versus

MESSRS. MACKINNON AND COMPANY, OLD BREWERY—JUDGMENT-DEBTOR—DEFENDANT.

Execution Attachment—Custodia legis—*Property*.

BHARGAVA COMMERCIAL BANK, LTD. *v.* MACKINNON & CO.

not liable to be legally possessed by private persons, attachment of—Court, duty of—Beer, whether attachable and saleable—Excise Act (XII of 1896), s. 45.

A *custodia legis*, such as the possession of attached property by a Civil Court executing a decree, requires no departmental sanction or license even, where the property is of a kind which cannot legally be possessed by a private person without such permission. [p. 342, col. 2.]

Therefore, the possession of attached property by a Court is no violation of the special law governing the possession of such property by private persons. [p. 343, col. 1.]

Where a District Judge passed an order attaching beer, an excisable property:

Held, that section 45 of the Excise Act had no application whatsoever to the acts of the District Court or any of its officials or agents acting under its orders. [p. 343, col. 1.]

It is the duty of every Judge to exercise the powers vested in him in such a way as to give effect to all provisions of the law. [p. 343, col. 2.]

Beer brewed within the local limits to which the Excise Act, 1896, applies is not exempt from attachment and sale in execution of a Civil Court decree. [p. 343, col. 2.]

Where a Civil Court attaches property of a nature governed by any Special law, such Court is bound to proceed with great circumspection so as not to defeat any of the purposes for which such Special law was enacted. [p. 343, col. 2.]

Civil revision against the order of the District Judge, Jubbulpore, dated the 8th October 1914.

Mr. *J. Mitta*, for the Decree-holder.

The Hon'ble Mr. *M. R. Dixit*, for the Judgment-debtor.

JUDGMENT.—It is necessary to state the circumstances which have led up to this revision. The plaintiff is the Bhargava Commercial Bank, Limited, and the defendant is the firm of Mackinnon and Company, Brewers. Both corporations carry on business, respectively, as bankers and brewers, among other places, at Jubbulpore. The plaintiff, having obtained a decree for Rs. 14,896-6 against the defendant, applied, on the 6th October 1914, to the District Court at Jubbulpore, for execution of the same in respect of the above sum, *plus* Rs. 190 costs of execution, or Rs. 15,086-6-0 in all. The assistance of the Court was claimed by attachment and sale of the defendant's brewery at Jubbulpore, comprising a building and the plant, furniture and stock contained therein. On the 8th October 1914 the District Judge (Lala Sheo Narayan) ordered the issue of warrants for the attachment of this property, and two warrants were accordingly sent out on the 22nd October 1914. One of these was in the form of a prohibitory order under Order XXI, rule 54, and Order XXXVIII, rule 7, of the Code of Civil Procedure, 1908. It had reference to the brewery building and was executed by the fixation of copies to the building and to the Court-house. The other was a warrant for the attachment of moveable property under Order XXI, rule 30, of the said enactment. Under this warrant the following articles situated in and about the brewery building were attached:—

		Rs.
5	tables ...	25
1	iron safe ...	50
2	racks ...	2
1	carpet ...	5
6	chairs ...	6
1	telescope ...	10
3	clocks ...	15
1	almirah ...	2
1	almirah ...	1
1	ice machine ...	2,500
1	sawing machine ...	500
17	fermenting vats ...	1,000
1	cooler ...	400
6	vats and loggers ...	300
326	empty casks ...	1,000
177	casks of beer ...	4,500

Both warrants were executed on the 28th October 1914, and custody of the above articles was made over to the decree-holder as a Receiver on behalf of the Court. Nothing was removed from its place. The premises were locked up and the keys taken away by the agent of the Receiver.

On the 31st October 1914 the decree-holder filed an application before the District Judge stating

(1) that the above property was attached on the 28th October 1914;

(2) that the attached property had been given into his custody as a Receiver because no one else would accept it, and that he had closed the brewery as he could not work it;

(3) that he had been informed by the Pleader of the judgment-debtor that the beer would be spoiled in six days and threatened with liability for the damage to stock alleged to be worth Rs. 12,000.

He, therefore, made an urgent appeal to the Court to make over the brewery

to the judgment-debtor after taking security for the due performance of the decree in any of several ways suggested.

The District Judge took no notice whatever of this application. On the 11th November 1914, the Commissioner of Excise made an inspection of the brewery, and in paragraph 3 of his note made the following remarks:—

"The brewery has been attached on the 28th ultimo by the District Judge on account of a decree passed against the brewers. I invite the attention of the Deputy Commissioner to section 45 of the Excise Act. If the Civil Court has taken possession of the brewery, the officers concerned seem to me to be liable to punishment under that section.

* * * * * * * *

If, as I understand, this interference by the Civil Court with the working of the brewery licensed by Government under section 5 of the Excise Act was effected without any reference to the Deputy Commissioner, the act seems to me to have been not merely discourteous but also illegal."

On the same day—the 11th November 1914—the Deputy Commissioner wrote demi-officially to the District Judge (now Shams-ul-ulama Muhammad Amin, *vice* Lala Sheo Narayan, retired) in the most courteous terms, mentioning the view taken by the Excise Commissioner as to the legality of the attachment, drawing attention to the inconvenience and probable loss resulting therefrom, and suggesting that the brewery might be made over to Messrs. Mackinnon and Company, subject to the attachment. This was stated to be in anticipation of formal proceedings. The new Judge only took over charge of his office on the day on which this letter was sent, and on the following morning made an order releasing from attachment the 177 casks of beer. He maintained the attachment on the rest of the property, but ordered that the judgment-debtor should be allowed to carry on the brewery business and render accounts to the Court and deposit proceeds therein. The Judge fixed the 24th November 1914 for the hearing.

On the 14th November 1914 the decree-holder made another application to the Court, asserting that the local manager of the judgment-debtor, one Mahomed Rahim, was evading taking over management of the brewery and was apparently building up a foundation for a claim for damages. The applicant, therefore, handed over the keys to the Court, and asked the Judge to have the brewery made over to the defendant by the bailiff. This was done the same day and the judgment-debtor became the Receiver of the Court. He gave a receipt for the beer released from attachment, and a Receiver's acknowledgment for the attached property made over to his custody.

On the 5th December 1914 the Deputy Commissioner wrote officially to the District Judge in formal confirmation of his above-mentioned demi-official communication. After drawing attention to section 45 of the Excise Act he went on thus:—

"I need scarcely enlarge on the administrative inconvenience which would arise, not to speak of inconvenience to the public, if breweries and distilleries were liable to attachment. Serious loss would occur to Government in respect of reduced receipts from royalty if such places were liable to be closed without notice to the executive officer concerned; and the public on being suddenly deprived of their supply of liquor would be aroused to a state of general indignation. I do not know whether the point as to whether a brewery is liable to attachment has ever formed the subject of an authoritative ruling; but it appears to me desirous that no Civil Court should ever willingly upset the excise arrangements of the Local Government, and for this reason a notice of an intended attachment could reasonably be expected; while the fact that no one can possess a brewery without a license would tend to show that such properties were not liable to attachment.

"If you agree in this view I would request that the attachment be withdrawn; because so long as the instruments and apparatus for brewing are under attachment it is impossible for the Government licensee to brew any beer, and this is causing serious loss to Government."

The District Judge replied officially to this letter on the 7th December 1914, pointing out what he had done, and affirming his opinion that all but the beer was liable to attachment. He expressed his regret for attachment of the beer having been made inadvertently by his predecessor and stated that in future, notice of attach-

ment in such cases would be given to the Deputy Commissioner. He concluded his reply with these words,

"I need hardly assure you that all Civil Courts would most willingly help the executive authorities in their excise and any other administration as far as lies in their power."

We approve of these words as correct and proper, and we expect the same attitude from the other departments of the Government towards the Civil Courts.

On the 24th November 1914 the judgment-debtor made his first application to the Court in this execution case, when he tried to figure as a mere representative of the Bank of Upper India, Limited, which was said to hold a possessory mortgage over the Jubbulpore brewery for six *lakhs* of rupees. On that ground the judgment-debtor sought to have the attachment raised, or to be made subject to the prior incumbrance of the mortgagee Bank. The learned District Judge rightly refused to allow the judgment-debtor to plead the claim of his mortgagee, and ordered the sale of the attached property to take place on the 5th January 1915. The further hearing of the execution case was fixed for the 7th January 1915.

In the meantime, by an official letter, dated the 11th December 1914, the Commissioner of Excise invited the attention of the Judicial Commissioner to the matter, reiterating his opinion that the attachment was illegal and discourteous to the executive authorities, and constituted an offence punishable under section 45 of the Excise Act on the part of the Civil Court officials who had taken possession of the brewery. The learned Judicial Commissioner having directed that the case should be dealt with judicially by a Bench, it has been registered as a case under section 115 of the Civil Procedure Code, 1908, and notices were issued to all concerned. The Commissioner of Excise had no appearance entered before us on his behalf, and in response to the notice sent to him he has written officially to the Registrar stating that he does not wish to make any further representation in the matter. The decree-holder and judgment-debtor appeared by Counsel who were heard, but nothing was said in support of the view of the Commissioner of Excise that the attachment of the property amounted to an offence.

The points which seem to call for decision are:

(1) whether the attachment of the brewery or the beer in this case amounted to an offence under section 45 of the Excise Act?

(2) whether such attachment was illegal?

(3) whether there was any irregularity in the procedure of the Court?

(4) whether the intervention of the excise authorities was regular in form?

The *first* of these questions is easily answered in the negative, but we consider it expedient to deal with it somewhat fully so as, if possible, by a clear statement of what seems to be the law, to prevent any further misapprehension on the subject. When so responsible an officer of Government as the head of a department represents the procedure of a Judge to constitute an offence, the result may be to deter the Judge, especially if he is a junior member of the judiciary, from doing his duty. In the present case it has had the effect of misleading the District Judge into a hasty raising of a perfectly legal attachment of property said to be worth Rs. 4,500 and of alarming a decree-holder in the lawful pursuance of his claim againt the judgment-debtor.

For the purpose of deciding the first point we will assume that the Civil Court had no *jurisdiction* to attach the brewery and the beer. Nevertheless, no offence was committed, either by the Judge who ordered the attachment, or by the officials who carried out that order. The Commissioner of Excise appears to have wholly overlooked sections 77 and 78 of the Indian Penal Code. By applying section 40 of that Code it will be seen that the above sections apply to an offence under section 45 of the Excise Act. Then there is the further reason that section 45 has reference to section 5 of the same enactment, and a District Court is not a "person" within the meaning of that term in the latter. The Civil Court is a branch of the same Government which, in another branch of its administration, is represented by the Excise Department. A *custodia legis*, such as the possession of attached property by a Civil Court executing a decree, requires no departmental sanction, or license even where the property is of a kind which cannot legally be possessed by a private person without such permission.

It follows that the possession of attached property by the Court is no violation of the special law governing the possession of such property by persons. We, therefore, hold that section 45 of the Excise Act had no application whatsoever to the acts of the District Court or any of its officials or agents acting under its orders in the present case.

Then as to the legality of the attachment. That depends upon whether or not the property attached is within the category given in section 60 of the Code of Civil Procedure, 1908. The Civil Court derives its authority to make attachments in execution under that Code, and this authority is paramount to the authority of any executive officer such as the Commissioner of Excise or the Collector. We have set out above the property attached, and it is manifest that every part of it constitutes the saleable property of the judgment-debtor, which is, therefore, available for attachment and sale to satisfy his creditors. We have it on the admission of the judgment-debtor himself that the property is mortgaged to one of his creditors. The law may and does impose special restrictions upon the sale of some kinds of property. Some instances are to be found in the Civil Procedure Code itself: some in other enactments of a general or special kind. But the existence of such restrictions does not take the property out of the category of saleable property either in law or common sense. In *Purshottam Narayan* v. *Balvant Babaji* (1), it was held that country liquor is not exempt from attachment and sale in execution of a money decree passed by a Civil Court, even though under section 16 of the Bombay Abkari Act (Bombay Act V of 1878) the Collector's permission was held to be necessary for the execution sale. The Bombay Court further considered that sale without the Collector's permission would apparently subject the seller to prosecution under the above enactment. The learned Judges did not, however, specify whom they regarded as "the seller," whether the judgment-debtor whose property is sold without his act or consent, or the decree-holder who causes it to be sold for his benefit, or the Court which actually makes the sale. Probably the term was applied to the judgment-debtor as a vendor by compulsion, and the learned Judges declined to express any opinion on the question whether, if prosecuted, he would be able to make a good defence.

We concur with the above ruling only so far as it decides that country liquor is not exempt from attachment and sale in execution of a money decree passed by a Civil Court. The provisions of the Bombay Abkari Act place restrictions upon the manufacture, possession, removal, and sale of fermented liquor, *inter alia*, similar to those imposed on that product by the Excise Act, 1896; and we hold that beer brewed within the local limits to which the latter enactment applies is not exempt from attachment and sale in execution of a Civil Court decree. Whether section 8 regarding the removal, and section 21 regarding the sale, of fermented liquor apply to removal and sale under the orders of a Court executing a decree, is a point on which we express no opinion because it does not arise in the present case. We find that the attachment was wholly legal, and that the learned District Judge erred in finding the attachment of the beer to be otherwise.

The *next* point we have to consider is the procedure of the lower Court. It is the duty of every Judge to exercise the powers vested in him in such a way as to give effect to all provisions of the law. Therefore, when a Civil Court attaches property of a nature governed by any special law, such as the Indian Arms Act, the Opium Act, the Excise Act, or the like, such Court is bound to proceed with great circumspection so as not to defeat any of the purposes for which such special law was enacted. In the present case the predecessor of the present District Judge of Jubbulpore entirely failed to use such circumspection. An application was made to him to attach a brewery, its plant, and some beer. The Judge allowed the application to be treated in a routine form as if the Excise Act, 1896, had no existence, and signed a general order written by his clerk for the issue of a warrant of attachment against the whole property. The Judge took no heed of the provisions of the Civil Procedure Code requiring him to protect so perishable an article as beer, whether fermented or half fermented—he ignored the rights

(1) 32 B. 157; 10 Bom. L. R. 13.

of a third party, namely, the Government having a pecuniary interest, *i. e.*, a claim for royalty, on the attached goods—and he failed to see that a continuance of the business under authorised management was for the benefit of all concerned, including the decree-holder. We can only explain these omissions by the supposition that the Judge responsible for them being on the eve of retirement had become inert. We must express our disapproval of such want of circumspection. Notice of the attachment should have been given to the Collector and his assistance invited in regard to the preservation and due disposal of the property. The Receiver of the Court should have been the judgment-debtor and not the decree-holder. Such powers as the Code gives the Court for the harvesting of agricultural produce attached in execution of a decree are not wanting in regard to other kinds of property which call for special treatment, *e. g.*, property subject to the Excise Laws. The hogsheads of beer were certainly heavy and bulky property within the Judicial Commissioner's Civil Circular No 1-31. We feel bound to note, however, that the judgment-debtor made no effort to assist the Court in any way. His manager seems to have plotted to set up a claim for damages against the decree-holder. He made no application of any kind to the Court on his own behalf, and the Excise Commissioner is in error in thinking that it was on his application that the beer was released from attachment. The facts were as given above, and we consider that the conduct of the decree-holder was entirely free from blame for any spoiling of beer that may have taken place. From the first he was anxious that the judgment-debtor should look after the beer, and it seems to us that the latter deliberately abstained from doing so.

The only other point requiring consideration is the form in which the Collector's intervention was made. As to that we feel bound to endorse the remarks of the Bombay High Court at page 162 of the ruling above cited.

The papers will now be returned to the District Court, which will proceed with the execution sale and dispose of the same according to law. If any beer should be attached or re-attached the fact will be notified to the Collector and his co-operation invited in order that the claims of Government for royalty may be safeguarded, and the provisions of the Excise Act may be given effect to consistently with those of the Code of Civil Procedure. Where the respective duties of two different branches of Government meet in respect of the same subject-matter, co-operation in furtherance, and not conflict in defeat, of both sets of duties is the proper administrative course.

In conclusion we maintain the order of attachment as perfectly legal, though improperly carried out in the first instance. There will be no order for costs of this revision.

Order of attachment maintained.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 989 OF 1914.

April 1, 1915.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Seshagiri Aiyar.

OOPPATH NARAMPARAMBATH KUTTAN *alias* KUNHAMAN AND ANOTHER —DEFENDANTS NOS. 4 AND 5—APPELLANTS

versus

V. P. M. P. V. KOYAKUTTY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 76 (c)—Mortgagor bound to pay Government revenue—Revenue falling into arrears—Sale of property, whether liable to be set aside.

Section 76 (*c*) of the Transfer of Property Act does not apply where the deed of mortgage distinctly provides that the Government revenue shall be paid by the mortgagor. [p. 345, col. 1.]

Where, therefore, it was an express condition of a deed of mortgage that the Government revenue need not be paid by the mortgagee and the property was put up to sale on account of the revenue falling into arrears, on a suit for redemption brought by the assignee of the mortgagor:

Held, that as the mortgagee was not bound by law to pay the revenue, the purchaser was not guilty of any fraud and the sale could not be set aside. [p. 345, col. 2.]

Sadanand v. *Rotanaji*, (1886) Bom. P. J. 68, followed.

Nawab Sidhee Nuzur Ally Khan v. *Rajah Ojoodhyaram Khan*, 10 M. I. A. 540; 5 W. R. (P. C.) 83; 1 Suth. P. C. J. 635; 2 Sar. P. C. J. 198; 19 E. R. 1076, distinguished.

Second appeal against the decree of the District Court of South Malabar, in Appeal Suit No. 939 of 1912, preferred against that of the Court of the District Munsif of Parappanangadi, in Original Suit No. 278 of 1911.

Mr. *K. P. M. Menon*, for the Appellants.

Mr. *A. V. K. Krishna Menon*, for the Respondents.

JUDGMENT.—The assignor of the plaintiff obtained a mortgage from the *jenmi* in 1893. In 1894, the said mortgagee sub-mortgaged a portion of the properties to the predecessor-in-title of defendants Nos. 1 to 3 (Exhibit A). The Government revenue due upon the property fell into arrears, and it was put up to sale. One Eressan Nair, who, it is alleged, was only a *benamidar* for the sub-mortgagee, purchased it in 1900. There was a partition among the members of the sub-mortgagee's family, and the property in dispute fell to the share of the 2nd defendant. Defendants Nos. 4 and 5 have purchased it from the 2nd defendant. Plaintiff, claiming to stand in the shoes of the mortgagee, sues to redeem; the Courts below have given him a decree.

We are unable to agree with the conclusion at which they have arrived. The deed of mortgage, Exhibit B, distinctly provides that the Government revenue shall be paid by the mortgagor, the *jenmi*. Reference to this document is made in Exhibit A, which sub-mortgages only a portion of the property covered by Exhibit B. We are, therefore, of opinion that section 76, clause (*c*), Transfer of Property Act, is not applicable. The mortgagor did enter into "a contract to the contrary", namely, that the revenue need not be paid by the mortgagee in possession. The sub-mortgagee was asked in his deed to pay the *jenmi* only the rent payable by the mortgagee. "The contract to the contrary" in Exhibit B must be taken to have been incorporated in Exhibit A. Consequently, there was no obligation on the part of defendants Nos. 1 to 3 to pay the arrears, although they were entitled to do so, if they liked. See *Sadanand* v. *Ratanaji* (1).

The lower Appellate Court quotes *Nawab Sidhee Nuzur Ally Khan* v. *Rajah Ojoodhyaram Khan* (2) for holding that the defendants are not entitled to rely upon the revenue sale. That case has no application to this second appeal. It was found in that case that the mortgagee, who was bound to protect the property from sale, wilfully made default in paying the revenue and was also guilty of other fraudulent acts. In the present case it was conceded that the only fraud alleged and proved is the non-payment of the arrears of revenue. We have found that as there was a contract to the contrary, the sub-mortgagee was not bound by law to pay the arrears. Consequently the purchaser was not guilty of any fraud. As the mortgage is no longer subsisting, the plaintiff is not entitled to redeem. We ought to point out that the *jenmi* is no party to this litigation.

On the ground that there is no mortgage to be redeemed, we must reverse the decrees of the Courts below and dismiss the suit with costs in all the Courts. The claim for arrears of Purappad, if any, will not be affected by this decision.

Appeal allowed.

(1) (1886) Bom. P. J. 68.

(2) 10 M. I. A. 540; 5 W. R. P. C. 83; 1 Suth. P. C. J. 635; 2 Sar. P. C. J. 198; 19 E. R. 1076.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 36 OF 1913-14 OF ALIGARH DISTRICT.

March 1, 1915.

Present:—Mr. Holms, S. M., and Mr. Campbell, J. M.

CHATAR BHUJ—PLAINTIFF—APPELLANT

versus

BASDEO AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 181—Decree, ex parte, by a Commissioner—Appeal against such decree, when maintainable.

Under section 181 of the Agra Tenancy Act an appeal lies to the Board against an appellate decree passed *ex parte* by a Commissioner when he has reversed or modified the decree appealed against to him. [p. 345, col. 2.]

Second appeal from an order of the Commissioner of the Agra Division, dated the 29th May 1914, reversing that of the Assistant Collector of Aligarh District.

JUDGMENT.

HOLMS, S. M. (*February 20th*, 1915.)—Under section 100 (2) of the Code of Civil Procedure, an appeal lies to the High Court against an appellate decree passed *ex parte*, and under section 181 of the Tenancy Act, apparently an appeal lies to the Board for similar reasons when the Commissioner has reversed or modified the decree appealed against to him. I was at

first very doubtful whether to hear this appeal on the merits, as it would appear that the appellant's proper course was to apply to the Commissioner for a review of his judgment if there were good reasons for his not being present before the Commissioner. I find, however, there is a decision of the High Court, *Ajudhia Prasad* v. *Balmukand* (1), against this view, which is referred to at page 394 of Mr. Woodroffe's Commentary on the Code of Civil Procedure. The respondent has no ruling to quote to the contrary. Despite this ruling I would have been loath to send the case back, but the findings of the Commissioner are not very clear. The Commissioner has found definitely that there is no evidence to show what the tenant's period of occupancy was in 1890 at the time the *kabuliat* was said to have been executed. The burden of proof was on the tenant to show that he had twelve years' occupancy at the time of the lease, and he has not discharged it. As regards the *kabuliat*, the Commissioner has come to no very definite finding.

I would, therefore, set aside the order of the Commissioner and direct that he re-hear the appeal, coming to a definite finding as to whether the tenant held under *kabuliat*. As the appellant has entirely failed to show any reason for his non-appearance before the Commissioner, whatever the result of the appeal may be, he should bear the respondents' costs in both Appellate Courts, and if the Commissioner allows the appeal, he should also bear the respondents' costs in the Assistant Collector's Court also.

CAMPBELL, J. M.—I agree.

Appeal allowed; Cause remanded.

(1) 8 A. 354; A. W. N. (1886) 110.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 708 OF 1912.

December 8, 1914.

Present:—Mr. Justice Rattigan and Mr. Justice Scott-Smith.

KHIALIA SHAH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

HANSARI MAL-NATHU MAL—PLAINTIFFS—RESPONDENTS.

Interest— Hundi *not paid at maturity—Trade usage—Creditor, whether entitled to appropriate payment towards interest.*

It was proved as a well-recognised rule in the city of Rawalpindi that if interest was charged on a *hundi* and such *hundi* was not paid at maturity the same rate of interest continued to be payable:

Held, that plaintiffs were entitled to appropriate all payments made by the defendants towards the interest, whenever the amount of such interest due at the time of any payment absorbed the sum paid. [p. 347, col. 1.]

Second appeal from a decree of the Divisional Judge, Rawalpindi Division, dated the 13th January 1912.

Messrs. *Nand Lal* and *Rama Nand*, for the Appellants.

Mr. *Manohar Lal*, for the Respondents.

JUDGMENT.—The facts are fully stated in the judgment of the Divisional Judge from which this further appeal has been preferred. The grounds upon which that judgment, so far as it is adverse to appellants, is impeached are—

(*i*) that the Divisional Judge erred in allowing interest *post diem* at the rate of 12 per cent. per annum upon the basis of a trade usage to that effect, inasmuch as plaintiffs in their plaint had made no reference to any such usage and the evidence adduced by plaintiffs in support of its existence was wholly insufficient; and

(*ii*) that the learned Judge was also in error in holding that plaintiffs were entitled to credit payments made by defendants towards interest.

We have heard Mr. Rama Nand at some length on behalf of appellants, but his arguments failed to convince us that either contention was correct.

It is true that the plaint makes no mention of any trade usage as to the rate of interest in cases such as the present, but it is clear from issues 4 and 5 and from the evidence adduced by the parties that both sides were well aware during the course of the trial that plaintiffs relied upon the existence of such usage.

In support of their contention that a usage of the kind existed in Rawalpindi, plaintiffs called two witnesses, Lala Bhagwan Das and Lala Ram Bhaj, who deposed that it was a well-recognised rule in that city that if interest was charged on a *hundi* and such *hundi* was not paid at maturity, the same rate of interest continued to be payable.

Both these witnesses deal in *hundis* and appear to be respectable merchants and bankers in no way connected with, or interested in, plaintiffs. Their evidence has been accepted by both the District Judge and the Divisional Judge and we see no reason to take a different view.

All that Mr. Rama Nand could urge against them was that they did not deal *exclusively* in the business of *hundis*, a criticism which struck us as singularly devoid of force. The evidence of Mathra Das (D. W. No. 1) in no way shakes the testimony of the plaintiffs' witnesses, as all that that witness could depose to was that in one of his cases this Court had held that section 80 of the Negotiable Instruments Act applied. But in that case no attempt had been made to prove the existence of any usage, and the question was decided merely with reference to the provisions of the Act and without any discussion.

We accordingly overrule the first point urged by Mr. Rama Nand.

As to the *second* question, we need say very little. It was clearly incumbent upon defendants to prove that when they made payments to their creditors (the plaintiffs), they notified the latter that such payments were to be credited towards the principal amount and not towards interest, and that it was upon this understanding that plaintiffs received the sums of money paid from time to time (see sections 59 and 60 of the Indian Contract Act). Defendants have entirely failed to discharge this onus and, as the Divisional Judge remarks, all that they have been able to show is that in their own books they entered the sums as paid towards reduction of the principal amount.

In a case such as this, it cannot reasonably be *implied* that the circumstances were such as to indicate that the payment was towards the principal and was accepted in that light by plaintiffs. On the contrary, it is hardly likely that a creditor to whom interest as well as the principal amount was due would accept a payment in reduction of the principal and leave the interest outstanding.

We agree, therefore, with the Divisional Judge in holding that in the circumstances plaintiffs were entitled to appropriate all payments towards the interest, whenever the amount of such interest due at the time of ny payment absorbed the sum paid.

The result is that the appeal fails and is dismissed with costs

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER NO. 2 OF 1915.

April 28, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

ABDUL GAFFAR—DEFENDANT—APPELLANT

versus

NUR JAHAN BEGUM—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 62, 120—Debt due to deceased received by one of his heirs—Suit by other heirs to recover their share—Limitation.

A suit by one of the heirs of a deceased person to recover his share of the debt due to the deceased, which had been realized by another heir holding succession certificate, is governed by Article 62, and not Article 120 of the Limitation Act. [p. 348, col. 2.]

First appeal from an order of the District Judge of Budaun, dated the 18th November 1914.

Mr. *A. Haider*, for the Appellant

The Hon'ble Dr. *Sundar Lal*, for the Respondent.

JUDGMENT.—This is an appeal against an order of remand passed by the District Judge of Budaun. The facts are that one Najmuddin died in July 1901 leaving a widow, Zebunnissa, a brother, Hamiduddin, and two nephews, Abdul Gaffar and Zahiruddin. In March 1903 Abdul Gaffar obtained a succession certificate in respect of the debts due to the deceased. Zahiruddin died in 1906 and his rights devolved directly or indirectly upon the plaintiff-respondent, Nur Jahan Begam, who in July 1913 brought the present suit against Abdul Gaffar claiming an account of all sums received by him as holder of the succession certificate and payment of what might be found due to her. The Subordnate Judge dismissed the suit, holding that it was governed by Article 62 of the first Schedule to the Limitation Act, and was barred by that Article, inasmuch as it was proved that no sum had been received by Abdul Gaffar within three years of the suit. On appeal the District Judge held

that the suit was governed, not by Article 62, but by Article 120 and remanded the suit for trial on the merits.

The District Judge has relied upon the decision of this Court in *Umardaraz Ali Khan* v. *Wilayat Ali Khan* (1). The facts of that case do not differ in essential particulars from the facts of the present case, except that the defendant in the present case obtained a succession certificate whereas the defendant in that case does not seem to have done so. The Court was disposed to follow the decision in *Kundan Lal* v. *Bansi Dhar* (2), but considered itself bound by the decision of the Privy Council in *Mahomed Riasat Ali* v. *Hasin Banu* (3) to hold that the suit was governed by Article 120. It seems to us that the decision of the Privy Council in the case mentioned had no application to the facts of the case of *Umardaraz Ali Khan* v. *Wilayat Ali Khan* (1). The case before the Privy Council was one in which the widow of one Mosheraf Ali claimed the moveable and immoveable property of her husband from a brother of the deceased who had taken possession. Their Lordships held that the claim to cash and moveables was governed by Article 120. Article 62, which, of course, had no application to the claim for moveables, does not seem to have been mentioned at all. The cash in question had not been received from any one, but had been seized by the defendant upon his brother's death. We do not think that the decision of the Privy Council obliges us to hold that such a case as this is governed by Article 120. In the recent case of *Amina Bibi* v. *Najmunnissa Bibi* (4), it was held that a suit like the one before us was governed by Article 62. In his judgment in that case Tudball, J., referring to the case of *Umardaraz Ali Khan* v. *Wilayat Ali Khan* (1), said that Article 62 was not mentioned at all in the judgment in that case, but he must have overlooked the last paragraph of the judgment at page 172 of the report, where Article 62 was mentioned and was held to be inapplicable on the strength of the decision of the Privy Council. The decision in the case of *Umardaraz Ali Khan* v. *Wilayat Ali Khan* (1) is a direct authority in favour of the respondent's contention, but for the reason already stated we think that the Court was wrong in supposing that the point was covered by the decision of the Privy Council. We prefer the later decision in the case of *Amina Bibi* v. *Najmunnissa Bibi* (4), which is supported by the decisions in *Parsotam Rao* v. *Radha Bai* (5), *Masihuddin* v. *Imtiazunnissa Bibi* (6) and *Mahomed Wahib* v. *Mahomed Ameer* (7). The circumstance that the defendant-appellant held a succession certificate does not appear to us to differentiate the case from cases in which one of several heirs receives payment of a debt due to the deceased, though he does not hold a succession certificate.

In our opinion the Subordinate Judge was right in holding that the suit was barred by limitation. We allow this appeal, set aside the order of the District Judge and dismiss the suit with costs throughout. Costs in this Court will include fees on the higher scale.

Appeal allowed.

(1) 19 A. 169; A. W. N. (1897) 34.
(2) 3 A. 170.
(3) 21 C. 157; 20 I. A. 155.
(4) 27 Ind. Cas. 712; 13 A. L. J. 255; 37 A. 233.
(5) 28 Ind. Cas. 953; 13 A. L. J. 407.
(6) 27 Ind. Cas. 533; 12 A. L. J. 1256; 37 A. 40.
(7) 32 C. 527; 1 C. L. J. 167.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 819 OF 1912.

December 8, 1914.

Present:—Mr. Justice Rattigan and Mr. Justice Scott-Smith.

DALIP SINGH—PLAINTIFF—APPELLANT

versus

RANNIA AND OTHERS—DEFENDANTS—RESPONDENTS.

Adverse possession—Non-occupancy tenants paying no rent and holding over after termination of lease—Attempt to get themselves recorded as proprietors.

Where plaintiffs' predecessors were originally lessees of *shamilat* lands, but on the termination of their lease in 1865 continued to be in possession and were shown in the Revenue Records as non-occupancy tenants and in 1881 claimed without success to be recorded as proprietors:

Held, (1) that the mere fact of their never paying any rent except the land revenue and cesses did not of itself constitute them proprietors; [p. 349, col. 1.]

(2) that their adverse possession could not be said to have begun in 1881, as after their failure to get themselves recorded as proprietors they

continued to cultivate the lands and pay the land revenue and cesses as before. [p. 349, col 2.]

Kantheppa Raddi v. *Sheshappa*, 22 B. 893; *Chandri* v. *Daji Bhau*, 24 B. 504; 2 Bom. L. R. 491, distinguished.

Second appeal from a decree of the Divisional Judge, Ludhiana, dated the 29th February 1912.

Bhagat *Gobind Das*, for the Appellant.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—This judgment disposes of two Appeals Nos. 819 and 820 of 1912. The suits out of which they arise were brought by the plaintiffs-appellants for a declaration that certain lands situated in village Lidhran in the Ludhiana District, of which they were shown in the Revenue Records as non-occupancy tenants, were owned by them. The Courts below have dismissed the plaintiffs' suits and they have filed second appeals to this Court.

It appears that the plaintiffs' predecessors were originally lessees (*mustajars*) of these lands and that their lease terminated in 1865, but they continusd to be in possession and were shown in the Revenue Records as non-occupancy tenants, the lands being part of the *shamilat-deh*. In 1881 they claimed to be proprietors, and not mere tenants of these lands.

The proprietors of the village, on the other hand, maintained that the plaintiffs were mere tenants and that the lands were part of the *shamilat-deh*. The Revenue Officers refused to make any alteration in the records and the entries remained as before.

We may admit for the sake of argument that the plaintiffs have never paid any rent, except the land revenue and cessss, but this fact of itself would not constitute them proprietors, for it is quite consistent with their being occupancy tenants under section 5, Act XVI of 1887.

Mr. Gobind Das, in arguing the case for the appellants, lays great stress on what occurred in 1881. He says that at that time his clients' predecessors set up an adverse claim to proprietary rights, and that since then they have been holding adversely to the defendants. He relies on *Kantheppa Raddi* v. *Sheshappa* (1) and *Chandri* v. *Daji Bhau* (2). In the latter it was held that a tenan holding over after the expiration of the term mentioned in his rent-note is a tenant by sufferance and there is no such relationship between the landlord and such tenant as is contemplated by Article 139, Schedule II, of the Limitation Act. Also, that the possession of the tenant holding over is wrongful, and if there is no evidence from which fresh tenancy can be inferred in the strict sense of that term, time begins to run against the landlord when the period of the fixed lease expires.

With all due respect, we think that the Judges have probably gone rather too far in the case referred to. The facts, however, are not on all fours with those of the present case.

Here we find that the plaintiffs' predecessors made an attempt in 1881 to get the entries in the Revenue Records amended in their favour, but failed. Thereafter matters continued as before, the plaintiffs' predecessors continued to cultivate the lands and to pay the land revenue and cesses. The inference which we draw from this is that the plaintiffs gave up their claims to proprietary rights, having failed in their attempt to get the entries modified. The village proprietors did not realise any rent from the tenants before 1881, and they did not realise any after that date beyond the land revenue and cesses due upon the lands.

We, therefore, agree with the Court below that the possession of the tenants did not become adverse to the landlords after 1881. Mr. Gobind Das also urges that some of the defendants have held land as tenants under his clients, but this also does not amount to an admission of the plaintiffs' *proprietary* rights. The appeals fail and are dismissed with costs.

Appeal dismissed.

(1) 22 B. 893.
(2) 24 B. 504; 2 Bom. L. R. 491.

KHEMESH CHANDRA v. ABDUL HAMID.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 2627 TO 2629 OF 1909 AND 1419 OF 1912.

March 19, 1915.

Present:—Mr. Justice N. Chatterjea and Mr. Justice Mullick.

KHEMESH CHANDRA RAKSHIT—*Proforma* DEFENDANT NO. 26—APPELLANT

versus

ABDUL HAMID—PLAINTIFF—RESPONDENT.

Bengal Land Revenue Sales Act (XI of 1859), ss. 13, 54, scope of—Sale, what passes by—Purchaser, rights of—Adverse possession—Incumbrance, acquisition of rights in respect of.

At a sale under section 13, Bengal Land Revenue Sales, Act XI of 1859, it is not the rights of the recorded proprietor that pass, but the share itself. [p. 352, col. 1.]

Obiter.—A Hindu widow in possession of a share of an estate as the heiress of her husband or her father represents the full owner's interest and the purchaser of such a share acquires the share itself, and not merely a life-estate. [p. 351, col. 2.]

Dabi Das Chowdhuri v. *Bipro Charan Ghosal*, 22 C. 641 and *Banalata Dasi* v. *Monmotha Nath Goswami*, 11 C. W. N. 821, referred to and followed.

Adverse possession against the defaulter, whether for the statutory period or for a lesser period, does not bind the purchaser of a share, who is not a person claiming from or through the defaulter. [p. 351, col. 2.]

Bilas Chandra Mukherjee v. *Akshay Kumar Das Sarkar*, 14 Ind. Cas. 219; 16 C. W. N. 587; 15 C. L. J. 436, referred to.

It is not the right, title and interest of the previous owner of the share which pass to the purchaser under section 54, but the share as recorded in the Collector's book, on which the revenue is assessed. [p. 352, col. 2.]

The words "shall not acquire any rights" in section 54, Bengal Land Revenue Sales Act, refer to the acquisition of rights in respect of interests, such as incumbrances or the like, which are referred to in the previous phrase of that section. [p. 353, col. 1.]

APPEAL NO. 2628 OF 1909.

Appeal against the decree of the Additional Subordinate Judge, Chittagong, dated the 18th June 1909, reversing the decision of the Additional Munsif, Satkania, dated the 23rd November 1908.

APPEAL NO. 1914 OF 1912.

Appeal against the decree of the Subordinate Judge, Chittagong, dated the 27th February 1912, reversing a decision of the Munsif, Satkania, dated the 15th December 1913.

Babus *Mohendra Nath Roy, Dhirendra Lall Kastgir* and *Khitish Chandra Sen*, for the Appellant.

Babus *Joges Chandra Roy* and *Probodh Coomar Dass*, for the Respondent.

JUDGMENT

IN NO. 1419.

The question for decision in this appeal is, what is the extent of share which passed to the plaintiff, at a sale held under section 13 of Act XI of 1859.

It appears that a 14 annas 9 pies share of an estate belonged to one Mofizar Rahaman.

Mofizar Rahaman died leaving two sons, Fazor Rahaman and Dula Meah, a widow and three daughters. Under the Muhammadan Law the two sons got one half (a quarter each) and the widow and the daughters the other half of the estate. On the 29th October 1886 Fazor Rahaman got himself and his brother Dula Meah, who was then a minor, registered in the Collectorate with respect to the whole of the 14 anns 9 pies share, ignoring his mother and sisters who may be conveniently referred to as the females.

These females, however, on the 21st March 1893 obtained an order for registration of their names in respect of one-half of 14 annas 9 pies share, that being their shares in the estate left by Mofizar Rahaman.

On the 7th June 1893, the plaintiff purchased the interest of Fazor Rahaman at a sale held in execution of a money decree and got himself registered with respect to 7 annas $4\frac{1}{2}$ pies share, although that share included the share of Dula Meah. On the 25th March 1897, the share of Dula Meah was purchased by one Wasek Ali, and he also got his name registered with respect to 7 annas $4\frac{1}{2}$ pies share, although Dula Meah's share was only one half of that.

Now after the females got their names registered with respect to 7 annas $4\frac{1}{2}$ pies share, Wasek Ali, as purchaser of Dula Meah's interest, ought to have bsen recorded as owner of one-half of 7 annas $4\frac{1}{2}$ pies share, and the share registered in the name of the plaintiff also ought to have been reduced to one-half of 7 annas $4\frac{1}{2}$ pies share. In the general register, however, the females were recorded as owners of 7 annas $4\frac{1}{2}$ pies share and Wasek Ali and the plaintiffs were recorded as owner of 7 annas $4\frac{1}{2}$ pies each. The total, therefore, (treating the 14 annas 9 pies as 16 annas) amounted to 24 annas.

It appears that sometime before 1895, the plaintiff got a separate account opened in respect of 7 annas $4\frac{1}{2}$ pies share with a

proportionate Government revenue and it was called *hissya* No. 2.

The shares of the females together with that of Wasek Ali (purchaser of Dula Meah's interest) were formed into a separate account consisting of 7 annas $4\frac{1}{2}$ pies share with a proportionate Government revenue and was known as *hissya* No. 5.

Both the *hissyas* Nos. 2 and 5 were sold for arrears of revenue under section 13 of Act XI of 1859, on the 4th March 1898, and *hissya* No. 2 (which formerly belonged to him) was purchased by the plaintiff, and *hissya* No. 5 was purchased by the defendant.

It appears from the judgment of the Court below, that a person claiming the interest of the females in the estate has lost his suit as against the plaintiff and the defendant, by reason of these sales for arrears of revenue. We are not, therefore, concerned with the shares of the females, and the only question now is whether the plaintiff by his purchase of *hissya* No. 2 acquired only one-half of 7 annas $4\frac{1}{2}$ pies share (that being the share which originally belonged to Fazor Rahaman and subsequently to the plaintiff under his purchase in execution of the money decree) or the entire 7 annas $4\frac{1}{2}$ pies share covered by separate account No. 2.

The question turns upon the construction of section 54 of Act XI of 1859, which runs as follows:—"When a share or shares of an estate may be sold under the provisions of section 13 or section 14, the purchaser shall acquire the share or shares subject to all incumbrances and shall not acquire any rights which were not possessed by the previous owner or owners."

It is contended on behalf of the appellant that the words "shall not acquire any rights which were not possessed by the previous owner or owners" mean that the purchaser shall not acquire any rights which were not possessed by the previous owner at any time previously, and that as Fazor Rahaman or the plaintiff never possessed more than a moiety of 7 annas $4\frac{1}{2}$ pies share, the plaintiff as purchaser at the revenue sale could not acquire a title to more than that share. On the other hand, it is contended on behalf of the respondents, that the purchaser acquires the share itself which is put up for sale, irrespective of the extent of the share of the person whose name was recorded in the separate account.

The rights of the purchaser, under section 54, Act XI of 1859, have been considered in several cases by this Court. In *Dabi Das Chowdhuri* v. *Bipro Charan Ghosal* (1), where an estate held by a Hindu widow was sold for arrears of revenue, and it was contended that under section 54 the purchaser did not purchase any estate which lasted longer than her life-time, Pigot, J., after referring to the provisions of section 13 observed: "It is plain that as the result of a sale under section 13, it is contemplated that the whole share in respect of which the arrear may have been due shall pass to the purchaser; and that confirms the impression which, upon reading section 54 alone, one would be disposed to form with regard to its meaning that the words 'shall not acquire any rights' in that section refer to the acquistion of rights in respect of interest, such as incumbrances or the like, which are referred to in the previous phrase of that section. We are, therefore, of opinion that the entire estate passed upon the sale for arrears of revenue under section 54, and that the purchaser did not take any interest limited to the life of Satanmani." No doubt a Hindu widow in possession of a share of an estate as the heiress of her husband or her father represents the full owner's interest and the purchaser of such a share acquires the share itself, and not merely a life-estate, and this is the ground upon which Brett and Sharf-ud-din, JJ., based their decision in *Banalata Dasi* v. *Monmotha Nath Goswami* (2). Pigot and Stevens, JJ., however, in the case cited above based their judgment upon a construction of the section and held that the words "shall not acquire any rights" which were not possessed by the previous owner or owners" refer to the acquisition of rights in respect of interest, such as incumbrances or the like, which are referred to in the previous phrase.

It has also been held that adverse possession against the defaulter, whether, for the statutory period or for a lesser period does not bind the purchaser of a share, and that

(1) 22 C. 641.
(2) 11 C. W. N. 821.

the purchaser is not a person claiming from or through the defaulter. See *Kumar Kalanand* v. *Syed Sarafat Hossein* (3), *Rahimuddi Munshi* v. *Nalini Kanta Lahiri* (4) and *Bilas Chandra Mukherjee* v. *Akshay Kumar Das Sarkar* (5). See also *Bhawani Koer* v. *Mathura Prasad* (6).

The authorities clearly show that at a sale under section 13 of Act XI of 1859 it is not the rights of the recorded proprietor that pass, but the share itself.

Reliance was placed on behalf of the appellant on the case of *Annada Prosad Ghose* v. *Rajendra Kumar Ghose* (7). In that case, the plaintiff, who purchased in execution of a money decree the rights of the defaulter in whose name a separate account had been opened in respect of a share of an estate, sued for declaration of his title to, and recovery of possession of, the share against the purchaser there at a revenue sale, and it was contended on his behalf that the words "the purchaser shall not acquire any rights which were not possessed by the previous owner or owners" mean that the purchaser at a revenue sale only acquires the rights possessed by the previous owner or owners *at the date of the sale*. Such a contention, if upheld would lead to the result that if the previous owner parts with all his rights before the share is put up for sale for arrears of revenue, the purchaser at such a sale acquires nothing, and the learned Judges (Rampini and Pratt, JJ.) overruled the contention. In doing so, however, they held that the words quoted above meant that "the purchaser shall not acquire any rights not possessed by the previous owner or owners at some time or another." It is upon this passage of the judgment that the appellant relies, and it is contended that as the previous owner of *hissya* No. 2 never had rights to anything more than one half of 7 annas 4½ pies share, the plaintiff could not, by his purchase of *hissya* No. 2, acquire a title to the entire 7 annas 4½ pies share. No doubt there is the passage in the judgment, but then the learned Judges also said with reference to the interpretation sought to be placed upon the section, "To put such an interpretation upon these words would be to entirely ignore the policy of the revenue law, which is to protect the revenue and make the share, on which the revenue is assessed, available for the arrears of revenue due upon it," and they quoted with approval the observation of Phear, J., in the case of *Ganga Deen Misser* v. *Kheroo Mandal* (8), "The sale of the Collector passes to the purchaser the share of the defaulting shareholder of the entire estate as it was registered in the Collector's books," and, "It was not the intention, we think, of the Legislature to introduce uncertainty of this kind into auction-sales held for the purpose of realizing revenue. On the contrary, it is rather the general principle of the Legislature to make these sales effective to pass the full share of the defaulting shareholder free, so to speak, of all incumbrances."

In none of the cases which we have referred to, was there any question of the extent of the share which belonged to the person in whose name the separate account of the share of the estate was opened, but these authorities establish the proposition that it is not the right, title and interest of the previous owner of the share which pass to the purchaser under section 54, but the share as recorded in the Collector's book, on which the revenue is assessed. It is true Phear, J., refers to the "full share of the defaulting shareholder." In the present case although Fazor Rahaman and subsequently the plaintiff as purchaser of his interest had only a moiety of 7 annas 4½ pies, the separate account was opened with respect to the whole 7 annas 4½ pies share in the name of the plaintiff with a proportionate Government revenue. The other moiety belonged to Dula Meah, and the name of Wasek Ali, the purchaser of his interest, ought to have been recorded in that separate account, but was entered in the separate account No. 5 along with the names of the females. But the 7 annas 4½ pies share was formed into the separate account No. 2 with a proportionate Government revenue, and not with a moiety of the revenue payable for that share. And if the policy of the revenue law is to protect the

(3) 12 C. W. N. 525.
(4) 1 Ind. Cas. 81; 13 C. W. N. 407.
(5) 14 Ind. Cas. 219; 16 C. W. N. 587; 15 C. L. J. 436.
(6) 7 C. L. J. 1.
(7) 29 C. 223; 6 C. W. N. 375.
(8) 14 B. L. R. 170; 22 W. R. 449.

revenue and make the share on which the revenue is assessed available for the arrears of revenue assessed upon it, as we think it is, the whole of the 7 annas 4½ pies share when it fell into arrears, became liable to be sold for such arrears, although the person recorded as the owner of that share had right to only a moiety of it.

We agree with the view taken by Pigot, J., in *Dabi Das Chowdhuri* v. *Bipro Charan Ghosal* (1) [followed by Mookerjee, J., in *Bhawani Koer* v *Mathura Prasad* (6)] *viz.*, that the words "shall not acquire any rights" in section 54 refer to the acquisition of rights in respect of interest, such as incumbrances or the like, which are referred to in the previous phrase of that section. It is to be observed that a separate account is opened under Act XI of 1859, after service of notice to the other share-holders. It is pointed out however on behalf of the appellant that section 69 of the Land Registration Act provides that no separate account shall be opened under the provisions of section 10 or 11 of Act XI of 1859 in respect of the share of any applicant under the said section otherwise than for a share corresponding with the character and extent of interest in the estate, in respect of which such applicant is recorded as proprietor or manager under the Land Registration Act, and that, therefore, *hissya* No. 2 ought not to have been opened with respect to 7 annas 4½ pies share in the name of the plaintiff when he applied for opening of a separate account of his share. But as already stated, in the general register the plaintiff was registered with respect to 7 annas 4½ pies; Wasek Ali and the females also were recorded each with respect to a similar share, the total shares thus amounting to more than 16 annas. That no doubt was a mistake, but the separate accounts were opened several years before the *hissyas* were put up to sale, one in the name of the plaintiff for a 7 annas 4½ pies share, and the other in the name of Wasek Ali and the females for a 7 annas 4½ pies with proportionate Government revenues. Neither Wasek Ali nor the females appear to have ever taken any steps to have the mistake corrected. The *hissya* No. 2 consisting of the whole of 7 annas 4½ pies stood in the name of the plaintiff, though erroneously, and when the Government revenue for that share fell into arrears, the Collector put up that *hissya* for sale, and if we are to hold that the entire *hissya* N . 2 did not pass to the purchaser because the person in whose name it stood recorded did not possess the entire 7 annas 4½ pies share, we would be introducing uncertainty into auction sales for the purposes of realizing revenue which, as pointed out by Phear, J., was not the intention of the Legislature.

Lastly, it was contended on behalf of the appellant, that the Court of first instance having found that sale of *hissya* No. 2 was brought about by the plaintiff fraudulently, the Court of Appeal below ought to have come to a finding upon the point, and it is wrong in holding that no question of fraud or mistake comes in. But the only ground upon which the Court of first instance found that the revenue sale was brought about by the fraud of the plaintiff, is that he took no steps to have the mistake in the matter of separate account having been opened in respect of a 7 annas 4½ pies share rectified. But the separate accounts were opened several years before the sale for arrears of revenue, and we cannot say that there was any obligation on the part of the plaintiff to have the mistake corrected for the benefit of Wasek Ali or persons representing him.

We are not concerned with a consideration of the rights of the females. As already stated, the purchaser of their rights has been held in a previous suit to have lost his rights by reason of the revenue sales, and both the plaintiff and the defendant were parties to that suit.

We are of opinion that the entire 7-annas 4½-pies share constituting *hissya* No. 2 passed to the plaintiff at the sale for arrears of revenue, and this appeal will accordingly be dismissed with costs.

IN NOS. 2627 TO 2629.

These appeals arise out of suits for rent in respect of 7-annas 4½-pies share instituted by the plaintiff as purchaser of *hissya* No. 2. Having regard to our decision in Appeal No. 1419 of 1912, we think these appeals must also be dismissed with costs.

Appeals dismissed.

PANNA LAL *v.* NATHA SINGH.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1510 OF 1912.

December 16, 1914.

Present:—Mr. Justice Rattigan and Mr. Justice Scott-Smith.

PANNA LAL—JUDGMENT-DEBTOR—APPELLANT

versus

NATHA SINGH—DECREE-HOLDER—RESPONDENT.

Punjab Pre-emption Act (II of 1905), ss. 10, 19—Money deposited in Court by plaintiff-pre-emptor, attachment of—Liability of plaintiff to pay up deficiency.

The plaintiff-pre-emptor deposited Rs. 400 in Court under section 19 of the Punjab Pre-emption Act of 1905, but during the pendency of the suit Rs. 297 were, without the knowledge of the parties to the suit, withdrawn under an attachment at the instance of a person who had a decree against the plaintiff. The suit being decreed in favour of the plaintiff, he paid in the balance of the price fixed over and above Rs. 400, but was ordered to pay Rs. 297 more before getting possession:

Held, that under section 10 of the Act the money deposited by the plaintiff could not be attached, but as he had presumably benefited by Rs. 297 being paid over to one of his creditors, he was in equity bound to make good the deficiency. [p. 355, col. 1.]

Second appeal from an order of the Divisional Judge, Ambala, dated the 17th May 1912.

Lala *Sangam Lal*, for the Appellant.

Mr. *Gokal Chand Narang*, for the Respondent.

JUDGMENT.—The Appeals Nos. 1510 and 1596 of 1912 have arisen out of an order passed in execution of a decree for pre-emption. The facts are fully stated in the judgment of the lower Appellate Court.

Briefly they are that Natha Singh, plaintiff, was given a decree for pre-emption of certain land on payment of Rs. 2,000 payable to Panna Lal, vendee. By order of the Court he deposited Rs. 400 in Court under section 19 of the Punjab Pre-emption Act of 1905.

During the pendency of the suit, Rs. 297 out of that sum were withdrawn under an attachment at the instance of a person who had a decree against Natha Singh. It does not appear that Natha Singh or Panna Lal had notice of this attachment and hence no objection was made to it.

After the suit was finally decided Natha Singh paid in the balance of the price as fixed by the Appellate Court. He has now been ordered to pay the sum of Rs. 297, removed under the attachment mentioned above, before he is given possession of the land decreed. Against this order he has filed a further appeal to this Court, and Panna Lal has also appealed asking that the suit should be dismissed as the price to be deposited was not paid into Court by due date.

Lala Sangam Lal who appeared for Panna Lal did not press that the suit should stand dismissed, but he urged half-heartedly that as Natha Singh had not as yet even paid in Rs. 297, the Court should not allow his decree to be executed. Natha Singh has complied with the decree and there is certainly no reason why his suit should be dismissed, while Panna Lal's interests have been sufficiently protected by the Court ordering Natha Singh to pay Rs. 297 more prior to execution.

Mr. Gokal Chand in arguing Natha Singh's appeal relies upon *Sant Singh* v. *Ghasita* (1), wherein *Sandha Khan* v. *Jhandu Khan* (2) was dissented from and it was held that money deposited in a Court to be paid to a vendee under a pre-emption decree cannot be withdrawn by an attachment under a decree of third party, and that a Court is not competent to pay it out to any one but the person entitled to it under the decree for pre-emption. In that case the plaintiff was not ordered to pay over again the money which had been withdrawn under an attachment. The whole of the money was paid after the decree had been passed and the *ratio decidendi* was that the plaintiff, immediately he had deposited the full amount in the Court, was entitled to the property decreed.

The present case is distinguishable, inasmuch as the money withrawn was a part of the deposit made under section 19 of the Punjab Pre-emption Act of 1905. At the time the plaintiff was not entitled to possession of the land, nor were the vendees entitled to remove any part of the money, and it could not be attached in accordance

(1) 21 P. R. 1902; 179 P. L. R. 1901.
(2) 61 P. R. 1890.

with section 10 of the Punjab Pre-emption Act of 1905, which provides that no sum deposited in or paid into Court by a pre-emptor under the provisions of this Act or of the Code of Civil Procedure shall, while it is in the custody of the Court, be liable to attachment in execution of a decree.

This provision of the law had not been enacted at the time of the decision reported as *Sant Singh* v. *Ghasita* (1), and, as already remarked, the present case is distinguishable, and we think that it should be decided in accordance with equity. The vendee is certainly in no way to blame for the money having been withdrawn, and we do not think that he should be forced to surrender the land till he is paid the full amount to which he is entitled. The plaintiff has presumably been benefitted by Rs. 297 being paid to one of his creditors. If no such sum of money was really due, he can seek redress by a regular suit. In our opinion the order of the Courts below was a correct one, and we dismiss both the appeals. Parties will bear their own costs in this Court.

Appeals dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1283 OF 1912.

February 17, 1915.

Present:—Mr. Justice Fletcher and Mr. Justice Teunon.

HARI KRISHNA DAS—PLAINTIFF—APPELLANT

versus

DINOR KINLA AND OTHERS—DEFENDANTS—RESPONDENTS.

Declaration of title, suit for—Nature of title to be ascertained first—Plaint, amendment of—Discretion exercised by lower Appellate Court—High Court, power of, to interfere.

A Court ought not to declare the title of any party to a piece of land without knowing what the nature of that title is. [p. 355, col. 2.]

A High Court ought not to interfere with the discretion deliberately exercised by a lower Appellate Court in refusing to allow a plaintiff to amend his plaint during the progress of the suit, unless it is satisfied that the lower Court came to a wrong conclusion. [p. 355, col. 2.]

Appeal against the decree of the Additional Subordinate Judge, Midnapore, dated the 10th of February 1912, affirming that of the Munsif, 2nd Court, Tamluk, dated the 18th of May 1911.

Babu *Hari Bhusan Mukherjee*, for the Appellant.

Babus *Sarat Chandra Khan* and *Hirendra Nath Ganguli*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal from a decision of the learned Subordinate Judge of Midnapore affirming the decision of the Munsif. The suit was brought by the plaintiff for a declaration of his title to $1\frac{1}{2}$ *bighas* of land. The plaintiff has failed in both the Courts below. In the lower Appellate Court he was unsuccessful on the ground that he failed to define what was the nature of the interest in the land for which he asked the Court to make a declaration in his favour. In that, obviously, the learned Subordinate Judge was right. The plaintiff did not inform the Court whether the land which he claimed was held subject to the payment of rent or rent-free or in absolute interest or in any other more limited interest. The reasons are not far to seek when one looks into the judgment of the Court of first instance, because the plaintiff deliberately attempted to shift during the trial of the case the nature of the title which he claimed, and in this suit obviously the Court ought not to declare the title of the plaintiff without knowing what the nature of that title is. It is quite clear that the learned Subordinate Judge exercised a proper discretion when he declined to declare the plaintiff's title to a piece of land in which he did not know what interest the plaintiff had.

Then it is said that the application made by the plaintiff for amending the plaint ought to have been allowed. This is not the place where in the ordinary course a question of this nature should be decided. That is a matter purely within the discretion of the Judges of the lower Courts and they not having permitted such an amendment, we ought not, in the ordinary course, to interfere with the discretion deliberately exercised by the Judges of the Courts below, unless we are satisfied that they came to a wrong conclusion. From the course the case took in the Court of first instance, it

seems to me that these learned Judges exercised a wise discretion in refusing to allow the plaintiff to amend his plaint during the progress of the suit. In that view, the decision arrived at by the learned Subordinate Judge of the lower Appellate Court is correct. The present appeal, therefore, fails and must be dismissed with costs.

TEUNON, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 141 AND 142 OF 1912.

March 19, 1915.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

Sri RAJAH ROW VENKATA MAHIPATY GANGADHARA RAMA ROW BAHADUR —PLAINTIFF—APPELLANT IN NO. 141 & RESPONDENT IN NO. 142

versus

Sri RAJAH VENKATA KUMARA MAHIPATY SURYA RAO BAHADUR GARU *alias Sri* RAJAH RAO VENKATA KUMARA MAHIPATHY SURYA RAO BAHADUR GARU, RAJAH OF PITTAPUR—DEFENDANT—RESPONDENT IN NO. 141 & APPELLANT IN NO. 142.

Hindu Law—Impartible estate—Right of a junior member to maintenance—Co-parcenary right—Pittapur Zemindary—Maintenance grant.

The *Zemindary* of Pittapur is an impartible estate governed by the *Mithakshara* Law and descending by lineal primogeniture. [p. 356, col. 2]

The plaintiff's father was adopted by the late *zemindar* who by a Will and an agreement gave him a maintenance. On the *zemindar's* death the plaintiff's father sued to recover the *zemindary* on the ground that the Will was invalid and that the defendant was not the Raja's natural son. The Will was upheld and the suit was dismissed. The plaintiff seeking maintenance from the defendant but denying his co-parcenary relationship with the defendant:

Held, that the plaintiff was not entitled to any maintenance. [p. 360, col. 1; p. 361, col. 2.]

As the agreement with the plaintiff's father for maintenance did not expressly state that it was for the plaintiff's father and his heirs, it could not be construed to have made a permanent provision for the grantee and his descendants. [p. 370, col. 2.]

Prima facie, a provision for maintenance by a grant of money allowance is temporary. Grants to be construed as permanent provisions must be supported by unambiguous language or by a course of conduct and enjoyment by the grantee's descendants for a very long time. [p. 357, col. 2.]

Though an impartible estate may be for some purposes spoken of as joint family property, the co-parcenary in it, which under the *Mithakshara* Law is created by birth, does not exist. The right to maintenance cannot, therefore, be a right which arises out of the co-parcenary interest of the property or which arises out of any community of interest acquired by birth. The right to get maintenance is not evidence of any community of interest which the members of the family acquire by birth. [p. 359, col. 1.]

A junior member of the family of the holder of an impartiable *zemindary* is, therefore, entitled to maintenance only as in a *Dayabhaga* family on account of his relationship and not on account of any interest in the property. [p. 359, col. 2.]

Where the plaintiff bases his claim to maintenance on no relationship, there is no community of interest and the property is not burdened with his maintenance in the hands of a donee. [p. 359, col. 2.]

Appeals against the decree of the Court of the Temporary Subordinate Judge of Rajahmundry in Original Suit No. 19 of 1911.

Messrs. *K. Srinivasa Iyenger*, *A. Krishnasami Iyer* and *A. Suryanarayaniah*, for the Appellant in No. 141 & Respondent in No. 142.

Messrs. *S. Srinivasa Iyengar*, *P. Naranyanamurthi* and *S. V. Padmanatha Iyengar*, for the Respondent in No. 141 & Appellant in No. 142.

JUDGMENT.

SANKARAN NAIR, J.—These are appeals from the decree of the Subordinate Judge, Rajahmundry, directing the defendant, the Rajah of Pittapur, to pay to the plaintiff the sum of Rs. 46,250 for maintenance.

The *zemindary* of Pittapur is an impartible estate descending by lineal primogeniture but otherwise governed by the *Mitakshara* Law. The plaintiff's father was adopted by the late *zemindar* who died in the year 1890, having executed a testamentary instrument disposing of all his properties in favour of the defendant, who also claims to be the natural son of the testator. The late Rajah had previously entered into an agreement with the plaintiff's father in 1882, whereby he had agreed to pay him Rs. 1,500 per month and a lump sum of Rs. 6,000 a year. The Will confirmed that arrangement. On the death of the Rajah the plaintiff's father sued to recover the *zemindary*, denying that the defendant was the late Rajah's natural son, and also the validity of the Will. But the suit was finally dismissed by the Judicial Committee on the ground that the Will was valid.

The plaintiff claims maintenance from 1902, when he ceased to be maintained by his

father. It will be noticed that the plaintiff does not admit that the defendant is a natural son of the late Rajah and that himself and the defendant are members of an undivided family.

The defendant contended that the plaintiff, a junior member of a family of the holder of an impartible *zemindary*, is not entitled to any maintenance from the holder, as the *zemindary* is not joint property; that if it is, on account of the agreement, Exhibit III, and the Will referred to and also on the ground that the plaintiff does not claim any maintenance as a member of his family, the suit must be dismissed.

The Subordinate Judge decided that the *zemindary* must be treated as joint family property and the plaintiff has got, therefore, legal rights to be maintained out of the *zemindary*. He was also of opinion that such right was independent of, and not derived through, the father.

On the second question, conceding that a Hindu father has the right to represent his descendants in obtaining a provision for himself and his posterity, the Subordinate Judge held that Exhibit III was not an arrangement which was intended to include the allowance due to the plaintiff also. He also held that even if the arrangement under Exhibit III is held to enure to the benefit of the grantee during his life-time, it was not intended to include within its scope all the descendants of the plaintiff's father even during that limited period. As to the rate of maintenance, he held that Rs. 250 per month *plus* Rs. 53 for house rent would be a "reasonable and respectable" provision, and he accordingly awarded arrears of maintenance at the rate of Rs. 3,000 per annum from August 1904 when the demand was made up to the date of suit. From this decree both parties appeal.

The learned Pleader for the Raja of Pittapur intimated that though he does not propose to argue before us that the junior member of a *Mitakshara* family is not entitled to maintenance from an impartible *zemindary* in the possession of a member of the family, in view of certain decisions of this Court he reserves his right to argue that question if this case is carried before a higher Court.

We agree with the lower Court that the arrangements made by the late Raja was not a provision made for the maintenance of the plaintiff's father and all his descendants. There is nothing to show that the grantee obtained Exhibit III as the head of his branch on behalf of himself and his decendants. There is no reference therein to the heirs or descendants of the grantee. There are no doubt cases where grants have been made making a permanent provision for the maintenance of the grantee and his descendants. See *Lakshmi Narayana Ananga* v. *Durga Madhawa Deo* (1), *Salur Zamindar* v. *Pedda Pakir Raju* (2), *Sri Raja Rau Venkata Kumara Mahipati Surya Rau* v. *Sri Raja Rau Chellayammi Garu* (3). But in all those instances either the language was unambiguous or there existed a course of conduct—that is, enjoyment by a branch for a very long time, which clearly indicated such an intention. *Prima facie*, a provision for maintenance by way of money allowance is temporary. In this case the grantee was the presumptive heir. The plaintiff was not born at that time. No intention can, therefore, be presumed to make a provision for the grantee and his descendants. This point is not seriously urged in appeal.

The *next* question is whether the arrangement and the Will bar the plaintiff's claim. Even if it is not a permanent provision, it was argued that the arrangement is intended to enure for the life-time of the plaintiff's father and that during that period the plaintiff is not entitled to claim any separate maintenance as provision was also made for him in Exhibit III. It is true that when the arrangement, was entered into between the plaintiff's father and the late Raja, in fixing the amount payable to him the fact that the plaintiff's father had also to maintain the plaintiff and his brother who had been born before the date of the arrangement, must have been taken into consideration and the amount must have been settled accordingly. But if the plaintiff is entitled to claim maintenance from the Raja, the amount would naturally vary from time to time. He would, after his marriage in 1904,

(1) 16 M. 268; 20 I. A. 9; 16 Ind. Jur. 106; 6 Sar. P. C. J. 270.
(2) 4 M. 371.
(3) 17 M. 150.

require a higher amount than in 1882, the date of the agreement.

Exhibit III, as I have already pointed out, does not describe the plaintiff's father either the managing member of his branch or as the guardian of his children then in existence. In certain cases that the father represented his branch or his sons may be presumed, but this is not one of such cases. Neither the plaintiff nor his brother are referred to in the document. It may be open to the defendant to modify the agreement, Exhibit III, if he has to pay separate maintenance to the plaintiff. But the question cannot affect the plaintiff's right. We disallow this contention.

It was *then* argued that the plaintiff is only entitled to maintenance from the joint family estate and according to the plaintiff's claim he and the defendant are not members of a joint family and he is not entitled to any maintenance out of the estate in the hands of the defendant.

Before the decision of the Judicial Committee in *Sartaj Kuari* v. *Deoraj Kuari*(4), the junior members were held entitled to maintenance on the ground that the impartible *zemindary* was a joint family estate like any other partible estate in which they had co-parcenary interest, with the single exception that it could be held only by one member of the family on account of the impartible character of the holding. Joint family property and co-parcenary property were assumed to be the same under the *Mitakshara* Law. In *Sartaj Kuari* v. *Deoraj Kuari* (4), it was held that the co-parcenary interest which is acquired by a member of a joint family by birth under the *Mitakshara* Law is so connected with the right to partition that it does not exist where there is no right to partition, and that community of interest, therefore, did not exist as partition could not be enforced. At the same time their Lordships stated, that for purposes of maintenance and succession the estate should be treated as joint family estate though there was no such interest in the property as would entitle a member to object to an alienation by the holder for the time being. Subsequent to this decision, the question has been raised in this Court very often, whether the property is not for that reason the sole property of the *zemindar* and the junior members can be said to have any interest in it, so as to entitle them to any maintenance or on their succession to the *zemindary* to deny their liability to pay the debts of their predecessor. The decisions upheld the right of the junior member to maintenance. The ground of decision was that for this purpose they must be taken to be members of a joint family. In the *Udayarpalayam* case(5), the High Court gave a decree for maintenance as the estate was found to be impartible and this decision was confirmed by the Judicial Committee, though the question whether a junior member is entitled to any maintenance does not seem to have been argued before their Lordships. In all the cases decided by this Court or the other Courts in India, in which the junior member's claim for maintenance has been upheld, the right was held to exist on the ground that he was a member of a joint family. According to the plaintiff, the plaintiff and the defendant are not members of a joint family. The plaintiff is not, it is argued, therefore, entitled to any maintenance out of the estate. It is argued, on the other side, that at the time of his birth he was the grandson of the then holder of the estate and his right to maintenance, therefore, cannot be defeated by an alienation subsequently made by that holder in favour of the defendant. Or in other words, it is urged that the sons of the plaintiff's father born subsequent to the vesting of the *zemindary* in the defendant may not be entitled to any maintenance out of the estate; if he had any interest in the *zemindary* before its alienation, then the plaintiff might be entitled to recover it. But the question is, if the plaintiff's claim was only a right to recover maintenance from the holder for the time being and his maintenance was not a charge on the estate, though it may have to be paid out of the incomes of the estate and with reference to it, whether then the plaintiff would be entitled to enforce it against the estate in the hands of an alienee who is not admitted by the plaintiff to belong to his family. Before the decision in *Sartaj Kuari* v. *Deoraj Kuari* (4) the question could not arise. We have, therefore, to consider the grounds of that decision. In that case the High Court of Allahabad

(4) 10 A. 272; 15 I. A. 51; 5 Sar. P. C. J. 139; 12 Ind. Jur. 213.

(5) 24 M. 562; 11 M. L. J. 191.

laid down the law in the following terms:— "It must be conceded that the complete rights of ordinary co-parcenership in the other members of the family, to the extent of joint enjoyment and the capacity to demand partition, are merged in, or perhaps, to use a more correct term, subordinated to the title of the individual member to the incumbency of the estate, but the contingency of survivorship remains along with the right to maintenance in a sufficiently substantial form to preserve for them a kind of dormant co-ownership." That is, the High Court decided that the right to maintenance was due to a kind of dormant co-ownership which is subordinated to the title of the individual member to hold the estate. This was the proposition which came before the Judicial Committee for consideration. Referring to the various cases in which an impartible *zemindary* was treated by their Lordships in their previous decisions as common family property or joint family property, the Judicial Committee said that all such statements were only made with reference to the questions then in issue, that is, the right of succession or right to maintenance and they declared the law in these words: "This is a clear opinion that, though an impartible estate may be for some purposes spoken of as joint family property, the co-parcenary in it which under the *Mitakshara* Law is created by birth does not exist." It is quite clear that the plaintiff is not, therefore, a co-parcener. They further held that the property in the paternal or ancestral estate acquired by birth under the *Mitakshara* Law is, in their Lordships' opinion, so connected with a right to partition "*that it does not exist where there is no right to it.*" Accordingly the plaintiff has not acquired any interest by birth. The right to maintenance, therefore, cannot be a right which arises out of the co-parcenary interest in the property or which arises out of any community of interest acquired by birth.

The property is, however, joint family property in the sense of the younger brother's taking "such rights and interests in respect of maintenance and possible rights of succession as belong to a junior member of a *raj* or other impartible estate descendible to a single heir." If the impartible *zemindary* is joint family property for purposes of maintenance, is not the right of maintenance, which has been upheld by the decisions of this Court, evidence of community of interest? Their Lordships held otherwise. This appears to be clear from a reference to the Hunsapore case, *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee*(6) and the *Dayabhaga* Law. Referring the case of *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee*(6), their Lordships said that though the estate was governed by *Mitakshara* law and had descended by family usage and custom according to the rule of primogeniture, subject to the burden of making allowances to the junior members of the family for maintenance, yet the right to get maintenance was not evidence of any community of interest which the members of the family acquired by birth. With reference to the *Dayabhaga* Law, they say: "In Bengal there is joint family property, but where property is held by the father as its head, his issue have no legal claim upon him or the property except for their maintenance. He can dispose of it as he pleases, and they cannot demand a partition. The sons have not ownership while the father is alive and free from defect. Upon his death, the property in the sons arises, and with it a right to partition." (Dayabhaga, Chapter I.) This shows that in the opinion of their Lordships, property may be called *joint family property*, though the junior members may have no ownership in the same at all during the lifetime of the holder for the time being. Their Lordships also point out that the father may alienate the property. The purchaser takes it without any obligation to maintain the sons. That their Lordships use the term 'joint family property' in a peculiar sense, not in the ordinary acceptation of those words, is not a reason for disregarding their opinion. That opinion was necessary to support the conclusion therein arrived at. A junior member of the family of the holder of an impartible *zemindary* is, therefore, entitled to maintenance only as in a *Dayabhaga* family on account of his relationship, and not on account of any interest in the property. The plaintiff does not advance any claim based on relationship; he refuses to admit any relationship. His claim cannot be sustained on that ground. As there was no community of interest, the property is not burdened with his

(6) 12 M. I. A. 1; 9 W. R. 15 (P. C.); 2 Suth. P. C. J. 114; 2 Sar. P. C. J. 348; 20 E. R. 241.

claim in the hands of a donee. In this view the plaintiff's claim fails. We reverse the decree and dismiss the suit with costs throughout.

OLDFIELD, J.—I have had the advantage of reading my learned brother's judgment and have nothing to add to it as regards Exhibit III and the effect on plaintiff's claim of any settlement with his father. There remains the wider question, whether that claim is sustainable by him in virtue of his position as a junior member of the Pittapur family.

As set out in my learned brother's judgment, plaintiff has, for motives which are easily intelligible, refused to rely on any relationship between himself and defendant, the present *zemindar*. Defendant must, therefore, for the purpose of the case be regarded as an alienee of the estate, who acquired it after plaintiff's birth. The questions in general terms are, therefore, whether (1) a junior member of a family has a right to maintenance from an impartible estate held by its head (2), that right is acquired at birth and runs with the estate after its transfer to a stranger.

The learned Pleader for defendant reserved his right to argue the first of these questions elsewhere, if necessary, and confined himself to the second. I understand him by taking that course to have conceded provisionally that the junior member's right existed, but to have admitted nothing as to its nature or basis, which could involve its binding the estate in the hands of an alienee Plaintiff supported his claim as founded in one way only, on the validity of a proposition which he contended for as settled law, that members of a joint family, whose property is impartible, are entitled to maintenance from that property, in whosoever hands during their lives, because they cannot claim shares in it on division. It is not suggested that this proposition can be supported by any text. It must then be justified either as endorsed by authority or on general principles.

Firstly, as to authority there is no case dealing with a claim against an alienee. Nor in fact is there any, in which the claim against the head of a family was contested directly as founded on principle and the legal rights of junior members of the family in its property were discussed fully for this purpose. For in *Maharana Shri Fatehsangji Jasvatsangji* v. *Kuvar Harisangji* (7), though liability was disputed generally, attention appears to have been confined to the question of the special law applicable to the parties, and the general issue was dealt with shortly by reference to *Muttusawmy* v. *Venkataswara* (8), *Himmatsing* v. *Ganpatsingh* (9). In the first of these decisions the Privy Council was dealing with the case of an illegitimate son and remitted it for determination as to his right against the *zemindary* property; the High Court thereon [*Coomara Yettappa Naikar* v. *Venkateswara Yettia* (10)] treated that right as established by *Chuoturya Run Murdun Syn* v. *Sahub Purhulad Syn* (11), which simply recognised the right to maintenance of an illegitimate son; *Naragunty Lutchmeedavamah* v. *Vengama Naidoo* (12), which referred to the right only incidentally, and *Stree Raja Yanumula Venkayamah* v. *Boochia Venkondora* (13), to which further reference will be made. In the other decision referred to by the Bombay High Court, the plaintiff's claim was no doubt allowed on a ground similar to that relied on here, but without comprehensive discussion or reference to the law, as now understood. In later cases and in this Presidency the right to maintenance has either not been denied on principle, the dispute being confined to its amount, or its existence has been referred to merely incidentally to the discussion of the other characteristics of impartible estates, in particular their inalienability. The *Udayarpalayam* case *Kachi Kaliyana Rengappa Kalakka Thola Udayar* v. *Kachi Yuva Rengappa Kalakka Thola Udayar* (14) is an instance of the former description; and *Zamindar of Karvetnagar* v. *Trustee of Tirumalai Tirupati Devastanams* (15) of the latter; and *Baboo Beer Pertab Sahee* v. *Maharaja Rajendar Pertab Sahee* (6) of both. In these

(7) 20 B. 181.

(8) 12 M. I. A. 203; 11 W. R. 6 (P. C.); 6 B. L. R. 15 (P. C.); 2 Suth. P. C. J. 175; 2 Sar. P. C. J. 395; 20 E. R. 317

(9) 12 B. H. C. R. 94

(10) 5 M. H. C. R. 405.

(11) 7 M. I. A. 18; 4 W. R. 132 (P. C.); 1 Suth. P. C. J. 313; 1 Sar. P. C. J. 591; 19 E. R. 217.

(12) 9 M. I. A. 66; 1 W. R. 30 (P. C.); 1 Suth. P. C. J. 460; 1 Sar. P. C. J. 826; 19 E. R. 666.

(13) 13 M. I. A. 333; 13 W. R. (P. C.) 21; 12 Suth. P. C. J. 302; 2 Sar. P. C. J 546; 20 E. R. 576.

(14) 28 M. 508; 15 M. L. J. 312; 2 C. L. J. 231; 1 M. L. T. 12; 10 C. W. N. 95; 7 Bom. L. R. 907; 2 A. L. J. 845; 32 I. A. 261.

(15) 2 Ind. Cas. 18; 32 M. 429; 19 M. L. J. 401.

circumstances, although the proposition put forward by plaintiff may occasionally have been more or less explicitly stated, it is not possible to hold that it has been sanctioned at any time by authority. Those occasional statements of it occur, it is to be observed, only in the judgments of the High Courts, the Privy Council having never committed itself to any more explicit statement than that contained in *Stree Rajah Yanumula Venkayamah* v. *Boochia Vankondora* (13), where it is said regarding the character of an admitted grant that "these grants by way of maintenance are, in the ordinary course of what is done by a person in the enjoyment of a *raj* or impartible estate, in favour of the junior members of the family, who but for the impartibility of the estate would be co-parceners with him." This clearly involves no decision that such grants originate in any principle of law and, an important point, not in custom or even benevolence, the last sentence merely supplying an explanation for them equally consistent with any of these origins. But it is possible that Judges in this country have been led to some extent by this passage to make the more definite statements on which plaintiff relies, and to credit the law in their *obiter dicta* with a symmetry which authority has never recognized directly.

My learned brother has observed that the conception of impartible property and its incidents was altered by the decision in *Sartaj Kuari* v. *Deoraj Kuari* (4) and I may add, in this Presidency by the decision in *Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *Court of Wards* (16). I concur with him in his conclusion that the right to maintenance does not arise from any co-parcenary interest in the property or any community of interest acquired by birth. As plaintiff's proposition is, in my opinion, inadequately supported by authority prior to these decisions and as its correctness is negatived by them, it is unnecessary to discuss its merits at length. The contention is however in effect, *firstly*, that, because a junior member of a *Mitakshara* family cannot, when the property is impartible, derive advantage from his membership in the ordinary way he is on that account entitled to derive it in another, not ordinarily authorised by Hindu Law. It is, *next*, that he can do so by way of receipt of a maintenance, although the cases in which a right to maintenance is recognised by the texts, are those of illegitimacy or other disqualification personal to the claimant and in no way depend on the nature of the property. Both positions seem to me open to question, and I should in the absence of direct authority hesitate to adopt them

In these circumstances plaintiff, having failed to show that he acquired a right to maintenance from the impartible estate by birth, must fail. I observe that his claim has been based on his membership of a *Mitakshara* family and his consequent acquisition of a right in its impartible property, and could be dealt with only on that basis. It has not, therefore, been open to us to consider his claim as based on custom, either as regards the Pittapur estate or impartible estates in general in this Presidency, although, if it had been put forward on the latter basis, the instance of recognition of the right to maintenance afforded by the reported decisions might have been important evidence in his favour.

In the result, I concur in my learned brother's judgment, dismissing the suit with costs.

Appeal allowed.

(16) 26 I. A. 83; 22 M. 383; 3 C. W. N. 415; 9 M. L. J. Sup. 1.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 1735 OF 1913.

December 22, 1914.

Present:—Mr. Justice Shah Din.

RATTAN MALIK—PETITIONER

versus

TIRATH RAM AND OTHERS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 15 (1), scope of—Petition presented by the debtor—Dismissal on the ground of bad faith—Material irregularity.

The concluding portion of sub-section (1) of section 15 of the Provincial Insolvency Act of 1907 refers only to cases in which the application has been made by the creditor and is opposed by the debtor. [p. 363, col. 2.]

Where, therefore, an insolvency petition presented by a debtor was dismissed under section 15 (1) of the Act, on the ground that the petitioner had been guilty of bad faith in having given undue preference to some of his creditors over others:

Held, that the District Judge acted with material irregularity in the exercise of his jurisdiction in dismissing the petition upon that ground. [p. 363, col. 2.]

RATTAN MALIK v. TIRATH RAM.

Girwardhari v. *Jai Narain*, 7 Ind. Cas. 39; 7 A.L. J. 835; 32 A. 645; *Udai Chand Maity* v. *Ram Kumar Khara*, 7 Ind. Cas. 394 12 C. L J. 400; 15 C. W. N. 213, *Sheikh Samirud-din* v. *Kadar Moyee Dassi*, 7 Ind Cas. 691; 12 C. L. J. 445; 15 C. W. N. 244. followed.

Nathu Mal v. *District Judge of Benares*, 6 Ind. Cas. 870; 7 A. L. J. 602; 32 A. 547, dissented from.

Petition for revision from an order of the Divisional Judge, Multan, dated the 28th August 1912.

Lala *Mehr Chand*, for the Petitioner.

Mr. *T. D. Khanna*, for the Respondents.

JUDGMENT.—This is a petition under section 46 (1) of Act III of 1907, for revision of the order of the Divisional Judge, Multan, confirming the order of the District Judge of Multan, whereby the insolvency petition presented by the petitioner was dismissed under section 15 (1) of the said Act on the ground that the petitioner had been guilty of bad faith in having given an undue preference to some of his creditors over others.

It is contended by the petitioner's Pleader that sub-section (1) of section 15 of the Provincial Insolvency Act under which the District Judge dismissed his client's petition is not applicable at all to the case like the present, where a debtor who has applied to be declared an insolvent has been found to have committed an act of bad faith; that the concluding portion of the said sub-section (1) authorises the dismissal of a petition made by a creditor, where the Court is satisfied by the debtor that he is able to pay his debts or that for any other sufficient cause no order of adjudication ought to be made against the debtor; and that, therefore, the ground upon which the petitioner's insolvency petition has been dismissed was not a valid and sufficient ground for the dismissal of the petition.

In support of this contention the learned Pleader has cited *Girwardhari* v. *Jai Narain* (1), and two decisions of the Calcutta High Court, one in the case of *Udai Chand Maity* v. *Ram Kumar Khara* (2) and the other in the case of *Sheikh Samir-ud-din* v. *Kadar Moyee Dassi* (3), respectively. In the Allahabad case Mr. Justice Chamier says at page 649: "Under section 351 of that Code (*i.e.* Code of Civil Procedure, 1882) the Court could grant an insolvency application only on being satisfied that the debtor had not transferred any part of his property with intent to defraud his creditors, and had not recklessly contracted debts or given an unfair preference to any of his creditors and had not committed any other act of bad faith regarding the matter of the application. Under the Insolvency Act, 1907, these appear to be grounds for refusing an absoluto order of discharge (see section 44), but not grounds for refusing to make an order of adjudication. The latter part of sub-section (1) of section 15 of the Act of 1907 reproduces almost word for word section 7, sub-section (3), of the English Bankruptcy Act of 1883, which plainly refers to an insolvency petition presented by a creditor. . . .

"In my opinion the latter part of sub-section (1) of section 15 of the Indian Act has no reference to an insolvency petition presented by a debtor. Authority for dismissing a debtor's petition for 'any sufficient cause' must be found, if at all, elsewhere."

In the present case the District Judge has followed the ruling of the Allahabad High Court in *Nathu Mal* v. *District Judge of Benares* (4). The learned Judges in the course of their judgment in that case said: "We wish to clearly express our opinion that the learned Judge (in the Court below).....was clearly wrong in granting the petition of Nathu Mal and declaring him insolvent. Section 15 of Act III of 1907 provides, amongst other things, that if the Court is of opinion for any sufficient reason that the order of adjudication should not be made, the Court should dismiss the petition." Mr. Justice Chamier in the later case cited above does not accept the construction put upon section 15 (1) in *Nathu Mal* v. *District Judge of Benares* (4), because, in his opinion, the latter part of sub-section (1) of section 15 only relates to an insolvency petition presented by a creditor and has no reference whatever to a petition presented by a debtor.

The same view has been taken by two Division Benches of the Calcutta High Court

(1) 7 Ind. Cas. 39; 32 A. 645; 7 A. L. J. 835.
(2) 7 Ind. Cas. 394; 12 C. L. J. 400; 15 C.W N. 213.
(3) 7 Ind. Cas. 691; 12 C. L. J. 445; 15 C. W. N. 244.
(4) 6 Ind. Cas. 870; 32 A. 547; 7 A. L. J. 602.

in the cases cited above. In *Udai Chand Maity* v. *Ram Kumar Khara* (2), Mr. Justice Mookerjee says: "It is clear, therefore, that there was ample proof of the right of the appellant to present the petition.

"The question now arises whether there was any valid ground for the dismissal of this application. The learned Judge has proceeded on the ground that the conduct of the petitioner has not been satisfactory and that he has made a false statement in his application, inasmuch as he mentions the name of a certain person as creditor in whose favour he had created a fictitious debt.

"It is obvious, however, from sub-section (1) of section 15 that those are not circumstances which can be taken into account by the Court at this stage to determine whether the application should be granted or refused.

"Reliance has been placed by the learned Vakil for the respondent upon the concluding words of sub-section (1) of section 15, which lay down the rule that where the Court is satisfied by the debtor that he is able to pay his debts or that for any other sufficient cause no order ought to be made, the Court shall dismiss the petition. But it is clear that this portion of sub-section (1) of section 15 refers only to cases in which the application has been made by the creditor and is opposed by the debtor. In such a contingency, if the debtor can satisfy the Court that he is able to pay his debts or that for any other sufficient cause [such as those mentioned in *Ex parte Dixon, In re Dixon* (5) and *Ex parte Oram, In re Watson* (6)] no order ought to be made, it is the duty of the Court to dismiss the application."

In the case of *Sheikh Samir-ud-din* v. *Kadar Moyee Dassi* (3), the same learned Judge observes as follows:—

"In the case before us, the learned District Judge has dismissed the application on a ground which is not included in any of those mentioned under section 15, sub-section (1). He has proceeded on the ground that as the debtor has, in his opinion, committed an act of bad faith, he is not entitled to an order of adjudication.

"This is clearly erroneous. The question of bad faith or improper dealing with the property of an insolvent arises for consideration at a much later stage of the proceedings. If the debtor, after the order of adjudication, applies for an order of discharge, it becomes obligatory upon the Court, under section 44 of the Provincial Insolvency Act, to investigate whether or not he has been guilty of acts of bad faith. Sub-section (3) of section 44 provides that the Court shall refuse to grant an absolute order of discharge on proof of various facts, which may be described compendiously as acts of fraud and bad faith."

My own view coincides exactly with the opinion expressed by the learned Judges of the Allahabad and Calcutta High Courts in the cases just cited: and, following the decisions in those cases, I hold that the District Judge acted with material irregularity in the exercise of his jurisdiction in dismissing the petitioner's insolvency petition upon the ground mentioned in his order.

I accordingly accept this revision and, setting aside the orders of the Divisional Judge and the District Judge, send the case back for disposal according to law. I make no order as to costs.

Revision accepted.

(5) (1889) 13 Q. B. D. 118; 10 L. T. 414; 50 L. J. Ch. 769; 32 W. R. 837; 1 Morrell 98.

(6) (1885) 15 Q. B. D. 399; 52 L. T. 785; 33 W. R. 890; 2 Morrell, 199.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 554 OF 1914.

April 21, 1915.

Present:—Justice Sir P. C. Banerji, KT.

MATHRA PERSHAD AND ANOTHER—DEFENDANTS—APPELLANTS

versus

CHEDDI LAL—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), ss. 68, 72—Mortgage-bond not properly attested, if admissible in evidence—Simple money-bond.

Where a mortgage-deed is not properly attested in accordance with the provisions of section 59 of the Transfer of Property Act, it is not admissible in evidence as a mortgage-deed but it is admissible in evidence as a simple money-bond [p. 364, col. 2.]

Pulaka Veetil Muthalakulangara Kunhu Moidu v. *Thiruthipalli Madhava Menon*, 1 Ind. Cas. 1; 32 M. 410; 19 M. L. J. 584; *Tofaluddi Peada* v. *Mahar Ali Shaha*, 26 C. 78; *Veerappa Kavundan* v. *Ramasami Kavundan*, 30 M. 251; 17 M. L. J. 213, followed.

Collector of Mirzapur v. *Bhagwan Prashad*, 18 Ind. Cas. 311; 11 A. L. J. 141; 35 A. 164, distinguished.

Second appeal from the decision of the District Judge of Allahabad, dated the 2nd April 1914.

Mr. *Umashankar Bajpai*, for the Appellant.

Mr. *G. L. Agarwala*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-respondent to realise the amount of a bond, dated the 23rd of August 1910, alleged to have been executed by one Ramdhan Lal in favour of the plaintiff and his deceased father, Ramadhin. Ramdhan Lal is dead. The suit was brought against the appellants who are in possession of Ramdhan Lal's property under a Will. The bond on the face of it purported to be a mortgage bond and the suit was brought in the Court of first instance to enforce the mortgage. That Court was of opinion that the document had not been duly attested as required by section 59 of the Transfer of Property Act and could not be treated as a mortgage. For that reason alone the Court dismissed the suit. The plaintiff appealed and in the Appellate Court he abandoned the claim for sale of the mortgaged property and asked for a simple money decree in respect of the debt. The learned Judge found that the document had been duly executed by Ramdhan Lal and that he had received the amount of it which was paid in the presence of the Sub-Registrar. He made a money-decree in favour of the plaintiff, to be recovered from the assets of Ramdhan Lal in possession of the defendants-appellants. This appeal has been preferred by the defendants and the only contention on their behalf is that in view of the provisions of section 68 of the Evidence Act the bond was not admissible in evidence for any purpose. I am unable to agree with this contention. As a mortgage it was undoubtedly necessary that the document should be attested by at least two witnesses and that one of those witnesses should be called. But it appears from the evidence of the scribe and of the witness Mata Ghulam that the document in question was not attested at all. On the contrary the scribe proved that Ramdhan Lal signed the document at the house of the scribe where it was written, and took it to the witnesses afterwards and got their signatures on it after admitting execution. This evidence of the scribe shows that the document was not attested in accordance with the provisions of section 59 of the Transfer of Property Act. Therefore it could not be treated as a mortgage. It is only in the case of a document which required to be attested and was attested that under section 68 of the Evidence Act it was necessary to call an attesting witness, as the document in this case was not so attested, section 68 had no application, and the case, in my opinion, fell within the purview of section 72 of the Evidence Act. For a simple money bond it is not necessary that it should be attested by witnesses. As the bond in this case was not so attested it was a valid document as a simple money bond and was admissible in evidence. This was held by a Full Bench of the Madras High Court in the case of *Pulaka Veetil Muthalakulangara Kunhu Moidu* v. *Thiruthipalli Madava Menon* (1) and by the Calcutta High Court in *Tofaluddi Peada* v. *Mahar Ali Shaha* (2). The case of *Veerappa Kavundan* v. *Ramasami Kavundan* (3), has, under the circumstances mentioned above, no application to the present case and it is unnecessary for me to say whether I agree with the decision in that case. There can be no doubt that the bond in this case contained a personal covenant and the plaintiff is entitled to a money decree in enforcement of that covenant. The learned Vakil for the appellant has referred to the Full Bench ruling of this Court in *Collector of Mirzapur* v. *Bhagwan Prashad* (4), but that case has apparently no bearing on the case before me. The terms of the document in that case were peculiar and it was held that under those terms there could not be a personal decree against the executant of the document. The appeal is, in my opinion, without force. I dismiss it with costs including fees on the higher scale.

Appeal dismissed.

(1) 1 Ind. Cas. 1; 32 M. 410; 13 M. L. J. 584.
(2) 26 C. 78.
(3) 30 M. 251; 17 M. L. J. 213; 2 M. L. T. 175.
(4) 18 Ind. Cas. 31; 35 A. 164; 11 A. L. J. 141.

MAHARAJA OF JEYPORE *v.* RUKMINI PATTAMHADEVI.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 50 OF 1911.

February 18, 1915.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

Sri Sri Sri VIKRAMADEO MAHARAJ-LUNGARU, MAHARAJA OF JEYPORE—PLAINTIFF—APPELLANT

versus

KISHETRAVARA TODRAMAL NARENDRA TATRAJ BAHADUR GARU, HAVING DIED, HIS WIFE AND LEGAL HEIR *Sri* RUKMINI PATTAMAHADEVI GARU —DEFENDANT—RESPONDENT.

Landlord and tenant—Forcible dispossession—Subsequent re-entry by tenant—Effect of dispossession on tenant's estate—Madras Regulation XXV of 1802, *s.* 4—*'Small quit-rent', meaning of—Permanent Settlement*—Sanad, *construction of—Lessor and lessee—Forfeiture, if incurred by lessee describing his holding as independent and permanent at a fixed rent—Resumption, when permissible—Service, whether includes' attendance on ceremonial and indefinite occasions.*

Where a *zemindar* wages war against his feudatory and forcibly seizes his estate, but, later on a descendant of the said feudatory gets back possession of the same, the intermediate possession of the *zemindar* does not affect the right of the feudatory and change the character of the tenure. [p. 373, col. 2.]

Vizianagaram Maharaja v. *Suryanarayana*, 9 M. 307; 13 I. A. 32; 4 Sar. P. C. J. 696; 10 Ind. Jur. 193; *Sita Ram Vasudev* v. *Khanderav Balkrishna*, 1 B. 286; *Gunga Gobind Mundul* v. *Collector of the Twenty-four Pergunnahs*, 11 M. I. A. 345; 7 W. R. 21 (P. C.); 1 Suth. P. C. J. 676; 2 Sar. P. C. J. 284; 20 E. R. 131 and *Radhabai and Ramchandra Konher* v. *Anantrav Bhagvant Deshpande*, 9 B. 198 at p. 226, distinguished.

Secretary of State v. *Vira Rayan*, 9 M. 175 at p. 185 and *Fatimatulnissa Begum* v. *Sundar Das*, 27 C. 1004, 27 I. A. 103; 4 C. W. N. 565, followed.

Where a *sanad* which was granted to a *zemindar* at the time of the Permanent Settlement contained the following clause: "Alienated lands, paying a small quit rent, which quit rent, unchangeable by you, is included in the assets of your *zemindari*"; and where it was contended that under the above clause the *zemindar* was not entitled to enhance the rent of under-tenures granted by the *zemindar* prior to the said Permanent Settlement:

Held, that the words 'small quit-rent' in the above clause, which corresponded to section 4 of the Madras Regulation XXV of 1802, meant a favourable rent; that only permanent grants should be understood as coming within the mischief of the word 'alienated' therein; that there was no warrant in authority or practice for applying it to mere temporary leases, not understood by parties to be permanent, however long their currency might be; and that the clause in question prohibited only enhancements imposed by the *zemindar* and not those to which the lessee consented. [p. 376, cols. 1 & 2.]

A lessee does not repudiate the title of his land lord and incur forfeiture by describing his holding as independent and permanent at a fixed rent. [p. 376, col. 2.]

Kali Kishen Tagore v. *Golam Ali*, 13 C. 3; *Kali Krishna Tagore* v. *Golam Ally*, 13 C. 248; and *Unhamma Devi* v. *Vaikunta Hegde*, 17 M. 218; 3 M. L. J. 287, followed.

Ruia Venkatarangayya v. *Poranki Appalarazu*, 8 Ind. Cas. 546; 8 M. L. T. 429; 20 M. L. J. 728 and *Sri Rajah Parthasarathy Appa Rao* v. *Secretary of State*, 21 Ind. Cas 871; (1913) M. W. N. 959; 14 M. L. T. 514; 26 M. L. J. 39, distinguished.

Forbes v *Meer Mahomed Tuquee*, 14 W. R. 28 (P. C.); 5 B. L. R. 529; 13 M. I. A. 438 2 Suth. P. C. J. 358; 2 Sar. P. C. J. 588; 20 E. R. 614 and *Venkata Narasimha Appa Rao Bahadur* v. *Sobhanadri Appa Rao Bahadur*, 29 M. 52 (P. C.); 16 M. L. J. 1; 1 M. L. T. 3; 3 C. L. J. 1; 3 A. L. J. 55; 8 Bom. L. R. 1; 10 C. W. N. 161; 33 I. A. 46, referred to.

A resumption of an estate is permitted to a *zemindar* only when the estate has been included in the assets of his *zemindari* at the Permanent Settlement and the grant is for service in lieu of wages (in which case the right of resumption is absolute), or is burdened with service (in which case the right can be exercised only if the grantee is unwilling to perform the service, even though the same might be obsolete or unnecessary). [p 377, col. 1.]

Where the obligations on the part of a tenant, the non-performance of which was alleged to give rise to the exercise of the right of resumption by the *zemindar*, were to attend (1) with 500 *paiks* at Dusserah, the occasion of the annual festival and Durbar and (2) whenever such attendance was directed, when the tenant went on Sircar business:

Held, that the attendance required was on indefinite and ceremonial occasions and could not be deemed a condition of the holding, that it was at the most analogous to that of copy-holders in England to do suit in the Court of their manor and that the default in question did not entail a forfeiture of the holding. [p. 378, col. 2; 379, col. 1.]

No forfeiture is incurred unless there is non-performance on the part of the tenant of a subsisting obligation for service and that service is connected with his title. [p. 379, col. 1.]

Appeal against the decree of the Court of the Agent to the Governor at Vizagapatam, in Original Suit No. 2 of 1909.

FACTS.—The facts of the case are fully set out in the judgment.

Messrs. *B. N. Sarma* and *S. Srinivasa Iyengar*, for the Appellant:—[After referring to facts]. The resumption put an end to the previous tenure. See *Vizianagaram Maharaja* v. *Suryanarayana* (1), *Sita Ram Vasudev* v. *Khanderav Balkrishna* (2), *Radhabai and Ramchandra Konher* v. *Anantrav Bhagvant Deshpande* (3) and *Gunga Gobind Mundul* v. *Collector of The Twenty-four Pergunnahs* (4). Originals of Exhibit HHH series are admissible in evidence and do

(1) 9 M. 307; 13 I. A. 32; 4 Sar. P. C. J. 696; 10 Ind. Jur. 193.

(2) 1 B. 286.

(3) 9 B. 198 at p. 226.

(4) 11 M. I. A. 345; 7 W. R. 21 (P. C.); 1 Suth. P. C. J. 676; 2 Sar. P. C. J. 284; 20 E. R. 131.

not require any stamp, as the Stamp Act was never extended to Vizagaptam Agency. See *Marine Investment Co.* v. *Haviside* (5). Exhibit VI is a concoction and cannot be admitted in evidence as it does not come from proper custody.

The *zemindar* was within his rights in enhancing the rent. Exhibit K shows that the enhancement was gradual and kept pace with the reclamation of the country. Further, in this case, the enhancement was with the consent of the Thatraz and there is nothing in the Regulation XXV of 1802 to prohibit such a course. It is also competent to the *zemindar* to resume the estate, as it was a service tenure. The tenure-holder had forfeited the estate by disclaiming the title of his landlord. [See *Raja Venkatarangayya* v. *Poranki Appalarazu* (6) and *Sri Raja Parthasarathy Appa Rao* v. *Secretary of State* (7)], and also by declining to do the services which he was bound to render. See Exhibit BB.

Messrs. *K. Srinivasa Iyengar*, *V. Ramesam* and *A. Krishnaswami Iyer*, for the Respondent:—Bissemkatak was not included in the assets of Jeypore at the Permanent Settlement. See Exhibits VI, VII (*a*), VIII, IX, etc. The resumption before 1816 did not affect the previous relationship of the parties. At the most there was only a dispossession and re-instatement. See *Secretary of State* v. *Vira Rayan* (8). Exhibit HHHI is inadmissible in evidence as its original was not stamped. The Maharaja was not entitled to enhance the rent, *vide* clause (4) of the *sanad* and Exhibit D. Compare also sections 4 and 12 of Regulation XXV of 1802. The *zemindar* could not resume the estate. Default in payment of rent could be relieved against. The mere assertion of a person that his holding is independent and permanent at a fixed rent does not amount to a repudiation of the landlord's title so as to give rise to forfeiture. *Kali Kishen Tagore* v. *Golam Ali* (9), *Kali Krishna Tagore* v. *Gulam Ally* (10), and *Unhamma Devi* v. *Vaikunta Hegde* (11). cases of *Raja Venkatarangayya* v. *Poranki Appalarazu* (6) and *Parthasarathy Appa Rao* v. *Secretary of State* (7) are distinguishable as they are cases of resumption by the Government where such broad questions as the ones in issue in the present suit are not involved. Vide *Forbes* v. *Meer Mahomed Tuquee* (12), and *Venkata Narasimha Appa Rao Bahadur* v. *Sobhanadari Appa Rao Bahadur* (13). Again, the tenure in suit is not a grant subject to service. In the first place one of the services required, *viz.*, attendance whenever the Thatraz went on *sircar* business, is indefinite and unenforceable. The attendance at the procession has not been proved. Attendance at the Dusserah is only a mark of courtesy akin to that of a copy-holder in England to do suit in the court of the manor. Attendance on ceremonial occasions cannot amount to a condition of the holding, so as to subject it to forfeiture for non-performance thereof.

JUDGMENT.

OLDFIELD, J.—This appeal relates to the claim of the Maharajah of Jeypore to eject the the defendant, Thatraz of Bissemkatak, from that estate and to recover from him arrears of *kattubadi* and profits on the grounds that he has denied his liability to pay Rs. 15,000 annually and to render service and has defaulted in both respects in each year from October 1903, such payment and service being the tenure on which the estate is held. Defendant's contentions are that (1) he holds at a fixed *jama* of Rs. 2,200 only, (2) that the income of his estate was excluded from the assets of Jeypore for the purpose of the Permanent Settlement and that, therefore, his *jama* is not liable to enhancement, or his estate to resumption, and (3) he is bound to no service.

We refer to the Thatraz as defendant, though he died pending the suit, and his widow was impleaded in his place.

The Jeypore Maharajah owns a large *zemindary* of over 12,900 square miles extent,

(5) 5 H. L. 624; 42 L. J. Ch. 173.
(6) 8 Ind. Cas. 546; 8 M. L. T. 429; 20 M. L. J. 728.
(7) 21 Ind. Cas. 871; 26 M. L. J. 39; (1913) M. W. N. 959; 14 M. L. T. 514.
(8) 9 M. 175 at p. 185.
(9) 13 C. 3.
(10) 13 C. 248.
(11) 17 M. 218; 3 M. L. J. 287.
(12) 13 M. I. A. 438; 14 W. R. 28 (P. C.); 5 B. L. R. 529; 2 Suth. P. C. J. 358; 2Sar. P. C. J. 588; 20 E. R. 614.
(13) 29 M. 52 (P. C.); 16 M. L. J. 1; 1 M. L. T. 3; 3 C. L. J. 1; 3 A. L. J. 55; 8 Bom. L. R. 1; 10 C. W. N. 161; 33 I. A. 46.

situated in the hill tracts of the Vizagapatam District, of which the Bissemkatak estate, measuring approximately 500 square miles, forms part. Those tracts came under the British Government at the Permanent Settlement in 1802. But for many years they were without local Courts, Magistracy or Police, being until 1839 under the Courts on the plains. By Act XXIV of 1839 they were placed for all purposes under the Agent to the Governor and were subject to the law, as represented by rules framed thereunder. Before 1863, however, there were, in fact, neither British Magistracy nor Police in Jeypore territory. During the greater part of the period from 1869, with which we are concerned, the country was, as the District Gazetteer shows, intermittently in a state of private war between Jeypore and its neighbour, Vizianagaram, or its feudatories, including defendant's predecessors. In these circumstances, the origin and development of titles would naturally be obscure and the evidence regarding them meagre and ambiguous. It is not, however, on that account permissible to treat the burden of proof, as it devolves on either party, as discharged, until a reasonable degree of certitude has been reached, or to refuse, to the prejudice of the one, to draw inferences from substantial defects in the evidence of the other.

The case for plaintiff is that Bissemkatak was settled and has always been treated as part of Jeypore, that early in the last century it was granted to one Ramachandra, great-great-grand-father of defendant, with the designation of Thatraz (lord of the army), in remuneration for and for the continuance of his services, that it was resumed by Jeypore in 1816 and retained under direct management till after 1846, that Narandra, grand-son of Ramachandra, having obtained possession by intriguing with the then Maharajah's son, accepted a lease on an obligation for service in respect of the provision of 700 *paiks* (men at arms) and for payment of Rs. 2,500 per annum, and that this payment was enhanced to Rs. 5,000 in 1864 and Rs. 15,000 in 1877, the number of *paiks* being then reduced to 500. During the minority of plaintiff and defendant, the Agent to the Governor in charge of their estates commuted the service temporarily for an annual payment of Rs. 1,500. In 1903, defendant, on attaining majority, refused to render the service and offered to pay only Rs. 2,200, repudiating further obligation by a letter, Exhibit BB, dated 26th November 1904.

It is not disputed that plaintiff must prove his right to resume, or that he can, in no circumstances, resume lands not included in the assets on which his *zemindari* was permanently settled. The first important question is, therefore, whether the Bissemkatak estate was among those assets. Defendant has attempted to meet plaintiff's evidence that it was so (1) directly and (2) by proof that the estate became his before the Permanent Settlement under a grant, Exhibit VI, dated 1689. In connection with the alleged history of this grant reference will be made to facts which bear also on the decision of the other questions before us, whether the claim to rent at a higher rate than Exhibit VI authorises is sustainable and whether the estate, having been included in the Settlement assets, fulfils the further conditions, entailing liability to resumption, which authority prescribes.

The evidence regarding the Permanent Settlement begins with the Circuit Committee's reports, Exhibits NN and NNI. The lower Court in its paragraph No. 33 refused to attach importance to these accounts: and it may have been justified in doing so as regards matters of detail, as distinct from the principles followed. And the fact that they purport to bring the whole income of Bissemkatak into Settlement and make no reference to the restriction of Jeypore's receipts from it to the tribute of Rs. 2,200, for which defendant contends, is not without weight. No such objection, moreover, can be made to the next documents, Exhibits A and B, the *cowle* granted to Jeypore in 1795, and the *sanad*, which replaced it, dated 1803 but apparently delivered later. In them and the correspondence connected with the former, there is no sort of distinction made between Bissemkatak and the other divisions of the *zemindari*, which (it is not disputed) were included with their full incomes in the assets. The *sanad* embodied the Permanent Settement. To the probability

that the then Thatraz would have failed to plead Exhibit VI at it and obtain recognition of his independent status, we shall return. At present the point is that, all allowance made for the remoteness of these hill tracts and the lack of information available regarding them, those responsible in 1803, the Collector, the Special Committee and Government, are not likely to have excluded from Settlement the greater part of the income of a substantial estate, which they mentioned and of the circumstances of which they had some information (*vide* Exhibits VIII and IX), without being conscious of and referring to having done so. No doubt, as the lower Court observes, and Exhibits A1 and A8 show, the *peishkush* payable to Government was fixed arbitrarily and without direct reference to the income which Jeypore would receive. But it does not follow, and there is no general or special reason to be founded on the interest of either Government or the *zemindars* concerned, for supposing that the Settlement was, or was intended to be, incomplete or other than comprehensive of all assests in the settled tracts. Defendant does not suggest that any part of the income of his estate, other than that represented by his liability to Jeypore, was settled separately. The documents referred to are, in our opinion, sufficient to transfer the burden of proof from plaintiff on this point.

Defendant relies to discharge it, *first*, on the correspondence preliminary to the issue of Exhibit D, relating to the abolition of *sayer* or customs revenue in the tracts under Settlement. In Exhibit VIII, in 1802, Mr. Webb, the Collector, referred to Bissemkatak as held on a hereditary tenure by a proprietor, with whom it would be necessary to negotiate through Jeypore for the closure of a *chowky* or custom-house on its borders; and in Ehhibit IX, 1803, his successor, Mr. Alexander, described it as "not immediately under the management of Jeypore, but constituting a small separate *zemindari* held by the Thatraz." It does not, however, follow that the possession of a *chowky* by Bissemkatak involved its independence. For, it is clear from Exhibit VII that it was accountable for the *sayer* collected by it to Jeypore; and the meaning may well be that a revision of the agreement between it and Jeypore as to the collection would have to be arranged. Mr. Alexander had been Secretary to the Circuit Committee (Exhibit A3). But his experience as Collector had been short when Exhibit IX was written: and nothing therein entails his meaning that Bissemkatak was subject to a fixed tribute, or had independent assets over which Jeypore had no claim. If he, or Mr. Webb, had meant that, they must have gone on to do what no record suggests their contemplating and what was never done, settle with Bissemkatak on those assets independently. And in fact these letters strongly support plaintiff's case that the omission to make such a Settlement was intentional and was due to the fact that the Settlement with Jeypore was known to be comprehensive.

Further argument for a different intention has been based on the details of the account alleged to have been submitted with Exhibt IX, Exhibit B and VII series, when the Jeypore *peishkush*, fixed by Lord Hobart at Rs. 25,000, was reduced to Rs. 16,000 in consequence of the abolition of the *sayer*. In Exhibit IX, an attempt was made for the first time to deal with the actual income of the *zemindari*, Mr. Alexander estimating the hardship involved in the loss of the *sayer* revenue with reference to the actual income which Jeypore would receive after it, and arriving at that actual income by substituting for the income shown in Exhibit N, N1 from Bissemkatak and Gunupore *pergunnahs*, the only parts of the *zemindari* not under direct management, the actual fixed income therefrom, Rs. 3,344 in the case of the former, thus excluding the farmer's profit. And defendant, therefore, argued that, in Mr. Alexander's opinion, only that actual income had been included in the assets on which the Settlement was made. Again, having thus estimated the Jeypore income, he reached his conclusion as to the effect of the abolition of the *sayer* by deducting from it the total *sayer* for the *zemindari* shown in Exhibit VIIb, less that derived from Bissemkatak and Gunupore; and this also, it is said, involves that they were treated by him as independent estates, with which separate Settlement would be necessary.

One answer to the first of these arguments

is that materials for it are not available, since it depends on the allegation that fixed income from Bissemkatak was Rs. 3,344; and that rests only on Mr. Alexander's statement in Exhibit IX, which is, as will appear, of questionable value, and on Exhibit VII*a*. This fixed income is material in connection also with defendant's argument in support of Exhibit VI, and it is, therefore, necessary to deal with Exhibit VII*a* closely. It is an unsigned account and is not referred to explicitly as an enclosure to Exhibit IX or elsewhere in the correspondence; and, though objection was taken to its admission in the lower Court, there is nothing regarding its history or origin. It accordingly differs from Exhibit VII which has in its favour the fact that the figures in it are repeated in, and were presumably the basis of, Exhibit B1, the enclosure to the report of the Board of Revenue to Government, Exhibit B. Both accounts, as their headings show, purport to have been furnished by the *lopayikari*, or subordinate *zemindar*, Samburaju. He may be identical with the Somanatha referred to at page 233, District Gazetteer. But, if so, his description of himself as *lopayikari*, not as Thatraz, is peculiar. Mr. Alexander, no doubt, in Exhibit IX referred only to the Thatraz, but the extent of his appreciation of the facts is doubtful. In the circumstances, plaintiff's explanation that the person in question, whether Somanath or some temporary renter, Samburaj, claimed no independent status, calls for consideration in this connection and in another to be referred to later. The heading of Exhibit VII*a* describes it as the *kham irusalnama* of Bissemkatak that is the gross remittance account, as *kham bhogatla* in the heading of Exhibit VII means gross demand account (*Vide* Wilson's Glossary). But the explanation for the differences between the figures in the two accounts for the same years, that Exhibit VII shows gross collections and remittances to the Bissemkatak Estate Treasury and Exhibit VII*a* the net remittances by Bissemkatak to Jeypore, is inconsistent with that interpretation of the former term. No explanation, moreover, has been offered for the reference to remissions in Exhibit VII*a*, in one year as much as Rs. 550, which are inconsistent with the theory that the Rs. 3,344, the figure on which defendant relies, was a fixed payment for land revenue and *sayer*. In these circumstances, we cannot act on Exhibit VII*a* as authentic, and the reference to Rs. 3,344, in Exhibit IX alone, is then insufficient ground for a conclusion.

For, to deal with the second objection to defendant's argument, scrutiny of Exhibit IX makes it doubtful whether Mr. Alexander wrote with any clear understanding of the facts; and the diposal of the matter by the Board of Revenue and Government did not consist in any adoption of his proposals, or involve anything which can be regarded as security for the correctness of his statements. As regards the first point, in paragraph No. 7 of Exhibit IX, Mr. Alexander wrote as though the terms of the *sanad* to be granted were still open to discussion and referred to his attempts to obtain accounts in order to an estimate of the Jeypore and other *zemindaris*, as though accounts, to which he made no reference, had not already been obtained by the Circuit Committee. Yet, having obtained Exhibit VII and (in some way) the figure, Rs. 3,344, he made no attempt to propose a revised *peishkush* on the fresh facts available, but adopted that of Rs. 25,000 already fixed, as beyond controversy. Next, in his calculation, he overlooked the fact that the fixed payment of Rs. 3,344, retained by him in the Jeypore income, in fact included Rs. 1,115 on account of the *sayer*, then under abolition, which should have been excluded, if the calculation was to be correct; and he did so, although, if defendant's contention is valid, he had Exhibit VII series before him, in which the fixed payment for *sayer* is distinctly referred to. Lastly, he referred to Exhibit A, Lord Hobart's *cowle*, as promising a deduction from the *peishkush* in consideration of the abolition of *sayer*, though it expressly negatived the right to one; and the explanation offered, that the reference is really to an annual *cowle* in some year subsequent to 1794, is useless, since the issue of such a *cowle* rests only on defendant's own statement in Exhibit YY6 in 1904. When these objections to Exhibit IX are unrebutted, it is not possible to assume the competence of its author, or the accuracy of his other statements, including those relating to the fixed annual payment, or the independent *sayer* of Bissemkatak and Gunupore. And next,

the lower Court erred in its statement that Mr. Alexander's proposals were adopted by higher authorities. He, first, in Exhibit IX, estimated the hardship to Jeypore, which the loss of the *sayer* would entail, and then proposed that a proportionate deduction from *peishkush* should be made. But the Board of Revenue, on whose report, Exhibit B, Government acted, did not follow him in either of these directions. For, it proposed no proportionate deduction from *peishkush*, but a deduction of Rs. 9,000, pretty evidently a round figure for Rs. 9,223, Mr. Alexander's estimate of actual collection for *sayer*; and, if it did follow him in adopting the latter figure and excluding the Bissemkatak and Gunupore *sayer* from it, it is probable that it did so from inadvertence, since its reference to the Collector's estimate is general and includes no mention of these two estates, or the necessity for a separate Settlement with them. Exhibit B in fact contains nothing, which entails or suggests that the portion of Mr. Alexander's report on which defendant relies, was or need have been treated as material in order to the disposal of the matter; and there is, therefore, no sufficient security for the correctness of his statements. The direct objection to plaintiff's case based on Exhibits VII and IX series must, therefore, be disallowed.

We turn *next* to defendant's claim that he holds the estate under a grant, Exhibit VI, dated 1689, his sole obligation being a payment of Rs. 2,200 per annum. The burden of proof of this grant is on him. Exhibit VI, the authenticity of which he must establish, is an inscribed copper plate; and we have not been shown that there is any intrinsic probability against its fabrication at a date later than that which it bears. Direct evidence of its origin is not to be expected, and defendant, therefore, relies on section 90 of the Indian Evidence Act, that is on evidence of its production from proper custody in circumstances justifying the making of the presumption authorised by that provision. The custody of Exhibit VI was, it is certain, with Government from 1891, when it was given by defendant's witness No. 11 to the Special Assistant Agent, then in immediate charge under the Agent of Bissemkatak estate during defendant's minority, until it was restored to him after he attained majority in 1903. That custody, no doubt, might be held proper. But it is the only established fact in this part of the case; and we are not prepared to draw the necessary presumption with reference to it alone. We, therefore, deal with the circumstances in which the custody by Government is alleged to have originated.

They begin with the fact that in 1853 disputes between the predecessors of the parties as to the tenure of Bissemkatak reached a climax, and the Agent summoned them in order to a settlement. The then Thatraz, instead of appearing, sent the petition, Exhibit X, in which he complained of the aggressions of one of the Maharajah's subordinates, stated his own case and enclosed what is now alleged to have been a translation of Exhibit VI. On account of the absence of both parties no settlement was effected, the Agent merely recording his opinion that an attempt should be made to fix a proper sum as rent or *kattubadi* for Bissemkatak. It is now, however, alleged that Exhibit VI was actually produced before the Agent by a representative of the Thatraz for the purpose of the enquiry, who retained it after taking it back owing to a quarrel over his master's failure to give him land as remuneration for his services. That representative is said to have been Narayana Patnaik, father of Karunakar Patnaik, an estate employee, now deceased. 12th defendant's witness's evidence is that he received Exhibit VI and three account books from Karunakra for safe custody, when the latter anticipated a search of his house by the Special Assistant Agent, Mr. Elwin, in connection with a charge of malversation, but handed them over to defendant's witness No. 3, defendant's mother, who sent them by her brother, defendant's witness No. 12, to Mr. Elwin whilst he was at Bissemkatak.

This case teems with improbabilities and inconsistencies. It was first put forward in any detail in paragraph 17 of Exhibit YY6, a representation made by defendant to Government in 1904, and based according to defendant's witness No. 13, who prepared it, on information obtained from defendant's witness No. 3. But the story, as told in Exhibit YY6, differs from that supported by Exhibit X series and that which defendant's witness No. 3 gave in evidence on the authority of her mother-

in-law. For, Exhibit YY6, refers to the document as actually produced before and taken back from the Agent; the order on Exhibit X, Exhibit Xb, implies that there was no inquiry at which evidence can be supposed to have been adduced; and defendant's witness No. 3 understood that Narayana Patnaik secreted Exhibit VI and did not produce it before the Agent at all. Next the identity of the agent employed by the Thatraz is uncertain. For the signatory of Exhibit X on his behalf was Narain Doss, and he cannot have been the same as Narain Patnaik, Doss being a Brahmin and Patnaik, a Sudra description. Again Exhibit QQQ shows that Narain Patnaik did receive land, service *inam* No. 10, from the Thatraz, and that Karunakara held it after him; and though this does not preclude his having quarrelled with his employer on the ground that the grant was insufficient, it and his and Karunakara's retention in service make it highly improbable that they were wrongfully retaining an essential estate record, which the Thatraz would naturally be eager to recover. Lastly, the details of the story as to the recovery of Exhibit VI before its surrender to Mr. Elwin are insufficiently supported. He, no doubt, has probably forgotten and could have given no evidence as to what he was told; and the letter sent by defendant's witness No. 3 with Exhibit VI has no doubt been destroyed. But of the three witnesses concerned, defendant's witnesses Nos. 3 and 11 are defendant's close relatives and defendant's witness No. 12 his low paid servant. The story is not probable. For Karunakara could have found many better ways of secreting Exhibit VI than depositing it with an untrustworthy person such as the last mentioned: and it will be shown later that the conduct of defendant's witnesses Nos. 3 and 11, of whom the former professes full knowledge of the importance of the document, was improbable in respect of their failure to rely on it.

The direct evidence in support of Exhibit VI standing thus, it might be unnecessary to deal with the plaintiff's argument to rebut it. One branch of that argument, his attack on the document on intrinsic grounds, has been considered fully by the lower Court, and we can concur on its rejection of it, because *data* for it are wanting. For it depends on the allegation that a different method of inscribing copper plates was in vogue in Jeypore in 1689 and on discrepancies between the terms of Exhibit VI and historical facts, or statements in Exhibit RRR, a communication by plaintiff to Government; and the allegation and facts are not, in our opinion, adequately established, whilst the statements are in no way binding on the plaintiff in this suit and may easily have been mistaken. The other branch of the argument, however, includes references to past occasions, on which it is alleged that Exhibit VI was, or, if it had really been in the Thatraz's knowledge or possession, should have been, relied on; and they would, in any case, have called for mention in connection with the nature of defendant's tenure and the plaintiff's right to resume. We, therefore, proceed to a survey of the course of defendant's enjoyment and deal with them as they occur in it.

Though Exhibit VI is dated 1689, it is admitted that its existence was not referred to until 1853 in Exhibit X. Defendant, however, relies, *first*, on the fact evidenced by certain copper plates, that the Thatraz was making permanent grants of land, as consistent only with his tenure having been such as Exhibit VI entails. Dealing only with those at the end of the 18th century, prior to the Permanent Settlement, I observe that the evidence for the authenticity of these copper plates is no better than that regarding Exhibit VI itself. The objection that the dates in Exhibits XXVIII, XXVIII*a*, XXVIII*b*, and XXVIII*c* are alleged to be inconsistent with one or other of the two Hindu systems of chronology, according to which they are stated, has been established as regards at least Exhibit XXVIII*c*. Exhibit XXVIII series was not produced by the grantees, when the Agent inquired into alienations of estate lands in 1896 (Exhibit QQQ); and the evidence as to custody, that of defendant's witness No. 6, does not show that it was proper, since there is nothing to connect the Seshaji Mutt referred to by him with the original grantees; the Mutt, in fact, relied also on another later grant, Exhibit CCCC, by plaintiff's predecessor. As regards Exhibit XXXII, dated 1768, there is the

evidence of the grantee's descendant, defendant's witness No. 7, and the estate manager, defendant's witness No. 14. Neither explains the recent custody of the document, or the fact that, Exhibit XXXII providing for a free grant, a quit-rent, which has once been enhanced, is now paid; the grantee was a Brahmin, and the grant should appear in Exhibit NNI among *shrotriems*, not among *tarast* or service *inam* villages. Exhibit XXVII in 1872 is the grant of a village mentioned in Exhibits NNI and QQQ; but no copper plate is referred to in the latter, and the evidence of 16th defendant's witness as to the amount now payable to the Thatraz is not reconcilable with them, or the terms of the Exhibit. I cannot, in these circumstances, hold that these copper plate grants have been proved, or are the grants under which the properties in question are or were held. They would, in any case, be of small weight as assertions of ownership by the Thatraz against the Maharajah, when, as appears at pages 46 to 48, District Gazetteer, the whole District was the scene of armed conflict, in which both were active. This conflict ceased shortly before Lord Hobart's *cowle* and the Permanent Settlment.

It is urged, and the lower Court has held, that there is no special probability that Exhibit VI would, if it had existed, have been referred to then by the Thatraz or Government. We have already declined to assume that Government made no enquiries and had no knowledge as to the Bissemkatak tenure.

We add that the Thatraz, who was deprived of his immediate reponsibility for collecting the *sayer*, can hardly have been ignorant of the pending Settlement and his duty to assert himself. Exhibit VII, already referred to, relates to the estate at this juncture. But we doubt whether it is safe to argue, from the reference to Samburaj in it, in favour of or against enjoyment as Thatraz by defendant's predecessor.

The amount payable under the *sanad* then granted, Exhibit B, has been referred to by the lower Court as involving a substantial correspondence between the portion of it assessed on Bissemkatak and the Rs. 2,200 specified in Exhibit VI and as, therefore, supporting the existence of the latter in 1803. The argument, by which the apportionment to Bissemkatak of Rs. 2,229 out of the total *peishkush* is reached, is that based on Exhibits VII series and X, which we have already rejected. We add only that, if the liability of the Thatraz were really fixed under Exhibit VI, the difference of Rs. 29 would require explanation and that none has been given.

As regards the next period from 1803 until about 1845, it is plaintiff's case that before 1816 the Maharajah had removed the Thatraz and resumed his estate. Defendant entirely denies this, admitting, however, that the Maharajah attempted usurpation, waged war against the then Thatraz, Ramachandra, and imprisoned him. No distinct evidence as to this period is to be expected, when (as appears from the District Gazetteer, page 268) "Jeypore remained an almost unknown quantity to the officers of the District." Exhibit ZZ series are indeed Jeypore accounts for 1833 and 1836, showing that a varying income, corresponding neither with that secured by Exhibit VI, nor any lease elsewhere referred to, was realised; but they are of no special value. If, therefore, a conclusion is to be reached, it must rest on the evidence as to occurrences in 1845 when, according to plaintiff, the imprisoned Thatraz, Ramachandra, and his son, Krishnachandra, were dead, and the latter's son, Narendra, attempted to regain possession (*vide* Exhibit TT2 and YY6, the latter a statement by defendant's predecessor). The only definite fact is that, as Exhibit F series, suit registers of the agent's Court, show, in 1845 and 1846, Narendra sued the Maharajah for possession of the Bissemkatak estate and for Rs. 4,500 profits; and the direct inference is that the former had been dispossessed. The lower Court has refused to draw it because (1) it accepted the statement of Narendra in Exhibit X in 1853, that the suit was for surplus funds after deducting the *jamabandi*, (2) the Maharajah, defendant, applied in the earlier suit by Exhibit XXXIX for attachment of the property and, therefore, could not have been in possession of it. But the answer to (1) is, *first*, that Narendra's statements in Exhibit X, made after the beginning of the dispute with the Maharajah, cannot be evidence in his successor's favour; and *next*, that there is no reason for preferring them to the explicit statements in Exhibit F series, official records, when, moreover, there is no reconciliation between

the reference to surplus income less *jamabandi* as amounting to Rs. 4,800 and that in Exhibit F to the annual income as only Rs. 5,200. As regards Exhibit XXXIX, it is doubtful, in view of the probable laxity of procedure, whether any inference can be justified. It is, however, to be observed that if, as the lower Court held and Narendra alleged in Exhibit X, the suits were for past income only, an application for attachment of the property itself would have been out of place. The explanation is probably to be found in two facts. *Firstly*, as Narendra admitted in Exhibit X and defendant in Exhibit YY6, the former's possession had been interfered with; and *secondly*, as Exhibit E series show, Bissemkatak had been attached by Government for arrears of revenue due by Jeypore, and its release was ordered in June 1844 or about a year before the earlier of the suits was filed. This attachment is not in itself significant with reference to the independence of the former estate since, on either party's case, it would have been liable for such arrears in consequence of its inclusion in the Jeypore *sanad*. But it is at least possible that the Maharajah took this opportunity and made his application in order to impose on the Court the responsibility for terminating the confusion in enjoyment, which the attachment would have enhanced. In dealing with this part of the case, the extent to which plaintiff's contentions are conceded is material. In Exhibit X, Narendra's petition in 1853, he said that he had been compulsorily prevented from managing, and defendant in Exhibit YY6 admitted that it was only in 1842, after the imprisonment and exile of his grandfather and father, that Narendra raised his forces to regain possession. When so much is admitted, there is no reason for distrusting the explicit statements in Exhibit F series that possession was sued for, or holding that Narendra was in possession in 1845-6. The suits (and it is possible that they were really only ones re-admitted and re-numbered) were in any case dismissed for default The inference is *prima facie* that Narendra could not sustain them and had not the almost conclusive evidence, Exhibit VI, in his possession. The lower Court rejects this conclusion, *firstly*, on the ground that in the disturbed state of the country, these legal proceedings would have been "a sheer farce." But something more is necessary to explain Narendra's abandonment of litigation, which he had thought it worth while to institute. Defendant's explanation is based on the statement in Exhibit X that satisfaction was obtained from the Maharajah out of Court, presumably the lease at Rs. 1,500 referred to in Exhibit K; and it is argued that having obtained this low rental, Narendra would not have relied on Exhibit VI, which made him liable for Rs. 2,200. But Exhibit X is, as already observed, inadmissible in defendant's favour. The lease at Rs. 1,500 is referred to only in Exhibit K and it is described there as justified by the jungly nature of the estate and as merely temporary; and it, therefore, was not obviously more advantageous than the permanent tenure under Exhibit VI. Moreover, if the latter document had existed, it is to be supposed that it was known to the Maharajah, or would have been brought to his notice in the course of the negotiations; and that its surrender would have been insisted on. The inference that Exhibit VI was not in Narendra's possession at this time must, therefore, be sustained.

This deposition of the Thatraz and his re-entry are the foundation of plaintiff's contentions, that his services were dispensed with by the Maharajah and his estate resumed, that his original right was extinguished and that, whatever its extent, the new grant under which he re-entered does not justify his present pretensions. This contention is the subject of issue V. We concur in the lower Court's finding on it in defendant's favour holding that the occurrences between 1824 and 1842 left the right of his predecessor unaffected. That decision, however, will not be of use to defendant, since we shall hold that such right was not as extensive as he alleges; and we, therefore, give our reasons for it only shortly. *Firstly*, with reference to *Vizianagaram Maharaja* v. *Suryanarayana* (1), we do not think that the evidence establishes anything of the nature of a resumption and re-grant on a new *sanad* and different tenure, or more than a dispossession and re instatement. And next, so far as plaintiff relies on defendant's failure to regain possession by suit during his exclusion from the estate over twelve years, from 1824 till at least 1842, more probably 1846, that is supported only by reference to section 18, Regulation II

of 1802, and *Sita Ram Vasudev* v. *Khanderav Balkrishna* (2), *Radhabai and Ramchandra Konher* v. *Anantrav Bhagvant Deshpande* (3) and *Gunga Gobind Mundul* v. *Collector of the Twenty-four Pergunnahs* (4). Those decisions, however, dealt with the Regulation applicable in Bombay; and the lower Court was right in following *Secretary of State* v. *Vira Rayan* (8) to the contrary effect. Reference may also be made to the decision of the Privy Council in *Fatimatulnissa Begum* v. *Sundar Das* (14) on section 1, Act XIV of 1875, a provision similar to that in the Madras Regulation. Authority is against plaintiff's contention and it must fail.

The lease at Rs. 1,500 is referred to in Exhibit K as granted by the Maharajah. But in the plaint it is alleged as granted by his son who was at feud with him, and as subject to a further obligation for service with 700 *paiks* (men-at-arms). We shall return to the evidence regarding service. It is sufficient that this lease was superseded by another in 1854 at Rs. 2,500 with the same condition for service. The lower Court's finding to that effect is not disputed, and the objections to it and subsequent leases based on coercion and misrepresentation have not been pressed in this Court. Reference has already been made to Exhibit X and the Agent's attempted negotiation in 1853 in connection with the alleged first reliance on Exhibit VI; and it is now to be noted that the failure of the Thatraz to appear before him and produce that document acquires additional significance in view of his further failure to rely on it to resist the enhancement of rent, which took place in the following year. There is, moreover, the fact that the translation given in Exhibit X of the copper plate then referred to differs from Exhibit VI in the important respect that it does not specify the Thatraz or any other person as grantee, an omission not likely to have been due to inadvertence in the circumstances. There is, accordingly, room for doubt whether Exhibit VI was in fact referred to in Exhibit X and strong reason against belief in the Thatraz's possession of it. There is no suggestion in Exhibit YY6 that this rent of Rs. 2,500 was not paid from 1855 to 1863; and Exhibit WW, a return submitted to Government in 1862, refers to it. The fact that this lease was superseded in 1864 by another at Rs. 5,000 is not disputed here. It is, however, contended that the latter had no effect, because there is no evidence of any payment of rent under it, and that it involved no enhancement of rent, because it included in addition to Bissemkatak additional land, the Rayabiji Muttah. But, the lease being admitted, it is for defendant to show that it was ineffective; and, though there is no evidence on either side as regards the period, there is again no suggestion in Exhibit YY6 consistent with defendant's contention, and there are explicit references to this lease in the next lease, Exhibit HHH1 and Exhibit HHH2. The argument that there was no enhancement is untenable, being based only on the fact that in 1865 the Diwan of the Thatraz remonstrated with the Maharajah for not reducing the people of Rayabiji to submission in accordance with his promise and on the inference that Rayabiji had been newly included in the lease. That inference, however, corresponds with nothing in exhibit YY6, or elsewhere in evidence. It was not suggested in the lower Court, and it is not clear from any available information, that Rayabiji had not been leased as part of Bissemkatak throughout. The next and last lease, that in 1877, is evidenced by Exhibit HHH1, copy of *patta* obtained from the Agent's office, the original having been lost or destroyed by fire (*vide* Exhibit TT); and the first point taken against it is that it is inadmissible, because the original would be inadmissible, being unstamped. The *first* answer is that no Stamp Act is shown to have been applied to the Vizagpatam Agency, including Jeypore, after the supersession of the ordinary law in it under Act XXIV of 1839. The *next* is that the originals of Exhibit HHH series cannot be taken to have been unstamped, if a stamp was required. The burden of proof that this was so would in England be on defendant's side [*Marine Investment Co.* v. *Haviside* (5)]. But, even if the law is different in India, we should still hold on the evidence that Exhibit HHH1 had been duly executed. The oral evidence of persons who saw it is interested and untrustworthy on both sides.

(14) 27 C. 1004; 27 I. A. 103; 4 C. W. N. 565.

Nothing can be inferred from plaintiff's failure to produce the corresponding *muchilika*, the original of Exhibit HHH2; for there is no reason for supposing that it would show whether the *patta*, Exhibit HHH1, was stamped or not. But then, apart from any presumption under section 114 of the Indian Evidence Act, there is the correspondence to be referred to, which shows that the transaction was carried through with the knowledge of the Agent and his assistant, who might, at any time, have called for the original document and would have impounded it, if it had been their duty to do so; and there is the evidence of defendant's witnesses Nos. 3 and 15 and Exhibit XXXI to show that it was actually on one occasion sent to the Agent for reference. In these circumstances, a decision is justified that it was in order and bore a stamp, if in fact a stamp was required. Defendant has applied to us to admit further documentary evidence in appeal from the records handed over to him by Government, after he attained majority. But we find that he was informed of the existence of these records and invited to arrange for their transfer by the Agent's letter, dated 22nd February 1910, filed with his affidavit, that is, after the examination of plaintiff's witness No. 11 and before his own evidence was taken. If, therefore, he had shown ordinary diligence, he could have produced these documents at the trial. Their admission now would, accordingly, be unjustifiable.

The evidence regarding this case is contained in Exhibits G, H, J, K, GG, RR, SS, GGG, HHH, LLL series and XXVI. It shows that owing to the failure of the Thatraz to perform what may for the present be referred to as his service on two occasions, the Maharaja proposed to resume his estate; that the Agent, who was informed of this intention, intended to inquire judicially into his right to do so or to enhance the rent, and reported his intention for the information of Government; and that, when the Settlement embodied in the original of Exhibit HHH was effected, he insisted on satisfying himself as to its terms. The proceedings were, accordingly, in no way hurried or perfunctory, and the Thatraz was in effect invited to resist an enhancement. Yet he made no attempt to do so by alleging the existence of Exhibit VI, or moving the Agent to obtain its production. The result was that he accepted Exhibit HHH with the greatly increased rental of Rs. 15,000 and an obligation for attendance with 500 *paiks*.

In the succeeding year, as Exhibit FFF shows, the Thatraz considered himself bound by Exhibit HHH1 : and Exhibit KKK series, the Jeypore accounts, justify a conclusion that payments were made in accordance with the lease until defendant's accession and the assumption of charge of his estate by Government during his minority. He, in fact, gave effect to his intention expressed in Exhibit FFF and attempted to presume on the increase in his own rent by raising that of the holders of three subordinate tenures, one created by himself, *Vide* Exhibits N, O, Q, R. From 1877 until 1890, the only other incident calling for notice is the Agent's statement in Exhibit TT2, a report in 1883, that he had heard at Bissemkatak of a copper plate *patta*, which was not then to be found. But this reference is not of weight, since there is nothing available regarding the extent of the Agent's inquiries, or the source of his information; and as he referred to the *patta* as for Rs. 2,500, it in no way probablises the case for Exhibit VI for a rent of Rs. 2,200. After Government assumed charge of the estate, Rs. 15,000 was paid annually without demur on the part of defendant's relatives, although, in recommending the assumption in Exhibit TT, the Agent had doubted "whether the grant should be acknowledged in its present permanent form." His doing so possibly led to defendant's present attempt to disclaim it. The manner, however, in which the attempt was made, indicated no intention to rely on any tenure such as Exhibit VI. For, it began with a plea in Exhibit GG, that it would be inconvenient or impossible to render service and it was only in Exhibit YYI that plaintiff was informed of the claim to hold at a permanent rent of Rs. 2,200 without service, and that claim was then based, not on Exhibit VI, but on the Permanent Settlement.

This closes the story of the relations between the parties; and the first conclusion authorised by it is against the authenticity of Exhibit VI. Whatever the interest or duty of the Thatraz to plead it up to and at the Permanent Settlement (and it is not so clear, as the lower Court supposes, that he had

none) his failure to rely on it on subsequent occasions is irreconcilable with his knowledge, or possession of it, or its existence. It has already been shown that the evidence as to its custody immediately before its production in 1891 is unsubstantial. In these circumstances, we cannot make any presumption under section 90 of the Indian Evidence Act regarding it and we, therefore, dismiss it from consideration, finding issue II in plaintiff's favour.

This result reached and defendant's arguments founded on Exhibit B series, VII series and IX having been rejected, there is no reason against accepting plaintiff's contention, based on the explicit and unqualified references to Bissemkatak in Exhibits A and D, that it formed part of the assets on which plaintiff's *zamindari* was permanently settled and was not treated as *lekhiraj* or land exempt from the payment of public revenue. That is our finding on issues I and III. The question is then whether the Maharajah was entitled to make the subsequent enhancements of rent and whether plaintiff is entitled to claim at Rs. 15,000, the rate provided in Exhibit HHH1.

Defendant relies in this connection on the reference in clause 4 of the *sannad*, Exhibit D, to "alienated lands, paying a small quit-rent, (which quit-rent, unchangeable by you is included in the assets of your *zemindari*)" as an unqualified prohibition of enhancements, such as plaintiff has proved. Comparison of the clause with the corresponding section 4 of Regulation XXV of 1802 shows that "a small quit-rent" meant a favourable one. But the provision is otherwise obscure and we have been shown no authority explaining it. Argument has been based on section 12. It, however, forbids only the appropriation of land to religious or other purposes with the intention that it shall be exempt from its portion of the public tax and the resumption or enhancement of the assessment on land already so appropriated at the date of the Settlement. We observe, *first*, that the word "alienated" in clause 4 is, in our opinion, to be understood as covering only permanent grants, since there is no warrant in authority or practice for applying it to mere temporary leases, however long their currency, such as those pleaded by plaintiff, which are not shown to have been, or to have been understood by the parties to them as being, permanent. *Next*, none of those leases is shown to have been at a favourable rent. For, the only evidence as to the actual yield of Bissemkatak is the Circuit Committee's account, Exhibit NNI, and we agree with the lower Court that it is of little value [*vide* also *Venkata Narasimha Appa Rao Bahadur* v. *Sobhanadri Appa Rao Bahadur*(13)] and there is nothing improbable in the suggestion made in Exhibit K and elsewhere that the rent was increased, as the country was reclaimed. *Lastly*, clause 4 in our opinion, prohibits enhancements imposed by the *zemindar*, not those, to which the lessee consents, as we have found that the Thatraz did in the present case. In the result we find on issues VI—VIII and XVII that the rent of Rs. 15,000 and the other enhanced rents accepted previously in 1854 and 1864 were not within the mischief of, and the first mentioned is not unenforceable by reason of, clause 4 of Exhibit D. No other objection has been argued in this Court in this connection, and plaintiff is, therefore, entitled to recover the amounts claimed by him in accordance with Exhibit HHH1.

His *remaining* claim, to resume defendant's estate, must be dealt with on consideration of the service character of its tenure. For, it is not suggested that defendant would not be entitled to relief against the forfeiture incurred in respect of his default in payment of rent; and his description of his holding as independent and permanent at a fixed rent in Exhibit BB is not such a repudiation of his landlord's title as would entitle plaintiff to relief [*Kali Kishen Tagore* v. *Golam Ali* (9), *Kali Krishna Tagore* v. *Golam Ally* (10) and *Unhamma Devi* v. *Vaikunta Hegde* (11)]. Detailed reference to the evidence as to service has hitherto been postponed for the sake of clearness; and we now refer shortly to the law before dealing with it. Numerous authorities have been cited. But it is useless to refer to cases such as *Raja Venkatarangayya* v. *Poranki Appalarazu* (6) and *Parthasarathy Appa Rao* v. *Secretary of State* (7), in which the claim to resume was made by Government, not the *zemindar*, when the material principles really lie in a small compass and can be gathered directly from two decisions, one of them recent, those of the Privy Council in *Forbes* v. *Meer Mahomed Tuquee* (12) and *Venkata Narasimha Appa Rao*

Bahadur v. *Sobhanadari Appa Rao Bahadur* (13). The *first* condition, on which they contemplate resumption as permissible, is that the estate shall have been included in the assets of the *zemindari* on which the Permanent Settlement was made ; our finding of fact already reached entails that this condition is complied with, and it is unnecessary for us to found our conclusion on the presumption based on the nature of the service, regarding which argument was offered. The next condition is that either the grant is for service in lieu of wages, in which case the grantor's right to resume is absolute, or that, if the grant is of an estate burdened with service, the grantee, even if that service is obsolete or unnecessary, is unwilling or unable to perform it. In the present case, however, it is in fact unnecessary to inquire which of these descriptions is applicable to the grants, because in his letter, Exhibit BB, defendant denied his obligation to render service and impliedly refused to perform any; and such inquiry would, moreover, be meaningless, because both descriptions assume that an enforceable obligation for service is in question, and we shall hold in accordance with defendant's contention that none is established. In these circumstances we do not consider at length how far the tenure of Bissemkatak possesses the characteristics of a grant subject to a burden of service enumerated by this Court in the portion of its judgment in *Venkata Narasimha Appa Rao Bahadur* v. *Sobhanadri Appa Rao Bahadur* (13), which the Privy Council adopted. For only the presence of the second, fixity of tenure, could be discussed. As to it, a finding in the negative would follow from our conclusion that the rent was enhanced on three occasions.

The lower Court's findings are that the nature of the service up to 1863 was uncertain and that after that year it was rendered as matter of courtesy. It did not decide, as we are asked to do, whether anything which can be described as service is exigible from defendant at all. His obligation is described in Exhibit HHHI as attendance (1) with 500 *paiks* at Dusserah on the occasion of the annual festival and Durbar and (2) whenever such attendance is directed, when the Thatraz goes on *sircar* business. The question is whether this description, read in the light of history, or as it stands, involves anything enforceable as a condition of the holding.

There is little doubt that prior to Permanent Settlement Bissemkatak was held primarily on a military tenure. No doubt, the only distinct evidence to that effect is Mr. Oram's statement in Exhibit NN1. But the fact would be in accordance with the usage of this part of the country, as disclosed elsewhere in that report and the Gazetteer; and there is defendant's admission in Exhibit YY6, in accordance with his predecessor's statement in Exhibit X, that Malloo Mahunty, who held the estate in the seventeenth century, "formed a well-organised force of armed men to protect himself" and that his son promised Jeypore "military aid in exchange for a formal acknowledgment of his title." Such military arrangements, of course, should have ceased with the Permanent Settlement in 1802; and it cannot matter that the unauthorised maintenance of armed force was actually continued till later, except in so far as it can be shown that those forces also performed private service, which the law permitted. Such maintenance is, in fact, referred to by Col. Campbell in 1852, in Exhibit XXVII*a*, when the Thatraz used his force against that "of his superior of Jeypore." And in Exhibit XXVIIb, in 1861, Sir W. Robinson wrote regarding the absence of any provision of Government for Police and Magistracy in Jeypore and the anarchy which had resulted from the failure to assume control from the *zemindar*, who was not providing for it efficiently. In 1863, when the Government Police was established, the Agent, Mr. Carmichael, in Exhibit XXIV, stated that the Thatraz had been maintaining two hundred salaried peons and that every third man in Bissemkatak village swaggered about with a sword. He said that Jeypore "though everywhere acknowledged as Suzerain, had not always the direct control," and made the first distinct allusion to the nature of the service as having been "commuted into a yearly tribute of Rs. 2,500; besides which, when specially called on to do so, the feudatory is expected to accompany the Suzerain with a numerous retinue on his travels. The last occasion of his doing so was during the visit paid by the present Rajah of Jeypore to the Rajah of Vizianagram in 1859. The

Thatrajah then came forward with a rabble of five hundred men." The questions to which the existence of these irregular forces gave rise, were in fact stated twice from the point of view of Government by another Agent, Mr. Goodrich, in 1875 and 1877, in reports, Exhibits XXV and XXVI. In the first, with general reference to the Jeypore Agency, he mentioned the existence of "a numerous body of *paiks*, whose tenures require revision. Upon them, by the tenure of their assigned salaries or favourably assessed lands, are incumbent the Police duties of the country, the guarding of prisoners, the escort of treasure and the general duties of subordinate revenue servants." In the second, on the occasion of the death of one Thatraz, he spoke of enhancements of rent by the Maharajah and went on to refer to the subsistence of customary service after its original military justification had been abolished. In both reports, although his point was the advisability of Government taking advantage of the service, he recognised that its character had changed and in the earlier he defined its subsisting civil and private characteristics. The period was one of transition and the evidence regarding it general, the one reference in it to a particular incident, the journey to Vizianagaram, being misleading, since "the present Maharajah" in 1893, the date of Exhibit XXIV, had inherited in 1860 (*Vide* Gazetteer, page 264) and the action of the Thatraz in accompanying him in 1859 before his accession is, therefore, inconclusive and may perhaps have been part of one of the latter's intrigues against his predecessor (Gazetteer, pages 268, 269). The result is, at most, that the service, after the loss of its military character, was still regarded as subsisting for private purposes and more loosely, for such purposes as the disturbed and unorganised condition of the country led the Maharajah to provide for until about 1863. Those purposes probably included such duties in respect of the maintenance of law and order as the Code of Criminal Procedure would have imposed on landholders on the plains. But there is nothing to support a distinct conclusion as to what they were, or to show that they were of a public nature or to explain or define the terms of Exhibit HHHI.

The evidence as to the service of 700 *paiks* stipulated for by the lettings in 1854 and 1864 is general. In Exhibit UUU Government opined that the service was to wait on the Maharajah with a retinue of *paiks* or peons on occasions of importance, consistently with the terms of the lease of the same year, Exhibit HHHI, which have already been given. After 1877, we have indications that the Thatraz was regarded by Government as able to embody some sort of force, Exhibit AAAA series and Exhibit XXII*b* and Exhibit XXII*c*. But they do not entail his being in any way subject to Jeypore for the purpose. For they are all calls for assistance in quelling the same disturbance in 1880; and it is not material that Exhibit AAAA series were addressed to the Maharajah, when the other two were addressed to the Thatraz direct. As regards the duty to attend at Dusserah, default in it had been the beginning of the incidents which resulted in Exhibit HHHI in 1877. The correspondence has already been referred to and no doubt indicates that the Thatraz did not demur to the Maharajah's pretensions. Subsequent exhibits, Exhibit CCC series and TT2, show that up to 1887 there had been attendance at Dusserah in some years and apologies for absence in others. During the minority of defendant from 1889 till 1903 the obligation to attend was commuted by the Agent in charge of his estate for a money payment, apparently without demur from his relatives. But on attaining majority, defendant, as already stated, having at first explained his absence on grounds of inconvenience, finally disclaimed all obligation in Exhibit BB.

The evidence, so far referred to, relates only to attendance at Dusserah, that being the first condition referred to in Exhibit HHHI. The second condition, attendance when on Sircar business, is so indefinite as to be unenforceable; and we refer to it no further. It is, accordingly, on the character of attendance at Dusserah as an enforceable condition of the tenure that plaintiff's case depends. We do not think that attendance on ceremonial occasions is such a condition. No witness, who spoke to the course of the Durbar which is held, described anything beyond the compliments usually paid by an inferior to a superior as passing; and we have been referred to no authority dealing

with a claim to resumption, in which an obligation merely to be present, even accompanied by a retinue, was regarded as sufficient. In every case, the service consisted in the doing of some act for the benefit of the grantor; and we have been shown no reason why less should be required to prove the service character of the tenure here. Defendant's duty is at most analogous to that of English copy-holders to do suit in the Court of their manor; and default in it will not entail termination of the holding [Halsbury's Laws of England, Volume VIII, page 14].

Default in this attendance being insufficient to support plaintiff's claim, he has attempted to prove that a further duty, not referred to in Exhibit HHH or definitely in any record, has been annexed to it by custom, that of guarding the idol, which on the occasion of the Dusserah is taken in procession, and he has argued that some inference as to the existence of definite enforceable duties is entailed by defendant's enjoyment of the title of Thatraz, signifying lord of the army. The *second* point can be dealt with shortly. We no doubt find defendant's predecessors enjoying that title from the earliest times and there are references, for instance in Exhibits HH, YYY, XXVI, to some sort of investiture, though it is not clear that it related to the title, not the estate. But it does not follow that any office, or, after the abolition of the military service, any distinctive duties were in question. For the defendant's witnesses speak of other petty tenure-holders, described only as Patros, fulfilling similar, though smaller, obligations in the way of attendance with *paiks* at Dusserah, and the lower Court has mentioned two *zemindars* whose use of the title of Thatraz is recognised, though they are independent of any superior (Gazetteer, page 298). There is, accordingly, no reason for presuming any connection between the title and subsisting obligation for service.

Lastly, as to the evidence that the Thatraz is bound to provide a guard for the idol, it is that his *paiks* take part in the procession and that a few of them guard the temple; but it includes no reason for assuming that they do so in the performance of a duty, and not in the enjoyment of a religious privilege. There is some evidence, that of 6th, 7th, 9th plaintiff's witnesses, that they received *batta* from the Maharajah. But it is contradictory and worthless; and, as it does not show whether the payments were simply for expenses or included remuneration, it would, if accepted, prove nothing. In these circumstances we find that no duty to guard the idol is established. As we have found that mere attendance with *paiks* at Dusserah is not a service default in which would justify resumption, our decision on issues IX and X must be against plaintiff's right to resume.

We, accordingly, allow the appeal, modifying the decree of the lower Court to the extent that plaintiff will have decree for Rs. 45,000 in respect of the *kattubadi* or rent due for *Faslis* 1313, 1314, 1315, with interest at 6 per cent. per annum to date of lower Court's decree and subsequent interest at 6 per cent. This suit is in other respects dismissed. Each party has failed as regards a substantial part of his case. We, therefore, make no order as to costs in either Court.

SANKARAN NAIR, J.—I agree. The compromise of 1877 and the exchange of *patta* and *muchilika* in the same year are not denied in appeal The Agent holds that the agreement is illegal as it is opposed to section 4 of the Permanent Settlement Regulation of 1802 and clause (4), Exhibit (D).

I am unable to agree with the Agent that the agreement is illegal on that ground. If Exhibit VI is genuine, there is nothing to show that the amount payable under it was only a quit-rent and there is no pretence for saying that it was a favourable quit-rent. But I agree with my learned brother that it is unsafe to act upon Exhibit VI.

The above observation as to the rent under Exhibit VI applies also to the amount, if any, payable to the plaintiff according to Collector Alexander in 1803. The increase of rent on more than one occasion, with the knowledge and approval of the Collector, and the reason assigned for it, *i.e.*, increase in cultivation, show, on the other hand, that what was paid was not quit-rent. Nor is there anything to show that what the chief of "Bissemkatak" was liable to pay before the Permanent Settlement was rent for the use of land. It might have been tribute that he paid. In fact, there is no evidence to show the legal relation which subsisted

between Jeypore and Bissemkatak, or that it was under a grant from the Jeypore Rajas that the Bissemkatak chief acquired this tract of country. It was not "alienated" land under clause (4), Exhibit D. Again, if the latter was liable to render military service to his Sovereign, then he was not holding the land for any quit-rent only and on that ground also the section would not apply.

For these reasons I hold that the agreement is legal and valid.

The defendant must, therefore, pay the rent due under the *patta* and *muchilika*.

It was then argued that according to the terms of the *patta*, the defendant is bound to render service and as he has failed to do so, the plaintiff is entitled to recover possession. Assuming the defendant is bound to render service under the agreement of 1877, there is nothing to show that the defendant forfeited the *raj* on default to render the same. The *patta* does not make it a condition. Considering that the chief of Bissemkatak was a ruler and a landed proprietor, who held land brought by him under cultivation, very strong evidence is required to prove any condition of forfeiture as alleged by appellant. The nature of the so-called service places the matter beyond doubt. The alleged service is said to be attendance at the Dusserah festival and for certain other ceremonial purposes. Besides being indefinite, this is not service. It is only a mark of respect which every person, even an official, is expected to pay and pays to his superior. I agree with what my learned brother has said on this question.

On this view, it is unnecessary to consider the relations of the parties before the agreement. If it is, I agree with my learned brother in his observations with one exception. I do not think that sufficient reasons have been shown to differ from the finding of the Judge in paragraph 19 of his judgment that the grants made by the Bissemkatak chief are genuine. This, however, does not affect the result.

Appeal allowed; Decree modified.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 84 OF 1914.

April 1, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

MUNICIPAL COUNCIL, KUMBAKONAM —RESPONDENT—APPELLANT

versus

R. SADAGOPACHARIAR—PETITIONER—RESPONDENT.

Civil Procedure Code (Act XIV of 1882), s. 583—Application for restitution—Reversing decree, whether contains direction to restore any benefit received—Civil Procedure Code (Act V of 1908), s. 144, scope of.

Applications made to obtain restitution under section 583 of the Civil Procedure Code, 1882, are proceedings in execution of the appellate decree, which the successful party has the right to treat as containing a direction to the other party to restore whatever benefit the latter has derived through execution under the reversed decree. [p. 381, col. 2.]

Venkayya v. Raghavacharlu, 20 M. 448, followed.

A decree for restitution passed in favour of a person in 1907 cannot be deemed to have ceased to exist in 1909 and can be executed whether an order of the first Court directing such restitution has been passed or not. [p. 381, col 2.]

Section 144 of the new Civil Procedure Code does not apply to decrees passed before the Code came into force. [p. 381, col. 2.]

Appeal against an order of the Court of the Subordinate Judge of Tanjore, in Execution Appeal No. 2504 of 1912, in Original Suit No. 23 of 1902.

FACTS.—In 1904 the Kumbakonam Municipality obtained a decree against one Raman Chetty, a toll gate contractor, for about Rs. 5,000. In 1907 he got this decree reversed by the High Court on appeal, on the ground that the Municipal contract with him was not in writing as required by section 95 of the District Municipalities Act. The Municipality before the reversal of the decree had executed it and obtained Rs. 1,200 in cash from Raman Chetty : it had also attached a debt due to Raman Chetty by the Dharmapuram Pandara Sannadhi. For releasing this attachment the Pandara Sannadhi had executed a promissory note to the Municipality in 1906 for Rs. 2,300 for which the Municipality entered satisfaction. The present respondent along with other decree-holders attached Raman Chetty's right to restitution as against the Municipality. In 1911 the respondent put in an execution application to obtain restitution not only for the Rs. 1,200 paid in cash to the Municipality by Raman Chetty,

but also for the Rs. 3,200 due under the pronote for which satisfaction had been entered. The Sub-Judge of Tanjore allowed restitution only for the Rs. 1,200 and disallowed the remainder. This appeal is against that order.

Messrs. *S. Srinivasa Aiyangar* and *N. Rajagopalachariar*, for the Appellant, contended:—(1) Under section 144 of the new Civil Procedure Code the application was not one in execution, (2) as it was filed more than three years after the reversal of the decree, it was barred by limitation, (3) even if it were otherwise, a separate order entitling restitution was necessary before applying for execution, as enunciated by the decision in *Vasudeva Ravi Varman* v. *Narayana Pattar* (1), and (4) as the application was put in after the new Civil Procedure Code, it was governed only by the new Act.

Messrs. *K. R. Subramania Sastri* and *V. Venkatachariar*, for the Respondent, argued *contra*.

JUDGMENT.—The questions for consideration are :—(1) Whether an application for execution to obtain the benefit of restitution, which a person became entitled to by reason of an Appellate Court having reversed the decree of the Court of first instance, is an application for execution of the decree passed on appeal, the reversing appellate decree being dated in 1907 before the new Civil Procedure Code came into force. In other words, whether the party who succeeded in the appeal has got a right to treat the appellate decree as not only a decree reversing the decree of the first Court, but also as a decree containing a direction to his opponent to restore whatever benefit the latter had derived through execution under the reversed decree.

(2) If the above question is answered in the affirmative on the construction of section 583 of the old Civil Procedure Code, whether the successful party in appeal lost the benefit of that portion of the appellate decree which granted restitution, by reason of the repeal of section 583 of the old Code and the substitution of section 144 (1) and (2) in the new Code.

In *Venkayya* v. *Raghavacharlu*(2), it was held [dissenting from an *obiter dictum* in *Kurupam Zemindar* v. *Sadasiva* (3)] that applications made to obtain restitution under section 583 (old Code) are proceedings *in execution of the appellate decree*. The language of section 583 also clearly supports that view, the important words being "decree passed in an appeal obtains execution *of the same*" and "such Court shall proceed *to execute the decree passed in appeal.*" The ruling in *Vasudeva Ravi Varman* v. *Narayana Pattar* (1), on the other hand, treats the application to obtain the benefit by way of restitution as an application *sui generis*, and not an application for execution of the appellate decree. We do not think it necessary to refer to the other numerous cases decided in all the Indian High Courts relied on by both sides on this question and on the connected questions, including the point whether the successful appellant has the right to bring a separate suit for obtaining the benefit of restitution besides the right to apply under section 583. Most of those questions are now only of academical interest after the enactment of the new Civil Procedue Code. The appellate decree of 1907 having been passed when the old Code was in force and the view enunciated in *Venkayya* v. *Raghavacharlu* (2) being, in our opinion, the sounder view, the appellate decree passed in 1907 must be treated as having contained a direction for restitution, which direction *could be enforced in execution of that appellate decree.*

On the *second* question we are clear that a decree for restitution passed in favour of a person in 1907 cannot be deemed to have ceased to exist in 1909, *assuming* (*without deciding*) that by reason of section 144 of the new Code, a reversing decree passed on appeal after the new Code came into force should not be treated as containing a direction for restitution, till an order is passed by the Court of first instance on the application of the successful appellant directing such restitution.

Admittedly no question of limitation arises if the appellate decree of 1907 is treated as an executable decree for restitution.

(1) 24 M. 345.

(2) 20 M. 448.
(3) 10 M. 66.

RAHIM BAKHSH *v.* UMAR DIN.

This appeal by the judgment-debtor (in restitution proceedings) is, therefore, dismissed with costs.

Coming to the memorandum of objections, the representative of the decree-holder in restitution (who is the respondent before us) contends that because the restitution-judgment-debtor obtained a pro-note from a debtor of the decree-holder for Rs. 2,300 and entered up partial satisfaction of the reversed original decree to that extent, he (the restitution-judgment-debtor) is bound to give back the entire sum of Rs. 2,300 in restitution, and not merely the sum of Rs. 1,200 and odd which he recovered on the strength of the pro-note before the decree was reversed. We think that as the restitution-decree-holder's debtor executed the pro-note to the restitution-judgment-debtor in the latter's capacity as attaching decree-holder under the first Court's decree, the obligation under that pro-note ceased to bind the garnishee as soon as that decree was reversed, because the garnishee executed the pro-note (according to the affidavit of the respondent's agent on the record) not at the request of the restitution-decree-holder (in which case it might be fairly argued that the pro-note did not become void for failure of consideration on the reversal of the first Court's decree), but by arrangement between the garnishee and the respondent as between themselves, the consideration for the pro-note being the then existing right in the respondent to proceed through Court against the garnishee and to recover the money due to the restitution-decree-holder. That considerarion failed as soon as that right of the respondent was extinguished by the appellate decree and the respondent could not thereafter recover anything under the pro-note. The restitution-judgment-debtor (appellant) was, therefore, liable to restore only the Rs. 1,200 which he had actually received before the reversal.

The lower Court's order was, therefore, right on this point also and the memorandum of objections is also dismissed with costs.

Appeal and memorandum of objections dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 763 OF 1911.

March 20, 1915.

Present:—Justice Sir Donald Johnstone, KT., and Mr. Justice Shah Din.

RAHIM BAKHSH—DEFENDANT—APPELLANT

versus

UMAR DIN PLAINTIFF—RESPONDENT.

Custom—Gulfarosh Arains *of Lahore city—Will—Burden of proof, nature of.*

Among the *gulfarosh Arains* of Lahore city there is a custom of Will-making contrary to Muhammadan Law. [p. 384, col. 2.]

The burden of proving such a custom lies on the person who asserts it, but in view of the fact that the tribe is a mere fragment of a very large body of *Arains*, who are agriculturists and follow, except as regards certain things, ordinary Punjab custom, the burden is not a heavy one. [p. 383, col. 2.]

The fact that a party has repeatedly by act or word shown that he does not really follow a particular law, though it does not amount to an estoppel against him, still shows the views held by the party. [p. 385, col. 1.]

Instances in support of an alleged custom are not always to be treated as of little or no value because supported only by oral testimony; if the deponents have means of knowledge and the opposite party makes no attempt to rebut, facts stated may often be accepted as proved. [p. 385, col. 1.]

Second appeal from the decree of the Divisional Judge, Lahore Division, dated the 9th May 1911, reversing that of the Subordinate Judge, first Class, Lahore, dated the 31st May 1910, dismissing the claim.

Messrs. *Fazl-i-Hussain*, *Roshan Lal* and Moulvi *Fazl-ud-Din*, for the Appellant.

The Hon'ble Mr. *Muhammad Shafi*, K. B., and Lala *Gopal Chand*, for the Respondent.

JUDGMENT.—We have heard this case argued by Mr. Fazl-i-Hussain on behalf of defendant-appellant and Mr. Muhammad Shafi on behalf of plaintiff-respondent. Plaintiff having sued for possession by partition of 1/6th of certain (5) houses under a Will, defendant raised various pleas, the decision in the first Court being against the plaintiff whose suit was dismissed with costs. Leaving out the first two issues which are connected with questions of fact concerning two shops and a house, with which questions we have now little further concern, the findings of the first Court were that the parties follow Muhammadan Law; that the Will of Mahtab, whose property is in suit, was duly executed by him but was invalid inasmuch as the consent of defendant, required by Muhammadan Law, had been

withheld; that under Muhammadan Law plaintiff would be entitled to 1/16th only of the property, and that he would not by this suit get even that, inasmuch as he had left out of his claim a certain house (called the Sathan house), which had been found to be joint property and which forms the subject of the second issue.

The lower Appellate Court, after finding the first and second issues (both of fact) exactly as the first Court found them, held that, while the parties are "probably governed by Muhammadan Law as a general rule," they follow custom in regard to the making of such Wills as the one in suit; that under their custom this Will is valid; that the execution of the Will is proved and that it was not necessary for plaintiff to prove the testator's soundness of mind, as defendant put in no plea to the contrary; that plaintiff was in genuine doubt as to the real fact in regard to the aforesaid Sathan house and never intended to omit any joint property and was, therefore, entitled to amend his plaint even at that stage. The Court, therefore, allowed amendment and gave plaintiff a decree (with half costs) as prayed, except as regards the two shops with *baithak* dealt with in the first issue.

Defendant has now come up here with a further appeal. He contends that the onus is on plaintiff to prove a special custom and that he has failed to prove it; that defendant has proved that the family follow Muhammadan Law; that former statements and admissions by defendant on such a point should not be brought up against him; that the Will is "neither legally proved nor is valid"; that amendment of the plaint should have been refused.

A good deal of this can be disposed of in a few words. In our opinion this amendment of the plaint was clearly not contrary to law,* and it appears to us eminently just and reasonable. We cannot improve upon the lower Appellate Court's own way of justifying it, and we endorse it. *Then*, the Will is certainly "legally proved", for we have concurrent findings that it was executed, and we agree with the lower Appellate Court that it was too late to start before it a new case upon a new plea that testator was not of sound disposing mind at time of execution. *Thirdly*, defendant has certainly not proved postively that the family follows personal law and in argument this has hardly been insisted upon. The whole length Mr. Fazl-i-Hussain found himself able to go was that in certain matters Muhammadan Law is, followed, that no special custom validating such a Will as this is established, and that, therefore, on the authorities, the Court must fall back on the personal law of the parties. It follows that the real question for debate is whether the plaintiff has shown that the family does follow a custom under which this Will is valid. [We decline to allow appellant to raise at this stage, as Mr. Fazl-i Hussain attempted to do, an objection that the suit cannot succeed because all the beneficiaries under the Will have not been impleaded. This has never been mooted before and is not even to be found in the grounds of the present appeal.].

The first remark we have to make is that it is not necessary, as Mr. Fazl-i-Hussain seemed to suggest, that these *gulfarosh Arains* of Lahore City follow agricultural custom in its entirety, or are governed in all matters by the same rules as the real agricultural *Arains* of Lahore Tahsil. It is enough if they can show that there is a practice of Will-making among them, that Muhammadan Law is in important points departed from, that, in particular, several Wills in violation of Muhammadan Law have been executed and not set aside, and that defendant has himself acquiesced in such violations of Muhammadan Law. These are the general lines on which the lower Appellate Court has proceeded, and we think all that is now required is to see whether the above *desiderata* have been achieved with reasonable completeness by the plaintiff. The burden of proof is no doubt on the plaintiff in view of *Miran Baksh* v. *Musammat Allajawai* (1) and *Musammat Talia Bibi* v. *Mehr Bakhsh* (2); but considering that this tribe is a mere fragment of a very large body of *Arains*, who are agriculturists and follow (except, as regards the rights of certain females) ordinary Punjab custom, we cannot hold that the burden is a very heavy one.

The Will was executed on 8th August 1899 and was registered. It left half of testator's houses (5 of them) to his wife, his daughter and his nephew son-in-law, the plaintiff

* Order VI, rule 17, Civil Procedure Code.

(1) 25 P. R. 1882.
(2) 72 P. W. R. 1908.

Umar Din. Defendant, the objector, is testator's brother.

The authorities may be briefly noticed first. *Miran Baksh* v. *Musammat Allajawai* (1) is a case in which it was held that among these *gulfarosh Bhatti Arains* of Lahore and Amritsar no special custom contrary to Muhammadan Law had been proved under which brother's sons exclude sisters *from inheritance*. The case was not one of gift or Will but of succession pure and simple and the ruling does not lay it down that these *Arains* do as a matter of fact follow Muhammadan Law generally but merely that, being city people and non-agriculturists, a special custom anent this particular matter of succession must be made out.

Musammat Talia Bibi v. *Mehr Bakhsh* (2) is a case of Lahore *gulfarosh Arains*. It is held there that the onus of proving a special custom contrary to personal law was on the persons asserting it, and that at best the evidence of such custom was conflicting. There a lady had gifted to her daughter's daughter property which had many years before been gifted to herself by her late husband, and the decision of the Bench proceeded really on two grounds *viz.*, that the plaintiffs, collaterals of that husband, had not proved a special custom allowing control by them of the widow's gift, and that the gift to the widow was so old, and was so clearly an out-and-out gift, that she had certainly by it and by lapse of time become absolute owner and so was emancipated from all trammels of custom, if any existed. It seems to us in these circumstances that it was hardly necessary to decide the question of custom *versus* law at all, and further that the decision on that question goes no further than this, that the plaintiffs in that case had not shown that they could control the act of a lady, widow of their agnatic relative, who had disposed at her Will of property which she had received from her husband as an out-and-out gift 20 or 30 years earlier. It is impossible to deduce from this any authority to the effect that among these same people a man can control the act of his brother who, wills property to his wife, daughter and son-in-law. At most the ruling can only be used in connection with the laying of onus, and even so we do not think the onus a heavy one. The evidence as to custom was not discussed, but only alluded to in very generally terms.

Musammat Fakhar-un-Nissa v. *Malik Rahim Bakhsh* (3) and *Daya Ram* v. *Sohel Singh* (4) have also been cited by appellants, but the former is of no help to us, and from the latter we only gather this that, where custom applicable to a particular point is not proved, personal law must be resorted to.

It follows that this case must be decided on its own record. The learned Divisional Judge has detailed ten indications in favour of respondent-plaintiff. We have heard all the evidence very exhaustively discussed, with the result that we find that in this comparatively small section of *Arains* of Labore city in the last 20 years or so several Wills have undoubtedly been executed and that in more than one connection Muhammadan Law is departed from. The Wills relied upon by Mr. Shafi (for plaintiff-respondent) are:

(*i*) Ala-ud-Din's Will, 18 years old, in favour of his daughters in presence of collaterals: depends on statement of P. W. No. 1 alone, but is uncontradicted.

(*ii*) Jowaya's Will, 9 years old, to daughter and son-in-law, in presence of near collaterals: depositions of P. W. No. 1 and P. W. No. 3 and P. W. No. 4, and the document itself.

(*iii*) Jani's Will, 22 years old, to his wife, in presence of collaterals: P. W. No. 3.

(*iv*) Jani's widow's Will, 5 years old, to daughter's daughter and latter's husband: P. W. No. 1, P. W. No. 3.

(*v*) Chaughatta's Will, 4 years at least old, to grandson, in presence of collaterals: P. W. No. 1 and P. W. No. 4.

(*vi*) Nabi Bakhsh's Will, 16 years old, to daughter in presence of nephews: P. W. No. 1 and P. W. No. 3.

(*vii*) Jalal-ud-Din's Will, to his son: P. W. No. 4.

(*viii*) Mutwala's Will: D. W. No. 4 in cross-examination.

(*ix*) *Musammat* Mehran's case: see page 8,

(3) 23 P. R. 1897.

(4) 110 P. R. 1906 (F. B.); 31 P. L. R. 1907; 59 P. W. R. 1907.

paper-book, instances 6 and 7: this was admitted by defendant.

(*x*) Mahtab's own earlier Will of 1895 was attested by defendant himself. That Will was on the same lines as the present one, the only difference being that the son-in-law then was defendant's own son, who has since died, his young widow being re-married thereafter to plaintiff Umar Din.

Mr. Fazl-i-Hussain criticises these instances. He says (*i*) was not acted upon, the property being in the end divided according to *Shara*. No doubt Khandu, P. W. No. 7, says boldly something of this sort, not really knowing what division under *Shara* would have brought about. The Will was in effect acted upon, and it contravened Muhammadan Law. Then he points out that (*iii*) and (*iv*) were rather gifts than Wills and this seems correct.

(*v*) was also attested by defendant. Mr. Fazl-i-Hussain makes nothing of his attack on it.

(*vi*) is attacked on the ground that P. W. No. 1 and P. W. No. 3 do not describe the beneficiaries precisely similarly and that the record of the litigation referred to by the witnesses should have been produced. The *first* objection is of no importance, one witness merely adds a widow as legatee, and as to the *second* objection it is much minimised by two circumstances, namely, that the dispute was compromised and that P. W. No. 3, being mixed up in the litigation, has personal first-hand knowledge. Here we may express the opinion that instances in support of an alleged custom are not always to be treated as of little or no value because supported only by oral testimony: if the deponents have means of knowledge and the opposite party makes no attempt to rebut, facts stated may often be accepted as proved.

It may be conceded that instances (*vii*) and (*viii*) are of little or no value, but (*ix*) and (*x*) undoubtedly are.

Apart from these Wills it is clear that defendant, who now finds it convenient to hold out for strict personal law, has repeatedly by act and word shown that he does not really follow that law. The lower Appellate Court has brought this out very clearly, and we cannot agree with Mr. Fazl-i-Hussain that this is immaterial. We do not say it raises an estoppel against defendant, but it shows the views held in the past by defendant, who seems to have busied himself a good deal with the affairs of the brotherhood and their dealings with property: see especially defendant's statement, Exhibit K, as to adoption by *Musammat* Mehran, as to Will by her, as to Wazir's property being willed to his wife, contrary to Muhammadan Law, and as to a customary form of adoption as prevalent in the tribe.

On the whole we think the plaintiff has shown that this Will is valid and we dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2490 OF 1913.

March 2, 1915.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Richardson.

NAZIMULLA—DEFENDANT No. 1—APPELLANT

versus

WAZIDULLA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Right of way, suit for establishment of—Limitation Act (IX of 1908), s. 23, applicability of—Water-course and way distinguished, obstruction to—Continuing nuisance.

The obstructions which interfere with the flow of water are in the nature of continuing nuisances, as to which the cause of action is renewed *de die in diem* so long as the obstructions causing such interference are allowed to continue. [p. 386, col. 1.]

Rajrup Koer v. *Abul Hossein*, 6 C. 394 (P. C.): 7 C.L. R. 529; 7 I. A. 240; 4 Shome L. R. 7; 4 Sar. P. C. J. 199; 3 Suth. P. C. J. 816; 4 Ind. Jur. 530, referred to and followed.

There is no distinction between an obstruction to a water-course and one to a way, and wrongful interference with a right of way constitutes a nuisance. [p. 386, col. 2.]

Lane v. *Capsey*, (1891) 3 Ch. 411; 61 L. J. Ch. 55; 65 L. T. 375; 40 W. R. 87 and *Thorpe* v. *Brumfitt*, (1893) 8 Ch. 650, referred to.

Soojan Bibi v. *Shamed Ali*, 1 C. W. N. 96, referred to.

Obstructions to easements other than water-courses may be treated as continuing nuisances. [p. 386, col. 2.]

Gillon v. *Boddington*, (1824) 1 Car. & P. 541; Ryan & M. 161 and *Whitehouse* v. *Fellowes*, 10 C. B. (N. S.) 765; 30 L. J. C. P. 305; 4 L.T. 177; 9 W. R. 557; 142 E. R. 654, 128 R. R. 919, referred to.

NANU NAIR *v.* KANTAN ASHTA MOORTHI.

Appeal against the decree of the Subordinate Judge, second Court, Sylhet, dated the 11th April 1913, affirming that of the officiating Munsif, second Court, Habigunj, dated the 22nd of July 1912.

Babu *Gopal Chandra Das*, for the Appellant.

Babu *Birendra Chandra Das*, for the Respondents.

JUDGMENT.—This is an appeal by the first defendant in a suit for establishment of a right of way. The plaintiffs came to Court on the allegation that they had used the disputed land as a path from time immemorial peaceably, openly and uninterruptedly; and that this was the only means of access to their land. The Courts below have found that the right of way as alleged by the plaintiffs has been established, and have made a decree accordingly. The only ground urged by the appellant against this decision is that the question of limitation has been erroneously decided, as the Subordinate Judge has held that section 23 of the Indian Limitation Act is applicable to the case and consequently no question of limitation arises. The obstruction is said by the plaintiffs to have been caused in 1908 and the suit was commenced on the 15th July 1911. It has been urged that section 23 has no application to the case and that the Courts below should have investigated whether the obstruction was caused within 12 years prior to the suit, so as to bring the case within Article 144. In our opinion there is no foundation for this contention.

It was pointed out by their Lordships of the Judicial Committee in *Rajrup Koer* v. *Abul Hossein* (1), where the suit was instituted for the removal of obstructions to a water-course used by the plaintiff from time immemorial, that the obstructions which interfered with the flow of water were in the nature of continuing nuisances as to which the cause of action was renewed *de die in diem* so long as the obstructions causing such interference were allowed to continue. In support of this conclusion reference was made by their Lordships to section 24 of the Indian Limitation Act, 1871. The same view was applied subsequently in the cases of *Achul Mahta* v. *Rajun Mahta* (2) and *Punja Kuvarji* v. *Bai Kuvar* (3). But it has been argued on behalf of the appellant that the cases mentioned related to water-courses, and that although an obstruction to a water-course may rightly be described as a continuing nuisance, an obstruction to a way does not fall within that category. We are of opinion that the distinction suggested is not well founded and that wrongful interference with a right of way constitutes a nuisance [*Lane* v. *Capsey* (4), *Thorpe* v. *Brumfitt* (5)]. The principle laid down by the Judicial Committee in *Rajrup Koer* v *Abul Hossein* (1) and applied in the case of *Punja Kuvarji* v. *Bai Kuvar* (3) was applied by Norris, J., to the case of obstruction of a way in *Soojan Bibi* v. *Shamed Ali* (6) and we agree with the view taken by that learned Judge. A reference to the cases of *Gillon* v. *Boddington* (7) and *Whitehouse* v. *Fellowes* (8) will show that obstructions to easements other than water-courses may be treated as continuing nuisances. We hold accordingly that the Subordinate Judge has correctly applied section 23 to the circumstances of this case.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

(1) 6 C. 394; 7 C. L. R. 529; 7 I. A. 240; 4 Shome L. R. 7; 4 Sar. P. C. J. 199; 3 Suth. P. C. J. 816; 4 Ind. Jur. 530.
(2) 6 C. 812.
(3) 6 B. 20.
(4) (1891) 3 Ch. 411; 61 L. J. Ch. 55; 65 L. T. 375; 40 W. R. 87.
(5) (1893) 8 Ch. 650.
(6) 1 C. W. N. 96.
(7) (1824) 1 Car. & P. 541; Ryan & M. 161.
(8) 10 C. B. (N. S.) 765; 30 L. J. C. P. 305; 4 L. T. 177; 9 W. R. 557; 142 E. R. 654; 128 R. R. 919.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1042 OF 1913.

February 9, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

NANU NAIR AND OTHERS—DEFENDANTS—APPELLANTS

versus

KANTAN ASHTA MOORTHI NAMBUDRIPAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 105 (2)—

NANU NAIR *v.* KANTAN ASHTA MOORTHI.

Res judicata—*Estoppel—Test—Burden of proof—Demise questioned—Original ownership and derivative tenure admitted—Nature of proof required—Evidence Act (I of* 1872), *s.* 90, *presumption in, whether applicable to copies—Arrears of rent, stale claim for—Interest, rate of, allowable—Interest, when allowable on arrears of rent —Enhanced Government revenue, whether payable by mortgagor or mortgagee.*

Section 105, clause (2), Civil Procedure Code, only prevents a party from agitating in an appeal a question which he could have objected to in the appeal against an order. The test is not whether a decision has been given upon the points raised in the appeal against the order, but whether the party has availed himself of the appropriate remedy of appealing against the order. [p. 389, col. 1.]

Where the question is as to whether certain property had been demised on *kanom* to the defendants' predecessors-in-title, and the property is conceded to have belonged originally to certain persons, others being recorded as holding under them, very little evidence regarding the actual letting relied upon will suffice to shift the burden of proving title to the defendants. [p. 389, col. 2.]

Bala v. *Shiva*, 27 B. 271; 5 Bom. L. R. 85, followed.

Where the title of the plaintiff is admitted and the defendants are shown to have come into possession as mortgagees under the plaintiff, Courts will not demand such strict proof of the mortgage sued on as where the title is denied and possession is not shown to have been under the owners. [p. 389, col. 2.]

Krishna Pillai v. *Rangasami Pillai*, 18 M. 462; 5 M. L. J. 187, *Vasudevan Nambudri* v. *Krishna Pisharoti*, 13 M. L. J. 274 and *Koru Nair* v. *Kesavan Nambudri*, 17 M. L. J. 122, distingnished.

The presumption contained in section 90, Indian Evidence Act, applies not only to original documents, but also to copies thereof. [p. 390, col. 2.]

Ishri Prasad Singh v. *Lalli Jas Kun var*, 22 A. 294; A. W. N. (1900) 82, followed.

The rate of interest allowable on a stale claim for arrears of rent is only 6 per cent. [391, col. 1.]

Parasurama Pattar v. *Vanktachallam Pattar*, 21 Ind. Cas. 701; (1914) M. W. N. 198; 25 M. L. J. 561, followed.

In the absence of any specific contract to pay interest, or even a period fixed for payment, and in the absence of any demand for the same, no interest is claimable on arrears of rent. [p. 391, col. 1.]

Ganesh Bakhsh v. *Harihar Bakhsh*, 26 A. 299 (P. C.); 31 I. A. 116; 8 C W. N. 521; 14 M. L. J. 190; 6 Bom. L R. 505; *Kamalammal* v. *Peeru Meera Levvai Rowthen*, 20 M. 481; 7 M. L. J. 263 and *Surja Narain Mukhopadhya* v. *Pratap Narain Mukhopadhya*, 26 C. 955, followed.

It is the mortgagee in possession and not the mortgagor that is liable to pay the enhanced Government revenue. [p. 390, col. 2.]

Panambatta Kalathil Kunchu Menon v. *Kalathinpadikil Narayanan Ezhutessan*, 25 Ind. Cas. 641; 16 M. L. T. 317, followed.

Second appeal against the decree of the Court of the Subordinate Judge of Coimbatore, in revised Appeal Suit No. 649 of 1909, preferred against that of the Court of the District Munsif, Palghat, in Original Suit No. 322 of 1907.

FACTS of the case appear sufficiently from the judgment.

Mr. *Nilakanta Aiyar*, for the Respondents, raised a preliminary objection that the appellant could not take objection to the finding that the demises were legally proved. He contended that the Subordinate Judge having, in his order of remand, found that the demises were true and that finding not having been reversed by the High Court when the matter came up before it on appeal previously, the question could not now be re-opened.

The preliminary objection was overruled.

Mr. *Anantakrishna Aiyar*, for the Appellants:—Exhibit A has not been properly proved and if that evidence is taken away, there is no other evidence to justify the finding. Where the suit is based on a particular mortgage, no relief could be given on the foot of a different mortgage not pleaded by the plaintiff. Vide *Krishna Pillai* v. *Rangasami Pillai* (1), *Vasudevan Nambudri* v. *Krishna Pisharoti* (2), *Koru Nair* v. *Kesavan Nambudri* (3). In the absence of the original *kanom* deed the lower Court erred in admitting the *maruput* or copy Not only is it not signed but there is absolutely no proof of the execution. The benefit of the presumption in section 90 and illustration (*g*) to section 114 of the Evidence Act does not apply to copies of documents: *Appathura Pattar* v. *Gopala Panikkar* (4). The Subordinate Judge erred in granting interest at 12 per cent. At the most not more than 6 per cent. could be awarded as the claim was a stale one: *Parasurama Pattar* v. *Venkatachalam Pattar* (5). But no interest at all is claimable in this case. There is no contract to pay, nor is there any demand so as to grant it by way of damages. Vide *Ganesh Bakhsh* v. *Harihar Bakhsh* (6), *Kamalammal* v. *Peeru Meera Levvai Rowthen* (7) and *Surja Narain Mukhopadhya* v. *Pratap Narain Mukhopadhya* (8).

(1) 18 M. 462; 5 M. L. J. 187.
(2) 13 M. L. J. 274.
(3) 17 M. L. J. 122.
(4) 25 M. 674.
(5) 21 Ind. Cas. 701; (1914) M. W. N. 198; 25 M. L. J. 561.
(6) 26 A. 299; (P. C.); 31 I. A. 116; 8 C. W. N. 521; 14 M. L. J. 190; 6 Bom. L. R. 505.
(7) 20 M. 481; 7 M. L. J. 263.
(8) 26 C. 955.

The decree as to the liability of the mortgagee to pay the enhanced revenue cannot be supported.

Mr. *Nilakanta Aiyar*, for the Respondents:—Exhibit A was not the only evidence on which the Subordinate Judge based his finding. Exhibits C, D and E clearly support the same. The cases cited by the other side have no application. The original ownership having been admitted, as also the record of a derivative holding, very little evidence would shift the burden: *Bala* v. *Shiva* (9). As regards Exhibit A, it is the prevailing custom in Malabar for mortgagors to retain such copies. [See Wigram on Malabar Law and *Parameswaran Nambudripad* v. *Ammunni Nair* (10)]. It is more than 30 years old and comes from proper custody.

The Subordinate Judge was, therefore, right in acting upon it. *Vide* section 90 of the Evidence Act. The decision in 25 Madras regarding non-applicability of section 90, Evidence Act, to copies of documents was not followed in the case reported as *Ponnambalath Parapravar* v. *Karoth Sankaran Nair* (11). The defendants not having produced the original *kanom*-deed, the presumption mentioned in illustration (*g*), section 114, Evidence Act, naturally arises against them. See *Rajah Kishen Dutt Ram Pandey* v. *Narendra Bahadur Singh* (12) and *Ram Prasad* v. *Raghunandan Prosad* (13). The Evidence Act allows a copy being put in evidence when the original is not forthcoming. Section 90 mentions any document, and ought not to be construed so as to restrict its operation to original documents only. *Vide* Wigmore on Evidence, Volume III, section 2143, sub-section (2), and *Ishri Prasad Singh* v. *Lalli Jas Kunwar* (14). Interest was rightly allowed on arrears of rent. *Vide* Appeal No. 187 of 1899. The enhanced revenue is certainly payable by the mortgagee. *Panambatta Kalathil Kunchu Menon* v. *Kalathinpadikil Narayanan Ezhutcssan* (15).

(9) 27 B. 271; 5 Bom. L. R. 85.
(10) 9 M. L. J. 360.
(11) 12 Ind. Cas. 453; 21 M. L. J. 981.
(12) 3 I. A. 85.
(13) 7 A. 738; A. W. N. (1885) 160.
(14) 22 A. 294; A. W. N. (1900) 82.
(15) 25 Ind. Cas. 641; 16 M. L. T. 317.

JUDGMENT.—The plaintiff's case is that the properties in suit belong to his *mana* in *jenmi*, that they were demised by two *kanom*-deeds in the year 1840 to two ladies, who were members of the defendants' *tarwad*, and that the defendants have denied his *jenmi* title. He sues to recover possession and *michavaram* on payment of the *kanom* amount. The defendants pleaded that the properties did not belong to the plaintiff's *mana* and alleged that they were their *tarwad* properties. They also denied the demises sued on.

The District Munsif held that the demises were not proved and dismissed the suit. On appeal, the Subordinate Judge came to the conclusion that "the demises sued upon were true and that the plaint lands were held under them." He reversed the decree of the District Munsif and remanded the suit.

An appeal was preferred to the High Court against this order of remand. The learned Judges who heard it pointed out that as the District Munsif did not dispose of the suit on a preliminary point, the order of remand was wrong. They set aside that order and directed the Sub-Judge to re-hear the appeal after calling for findings on the other issues raised in the case.

Findings were submitted and on their receipt, the Subordinate Judge held that the properties belonged in *jenmi* to the plaintiff's *mana* and decreed possesion. He also passed a decree for the payment of the *poruppu* and for the value of improvements. This second appeal is against that decree.

Mr. Anantakrishna Aiyar stated frankly at the outset that he was not prepared to contest the finding that the properties originally belonged to the plaintiff's *mana*. He contended that there is no legal evidence to support the demises sued on.

Before dealing with the points argued by the learned Vakil, it is necessary to dispose of a preliminary objection raised by Mr. Nilakanta Aiyar on behalf of the respondents, that it is not competent to the appellant to object to the finding that the demises were legally proved. His contention is that as the Subordinate Judge in his order of remand found distinctly in favour of the demises, and as that finding was not reversed by the High Court in the appeal against his order, the question should not be

re-opened. This argument proceeds on a misconception of the provisions of section 105; clause (2) prevents a party from agitating in the appeal against the decree a question which he could have objected to in the appeal against the order. The test is, not whether a decision has been given upon the points raised in the civil miscellaneous appeal, but whether the party availed himself of the appropriate remedy of appealing against the order. In the present case there was an appeal against the order of remand and that order was reversed. It is difficult to see how the appellant could have compelled the Court to express an opinion on a subsidiary point, when the order itself was vacated. The right view is to hold that the decision on the question of the demises was not given in the order which has been set aside, but in the final judgment which superseded it. The preliminary objection must be overruled.

The main point for consideration is, whether there is legal evidence on which the Sub-Judge could have based his decision in favour of the demises sued on. Mr. Anantakrishna Aiyar contended that Exhibit A has not been properly proved and that there is no other evidence, oral or documentary, which would justify the finding of the lower Appellate Court. Before dealing with Exhibit A, it is desirable to consider whether there is other evidence on which the conclusion of the Sub-Judge can be upheld. Exhibit E is an account of the property given as security by one Sankaran Nair, who admittedly was a member of the defendants' *tarwad*. In the bond he executed "property sowing 80 *paras* of paddy and situated in Netumballam" is described as the *jenmi* of the Kuruvayur *Mana*. Sankaran Nair is described as the *kanomdar*. It is not alleged that the plaintiff's *mana* had any other property in Nettumballam. The amount of the *kanom* is also given. The note appended to the document shows that the *kanom* document was produced before the head *gumastah* of the *Taluq* Office. Then we have Exhibits C and D which are extracts from the Stamp Register Book, showing that two stamp papers for writing *kanom*-deeds relating to lands sowing 40 *paras* of paddy each were purchased in *Meenam* 1015 (corresponding to 1840). They were sold to Kuruvayur Manakkal Nambudripad, the predecessor-in-title to the plaintiff. The District Munsif who decided the point against the plaintiff did not impugn the genuineness of these documents. The description in these documents of the ladies to whom the demises were executed as belonging to Thottanchath led him to hold that the defendants' *tarwad* was not the demisee. The Subordinate Judge, on a careful examination of the evidence, has come to the conclusion that the *tarwad* was known by the names of Kuruvakkat and Thottanchath indiscriminately. In this view, he is justified in holding that the reference in Exhibits C, D and E was to the defendants' *tarwad*. There is also Exhibit C, the evidence of one of the plaintiff's witnesses taken on commission, to support the plaintiff's case. We cannot say that the Subordinate Judge was not entitled to draw the inference that the property belonged in *jenm* to the plaintiff's *mana* and that the defendants' *tarwad* held them as *kanomdars*. Where the property is conceded to have belonged originally to certain persons and others have been recorded as holding under them, very little evidence regarding the actual letting relied upon will suffice. The decision of the Bombay High Court in *Bala* v. *Shiva* (9) applies to such classes of cases. The burden of proof is shifted to the defendants to establish their title. Mr. Anantakrishna Aiyar relies upon *Krishna Pillai* v. *Rangasami Pillai* (1), *Vasudevan Nambudri* v. *Krishna Pisharoti* (2) and *Koru Nair* v. *Kesavan Nambudri* (3) to show that where a particular mortagage is sued upon, Courts should not give relief on a mortgage not pleaded in the case. These decisions do not affect the present case. Where the title of the plaintiff is admitted and the defendants are shown to have come into possession as mortgagees under the plaintiff, Courts will not demand such strict proof of the mortgage sued on as where title is denied and possession is not shown to have been under the owners. The facts appearing in evidence in this case are enough in the circumstances already mentioned to prove the demises sued on.

There is another ground upon which the decision of the Subordinate Judge can be supported. The *kanom* deeds relied upon have not been produced. If the plaintiff's claim is

true, the deeds must be in the possession of the defendants. They deny the *kanom*. The plaintiff produces Exhibit A which, he alleges, is a *maruput* or copy of one of the *kanom* documents. It is not signed; nor has there been any proof of its execution. It purports to be more than 30 years old. The Subordinate Judge held it to be genuine. He says that it is customary in Malabar for *jenmies* "to keep *maruputs* or copies of *kanom* documents." Mr. Wigram in his book on Malabar Law refers to this practice. In *Parameswaran Nambudripad* v. *Ammunni Nair* (10), *marupattam* is said to be "a copy of the document executed to another to be retained by the party executing it". Exhibit A corresponds to this description. It comes from proper custody. It is argued that the presumption as to ancient documents contained in section 90 of the Evidence Act does not apply to copies. In *Appathura Pattar* v. *Gopala Panikkar*(4), it was stated that the presumption suggested in section 90 and in section 114, illustration (*g*), does not apply to copies of documents. But in *Ponnambalath Parapravan Karoth* v. *Sankaran Nair* (11), the learned Judges were not prepared to follow the earlier ruling. It seems to us that it would be unduly narrowing the scope of section 90 to hold that copies of the documents are not within the rule. In the language of illustration (*g*) to section 114, a presumption arises against the defendants by the non-production of the original. See *Rajah Kishen Dutt Ram Pandey* v. *Narendra Bahadur Singh* (12) and *Ram Prasad* v. *Raghunandan Prasad* (13). Under the Evidence Act, where the original is not produced, a copy made from the original can be exhibited to prove the transaction. Section 90, which follows the sections relating to proof by secondary evidence, refers to presumption regarding "any document." There is nothing in its language to restrict its operation to original documents only. The rule of law is thus stated in Wigmore on Evidence, Volume III, section 2143 (sub-section 2): "Where the alleged ancient *original* is *lost* and an *ancient purporting copy* is offered, made by a private hand, and the purporting maker being unknown or deceased, it seems to have been long accepted that this suffices, and that the copy may be received under the ancient document rule." The authority of Lord Eldon and of Chief Baron Gilbert is quoted in support of this proposition. In *Ishri Prasad Singh* v. *Lalli Jas Kunwar* (14), the principle of section 90 was applied to certified copies. We think that the object of the section will be frustrated, if the presumption is not extended to copies. Of course, Courts must scrutinise such copies very carefully and should not apply the presumption until the conditions required by the section are strictly conformed to. We do not think that when all the tests are satisfied, the fact that the document affected is a copy and not the original should make any difference. We are, therefore, of opinion that the Subordinate Judge was right in acting on Exhibit A. In this view, his finding on the question of title and on the demises sued on must be upheld.

There are a few subsidiary points to be noticed. Exhibit A relates to 40 *paras* sowing land. It fixes the *parappad* payable to the landlord at 5 *paras*. It was argued that as there is no evidence in regard to the *parappad* on the other half of the suit properties, plaintiff is not entitled to any *parappad* in respect of it. In the view that we have taken, that Exhibit A is a copy of one of the two documents of the same date, there is no reason for not holding that the same terms were embodied in the other *kanom* as well. We see no reason for differing from the Subordinate Judge in this respect. We also agree with him that the defendants are entitled to get only the money value of the gold coins as on the date of payment. Exhibit E1 refers to the commutation value in rupees, and that indicates that parties never contemplated the return of the coins or the payment of their value at the time of the redemption. The Sub-Judge is also right in holding that the defendants are only entitled to get a sum of money which would secure to them in perpetuity 20 *paras* of paddy. The contention that the amount must be such as would enable the defendants to purchase a *jenm* right is extravagant. The Sub-Judge has rightly held that the defendants were bound to pay the enhanced Government revenue. After some conflict of views, it was decided in *Panambatta Kalathil Kunchu Menon* v. *Kalathinpadihil Narayanan Ezhutessan* (15), that the mortgagee in possession was chargeable with such pay

ments. We think that this decision is right. The Subordinate Judge has decreed interest at the rate of 12 per cent. upon the arrears of rent due to the plaintiff. The claim is a stale one and we do not think he was justified in decreeing more than 6 per cent. See *Parasurama Pattar* v. *Venkatachalam Patter* (5). But we think that no interest is payable in this case. The Judicial Committee of the Privy Council pointed out in *Ganesh Bakhsh* v. *Harihar Bakhsh* (6), that where the conditions of Act XXXII of 1839 are not to be found, interest by way of damages is not awardable under the Contract Act. It is on this principle, it was held in *Kamalammal* v. *Peeru Meera Levvai Rowthen* (7), that where there has been an oral lease, no interest is payable on the arrears claimed. Our attention was drawn to an unreported judgment of this Court in Appeal No. 187 of 1899, which seems to suggest that if the contract is in writing, interest may be decreed. We are unable to follow this decision. Their Lordships of the Judicial Committee lay stress upon the clause in the Act which says that the claim must be made 'by virtue of some written instrument at a certain time." Sir Francis Maclean and Banerjee, J., construe this clause to mean that the date of payment must be definite. See *Surja Narain Mukhopadhya* v. *Pratap Narain Mukhopadhya* (8). Exhibit A contains no stipulation for payment of the rent at any fixed time. It only provides that the various payments "should be given per year." There is no evidence in this case that such payments were made or claimed at any particular period of the year The object of the Act is to penalise the person who withholds payment when the same is due. That is the reason why provision is made for interest running after demand. In the present case, there is no period fixed for payment. There has been no demand; and there is no stipulation for interest in the copy produced. Under these circumstances, we must disallow the interest decreed by the Subordinate Judge. Subject to this modification, the second appeal is dismissed. Parties will give and receive proportionate costs throughout. Six months' time from this date for payment.

Appeal dismissed; Decree modified.

COURT OF THE BOARD OF REVENUE UNITED PROVINCES.

REVENUE PETITION No. 8 OF 1908-09 OF FATEHPUR DISTRICT.

March 31, 1909.

Present:—Mr. Baillie, J. M.

M. MURLI DHAR—APPLLICANT

versus

MOHAMED MUNIR—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 12—Kabuliyat for one year, function of.

A *kabuliyat* for one year is intended to regulate rent, not length of occupation and it is not a lease for a fixed period, which cannot count for acquisition of occupancy rights.

Application for revision from an order of the Commissioner, Allahabad Division, dated the 12th November 1908, confirming that of the Assistant Collector of Fatehpur District.

JUDGMENT.—The Commissioner was mistaken in supposing that there was any compromise accepting the holding as an occupancy tenure, but apart from this, his finding was undoubtedly correct. The land is not recorded as *sir* since 1904, the Assistant Collector ordered it to be entered as a holding-in-chief. There is not a vestige of evidence that the land is *sir*. In fact since the time it was purchased by Imam-ud-din and until it was let to respondent, it could not have become *sir*. The land is ordinary *khalsa* and respondent has been cultivating it for upwards of twelve years. I do not consider that there is anything in the compromise of 1904, which estops him from now supporting his right of occupancy.

It is accepted law that a *kabuliyat* for one year is intended to regulate rent, not length of occupation and that it is not a lease for a fixed period, which cannot count for acquisition of occupancy rights. Respondent has clearly not occupancy rights.

The appeal is dismissed with costs on appellant

Application rejected.

MUTHUSWAMY PILLAY *v.* MUTHUVEERAM PILLAY.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 324 OF 1914.

March 1, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

MUTHUSWAMY PILLAY AND ANOTHER—PLAINTIFFS—PETITIONERS

versus

MUTHUVEERAM PILLAY—DEFENDANT—RESPONDENT.

Vendor and purchaser—Court-auction purchaser—Mortgage, existence of, undisclosed—Liability to pay, if non-existent—Purchaser from such purchaser compelled to pay mortgage amount—Liability of auction-purchaser to indemnify private purchaser.

Where a person purchases certain immoveable property at a Court sale in execution of a money decree, in ignorance of the existence of a mortgage upon the same, and subsequently sells it privately to a third party who also purchases without the knowledge of the existence of the mortgage, and where the mortgage is afterwards disclosed and the private purchaser is compelled to pay the amount thereof, the latter is not entitled to claim compensation from his vendor, as the purchaser of property in a Court sale takes it not only with all benefits but also subject to all liabilities. [p. 392, col. 2.]

Izzat-un-nisa Begam v. *Kunwar Pertab Singh*, 3 Ind. Cas. 793; 10 C. L. J. 313; 13 C. W. N 1143; 6 A. L. J. 817; 11 Bom. L. R. 1220; 6 M. L. T. 277; 31 A. 583; 36 I. A. 203, followed.

Alfatun v. *Rao Karan Singh*, 7 N. W. P. H. C. R. 362, not followed.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the judgment and decree of the Court of the Subordinate Judge of Trichinopoly, in Small Cause Suit No. 546 of 1913.

FACTS.—The plaintiffs purchased privately from the defendant certain immoveable property which he had himself purchased in a Court auction in execution of a money-decree. There was an outstanding mortgage on the property which both the plaintiffs and the defendant were not aware of, as the same had not been mentioned in the proclamation of sale. Plaintiffs having been compelled to pay the amount of the mortgage, now sued the defendant for the reimbursement of the sum so paid. The Subordinate Judge of Trichinopoly dismissed the suit. The plaintiffs preferred this civil revision petition.

Mr. *K. V. Krishnaswami Aiyar*, for the Petitioners:—The plaintiffs, being purchasers, are entitled to the relief claimed.

They are not bound by any fraud on the part of defendant's vendor, vide *Alfatun* v. *Rao Karan Singh* (1).

Mr. *K. Bhashyam*, for the Respondent:—The plaintiffs are not entitled to any relief. It has been held in *Izzat-un-nisa Begam* v. *Kunwar Pertab Singh* (2), that even if property is sold subject to encumbrances and the sale price which the auction-purchaser has to pay is diminished by the amount of that encumbrance, the purchaser and not the judgment-debtor mortgagor is entitled to the benefit of that amount, in case it turns out that the mortgage subject to which the property has been sold is bad. This case is the converse of it, but the principle applicable is the same.

JUDGMENT.—Mr. Krishnaswamy Aiyar restricts his clients' claim to relief to the fact that they are purchasers. He concedes that the ground that there was a wilful suppression of the first mortgage when the mortgage to his clients was executed will not give him a cause of action to sue for the present relief. The plaintiff purchased the property from one who bought it at a Court sale in execution of a money decree against the mortgagor. It was not the duty of the mortgagor to mention in the proclamation of sale that a previous mortgage was subsisting. The purchaser took the property subject to all the encumbrances then subsisting. Consequently he was not entitled to claim from the mortgagor the money paid by him to the first mortgagee. In *Izzat-un-nisa Begam* v. *Kunwar Pertab Singh* (2), the Judicial Committee of the Privy Council held that where a property was sold as being subject to previous encumbrances, and it was subsequently found that the encumbrances were unenforceable, the mortgagor was not entitled to claim from the purchaser the amount of the mortgages which the latter was absolved from discharging. The present case is the converse of that decision. The same principle governs both the cases, namely, that the purchaser takes the burden as well as the benefit, without liability to account to, or a right to claim compensation from, the mortgagor. In

(1) 7 N. W. P. H. C. R. 362.

(2) 3 Ind. Cas. 793; 31 A. 583; 10 C. L. J. 313; 13 C. W. N. 1143; 6 A. L. J. 817; 11 Bom. L. R. 1220; 6 M. L. T. 277; 36 I. A. 203.

Alfatun v. *Rao Karan Singh* (1), the principle underlying the applicability of section 69 has not been discussed. We must hold that the Subordinate Judge is right in his view that the plaintiff has no right to claim the benefit of section 69 of the Contract Act against the defendant.

The petition is dismissed with costs.

Petition dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 301 OF 1912.

March 5, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

ANKALA VENKATA REDDY—

PETITIONER—APPELLANT

versus

MANCHALA VENKATA REDDY AND OTHERS—COUNTER-PETITIONER AND HIS LEGAL REPRESENTATIVES—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 2 (2), 36, 47—Decree—'Matters in controversy', meaning of—Orders dismissing application to sue in forma pauperis *and awarding day costs, whether amount to decrees and are appealable.*

The term 'matters in controversy' in section 2 (2) of the Code of Civil Procedure, 1908 must not be understood as relating solely to the merits of a case. It would cover any question relating to the character and status of the party suing, to the jurisdiction of the Court, to the maintainability of a suit and to other matters preliminary, which necessitate an adjudication before a suit is enquired into, in fact all questions concerning a *pending suit*. It does not, however, include an order passed on an application preliminary to the institution of the suit itself, such as an application for leave to sue, and proceedings passed in execution in regard to such orders as well as orders granting day costs are not appealable as they do not come within the scope of section 47, Civil Procedure Code, although such orders can be executed under section 36, Civil Procedure Code. [p. 393, col. 2; p. 394, col. 1.]

Narayan Balkrishna Kulkarni v. *Gopal Jiv Ghadi*, 23 Ind. Cas. 889; 38 B. 393; 16 Bom. L. R. 206; *Secretary of State for India* v. *Jillo*, 21 A. 133; A. W. N. (1898) 204 and *Mozaffer Ali* v. *Hedayet Hosain*, 34 C. 584; 5 C. L. J. 641, followed.

Appeal against the order of the District Court of Kurnool, dated the 22nd August 1912, in Execution Petition No. 12 of 1912, in Original Suit No. 12 of 1909.

FACTS.—The appeal arose out of proceedings to execute an order for costs made by the High Court in an appeal against an order granting permission to sue *in forma pauperis* and another order awarding day costs in the same.

Mr. *K. S. Jayarama Iyer*, for Mr. *V. C. Seshachariar*, for the Respondents, raised a preliminary objection that the appeal was incompetent and relied on *Secretary of State for India* v. *Jillo* (1) and *Mozaffer Ali* v. *Hedayet Hosain* (2) He contended that the orders on question were not decrees, inasmuch as they were not passed in any pending suit, but only in proceedings preliminary to the filing of the suit itself.

Mr. *S. Ranganadha Iyer*, for the Appellant, argued *contra* and relied on *Narayan Balkrishna Kulkarni* v. *Gopal Jiv Ghadi* (3).

JUDGMENT.—An application was made in the Court below to execute two orders, one relating to the grant of costs by the High Court in a petition presented against an order granting permission to sue *in forma pauperis*, and the other relating to the grant of day costs to the plaintiff, when the defendant asked for an adjournment of the case. The District Judge dismissed the application. Hence this appeal. A preliminary objection is raised by Mr. Jayarama Iyer that no appeal lies. We think he is right. The orders referred to are not decrees. We are prepared to accept the extended definition suggested in *Narayan Balkrishna Kulkarni* v. *Gopal Jiv Ghadi*(3) regarding the meaning of the term "*matters in controversy*" in the definition section. That expression is not to be understood as referring solely to the merits of a case. Any question relating to the character and status of the party suing, to the jurisdiction of the Court, to the maintainability of the suit, and to other matters preliminary, which necessitate an adjudication before the suit is enquired into, will be covered by the expression. But there must be a suit pending. Taking first the application to sue *in forma pauperis*, it is only after the grant of the application that the suit begins. As pointed out in *Secretary of State for India* v. *Jillo* (1) the order rejecting an application to sue as a pauper will not be appealable as a decree. The application in such cases is

(1) 21 A. 133; A. W. N. (1898) 204.
(2) 34 C. 584; 5 C. L. J. 641.
(3) 23 Ind. Cas. 889; 38 B. 392; 16 Bom. L. R. 206

analogous to a petition for leave to sue under Act XX of 1863. It has been held in *Mozaffer Ali* v. *Hedayet Hosain* (2) that orders passed on such applications are not decrees. The reasoning applies equally to the order passed in pauper application. We must, therefore, hold that proceedings passed in execution in regard to such orders do not fall under section 47 of the Code of Civil Procedure, although the order itself can be executed under section 36 of the Code of Civil Procedure. This reasoning applies *a fortiori* to the order granting day costs. The preliminary objection is allowed and the appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 986 OF 1914.

April 12, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

JANGA VENKATAREDDY AND OTHERS —DEFENDANTS—APPELLANTS

versus

JAMAL AHMED SAHEB—PLAINTIFF—RESPONDENT.

Vendor and purchaser—Sale of land—Deficiency in extent—Transfer of Property Act (IV of 1882), s. 55 (a)—Covenant for title, meaning of—Compensation for breach of contract—Claim made after execution of conveyance.

A covenant for title is only a contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that the seller has power to transfer the same. [p. 394, col. 2.]

Abdullah Khan v. *Abdur Rahman Beg*, 18 A. 322; A. W. N. (1896) 81; *Doyal Krishna Naskar* v. *Amrita Lal Das*, 29 C. 370; *Tavala Nageswara Row* v. *Saripalli Sambasiva Row*, 11 Ind. Cas. 337; (1911) 1 M. W. N. 361, referred to.

A suit to recover compensation for deficiency in the extent of land purchased is not a suit for damages for breach of a convenant for title, but one for part failure of consideration and for compensation for failure to perform the vendor's part of the contract in full. [p. 394, col. 2.]

Where under the contract the part unperformed bears only a small proportion to the whole of its value, a suit for specific performance with a claim for compensation would lie for the unperformed part. [p. 395, col. 1.]

The same rule also holds good even where the mistake as to the extent is discovered after the execution of the conveyance, as the vendee before that date has no right to inspect the land except with the vendor's permission. [p. 395, col. 1.]

Hill v *Buckley*, 17 Ves. 394; 11 R. R. 109, 34 E. R. 153; *In re Turner and Skelton*, 49 L. J. Ch. 114; 41 L. T. 668; 28 W. R. 312; 13 Ch. D. 130; *Cann* v. *Cann*, 3 Sim. 447; 30 R. R. 184; 57 E. R. 1065, followed.

Jolliffe v. *Baker*, 52 L. J. Q. B. 609; 48 L. T. 966; 32 W. R. 59; 47 J. P. 678; 11 Q. B. D. 225, dissented from.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Masulipatam, in Appeal Suit No. 130 of 1913, preferred against that of the Court of the District Munsif of Ellore, in Original Suit No. 846 of 1911.

Mr. *R Narasimham*, for the Appellants.

Mr. *T. Ramachandra Row*, for the Respondent.

JUDGMENT.

NAPIER, J.—This is an appeal from a judgment of the Temporary Subordinate Judge of Masulipatam, allowing a claim for compensation by the purchaser of certain land in respect of a deficiency in extent. The District Munsif disallowed the claim on the authority of the case reported as *Abdullah Khan* v. *Abdur Rahman Beg* (1). The Subordinate Judge, relying on the case reported as *Doyal Krishna Naskar* v. *Amrita Lal Das* (2), where *Abdullah Khan* v. *Abdur Rahman Beg* (1), was dissented from, allowed the claim. The basis on which the claim is made is not stated in the plaint, but it was sought in argument to base it on the implied covenant for title relying on the case reported as *Tavala Nageswara Row* v. *Saripalli Sambasiva Row* (3). In my opinion that case does not apply. A covenant for title, is not a covenant that the land purported to be conveyed is of the extent stated in the sale-deed, but, as shortly defined in section 55 of the Transfer of Property Act, a contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same. Further, this suit is well known in English Law and has never been based on a covenant for title. In my opinion the suit is brought for part failure of consideration owing to a mutual mistake. Admittedly where a contract has

(1) 18 A. 322; A. W. N. (1896) 81.
(2) 29 C. 370.
(3) 11 Ind. Cas. 337; (1911) 1 M. W. N. 361.

been made and one of the parties is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole of its value, a suit lies at the instance of the other party under section 14 of the Specific Relief Act, (I of 1877) for direction by the Court for specific performance of so much of the contract as can be performed with compensation in money for the deficiency. If, therefore, the parties had discovered their mistakes as to the area prior to the conveyance, the vendee could have brought a suit asking for compensation; and seeing that the Specific Relief Act is intended to give reliefs of a certain class where an injury has been suffered, it seems necessarily to follow that a legal injury is presumed by this Act to exist, for which the Act provides a remedy at one stage. I am, therefore, clear that there is a cause of action arising out of a legal injury. This is the view taken by the Courts of Equity in England : *vide* the leading case of *Hill* v. *Buckley* (4) and Dart's Law of Vendors and Purchasers, 7th Edition, page 675.

The only question that remains is whether this claim cannot be made after the execution of the conveyance. That point is expressly decided by Jessel, M. R., in *In re Turner and Skelton* (5). The learned Master of the Rolls says as follows: "No book can be produced to show that it was thought to be settled law that a purchaser loses his right to compensation by taking a conveyance, and on what principle should he do so? ..... The purchaser can only investigate the state of the property before completion by permission of the vendor, which permission the vendor is not bound to give. When the mistake is one which a purchaser could not by due diligence discover, why should he be held not to be entitled to compensation?" The learned Master of the Rolls followed an earlier decision, *Cann* v. *Cann*(6), and decided in favour of the vendee. It is true that a different view was taken in *Jolliffe* v. *Baker* (7), but I am prepared to follow the decision of this high authority as I find nothing in any Statute which makes the principle inapplicable.

The appeal will, therefore, be dismissed with costs.

SADASIVA AIYAR, J.—I entirely agree and have nothing to add.

Appeal dismissed.

(4) 17 Ves. 394; 11 R. R. 109; 34 E. R. 153.
(5) 13 Ch. D. 130; 49 L. J. Ch. 114; 41 L. T. 668; 28 W. R. 312.
(6) 3 Sim. 447; 30 R. R. 184; 57 E. R. 1065.
(7) 11 Q. B. D. 255; 52 L. J. Q. B. 609; 48 L. T. 966; 32 W. R. 59; 47 J. P. 678.

CALCUTTA HIGH COURT.

CIVIL RULE No. 733 OF 1914.

March 26, 1915.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Chapman.

DILJAN MIHHA BIBI—JUDGMENT-DEBTOR—PETITIONER

versus

HEMANTA KUMAR ROY AND OTHERS—DECREE-HOLDERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 141, scope of—O. XXI, r. 90; O. IX, r. 9, applicability of—Execution, application for—Sale, application for setting aside.

Section 141 of the Civil Procedure Code, 1908, does not apply to applications for execution. [p. 396, col. 2.]

An application for setting aside a sale under section 47 and Order XXI, rule 90, Civil Procedure Code, is not an application for execution. It is a miscellaneous proceeding in the nature of an original proceeding in which the auction-purchaser is the principal interested party. [p. 396, col. 2.]

Where on the dismissal for default of an application for setting aside an execution sale under section 47 and under Order XXI, rule 90, of the Civil Procedure Code, another application for setting aside that order under Order IX, rule 9, is made:

Held, that Order IX, rule 9, is applicable to cases of this kind. [p. 396, col. 2.]

Asim Mandal v. *Raj Mohan Das*, 11 Ind. Cas. 385; 13 C. L. J. 532; *Hari Charan Ghosh* v. *Manmatha Nath Sen*, 19 Ind. Cas. 683; 18 C. W. N. 343; 41 C. 1; *Subbiah Naicker* v. *Ramanathan Chettiar*, 22 Ind. Cas. 899; 37 M. 462; 26 M. L. J. 189; (1914) M. W. N. 205; 1 L. W. 251; *Safdar Ali* v. *Kishun Lal*, 7 Ind. Cas. 241; 12 C. L. J. 6; *Thakur Prasad* v. *Fakir Ulla*, 17 A. 106; 22 I. A. 44; 5 M. L. J. 3; 6 Sar. P. C. J. 526, referred to.

In the matter of section 115 of the Code of Civil Procedure and section 15 of the Charter Act and in the matter of Miscellaneous Case No. 293 of 1913 of the Munsif, second Court, Jhenidah.

Babu *Monmothanath Mukerjee*, for the Petitioner.

Babu *Surendra Chandra Sen*, for the Opposite Party.

JUDGMENT.—An application for setting aside an execution sale under section 47

and Order XXI, rule 90, of the Civil Procedure Code was dismissed for default. The judgment-debtor made an application for setting aside that order under Order IX, rule 9. The learned Munsif rejected the application, holding that Order IX had no application to the case. This Rule was granted on the opposite party to show cause why the application should not be entertained either under Order IX or Order XLVII, or why such other order should not be made as to this Court might seem fit and proper. It is admitted by the learned Vakil for the petitioner that Order XLVII is not open to him, as the application was made to the successor of the trying Munsif. He relies upon Order IX or section 151 of the Civil Procedure Code. I do not think he is entitled to rely on section 151. To allow him to do so would be to allow him to apply for a review which is expressly prohibited by the Code. He must stand or fall by Order IX. There is some apparent diversity of opinion as to whether the provisions of Order IX are applicable to matters arising in execution. In the case of *Safdar Ali* v. *Kishun Lal* (1), it was held that an application for re-hearing a matter arising in execution could be entertained under Order IX, rule 9. This is an express authority on the point. This case was distinguished in the case of *Asim Mandal* v. *Raj Mohan Das* (2) and it was held that all the provisions of Order IX were not applicable to execution proceedings. That was a case in which an application for execution was dismissed for default and it was held that a fresh application for execution would nevertheless lie as Order IX, rule 9, was not applicable to an application for execution. The matter came under discussion again in the case of *Hari Charan Ghosh* v. *Manmatha Nath Sen* (3) and it was held that Order IX, rule 13, was not applicable to a proceeding under rules 100 and 101 of Order XXI. Both these cases rely on the history of section 647 of the old Code in the course of its transformation into section 141 of the Civil Procedure Code of 1908. Section 647 of Act XIV of 1882 was: "The procedure herein prescribed shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction other than suits and appeals." In consequence of some divergence of opinion between different High Courts as to whether the proceedings named in this section included execution proceedings, an explanation was added by Act VI of 1892: "This section does not apply to applications for the execution of decrees which are proceedings in suits". In 1894 the Judicial Committee held that even without the explanation the section did not apply to applications for execution of decrees, *Thakur Prasad* v. *Fakir Ulla* (4). That was a case in which an application for execution had been struck off at the request of the decree-holder without any permission to apply again, and the question was whether sections 373 and 374 barred a fresh application. This objection was overruled by their Lordships. The result of this decision was that the explanation was held to be superfluous. Section 141 of the present Code runs as follows: "The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction." Supposing that the alteration in language is not material and adopting the construction given by the Privy Council to section 647 of the old Code, it will follow that section 141 does not apply to applications for execution.

An application for setting aside a sale under section 47 and Order XXI, rule 90, is not an application for execution. It is a miscellaneous proceeding in the nature of an original proceeding in which the auction-purchaser is the principal interested party. I do not think that a proceeding of this kind is excluded from the purview of section 141. I think, therefore, that Order IX, rule 9, is applicable to cases of this kind and the cases of *Asim Mandal* v. *Raj Mohan Dass* (2), *Hari Charan Ghosh* v. *Manmatha Nath Sen* (3) have not decided to the contrary. Both these rulings are careful in stating that all the provisions of Order IX are not applicable. Some of the provisions, therefore, may apply and the judgment of the learned Chief

(1) 7 Ind. Cas. 241; 12 C. L. J. 6.
(2) 11 Ind. Cas. 385; 13 C. L. J. 532.
(3) 19 Ind. Cas. 683; 18 C. W. N. 343; 41 C. 1.
(4) 17 A. 106; 22 I. A. 44; 5 M. L. J. 3; 6 Sar. P. C. J. 526.

Justice in *Hari Charan Ghosh* v. *Manmatha Nath Sen* (3) contains a clear indication that the interests of justice must have an important bearing in the matter: "It is not as though there was any necessity in the interests of justice that the provisions of rule 13, Order IX, should be applicable to proceedings in execution, because the order is not conclusive but is subject to the right of the person aggrieved to bring a suit." In the present case the order is conclusive: there is no regular suit and a review is impossible. The petitioner is, therefore, without any remedy other than Order IX, rule 9, to have an adjudication of her case. I may state that the Madras High Court favours the view contended for by the petitioner in this connection. See *Subbiah Naicker* v. *Ramanathan Chettiar* (5). I would, therefore, make the Rule absolute with costs three gold *mohurs* and direct that the petition of the applicant should be dealt with in due course of law.

Rule made absolute.

(5) 22 Ind. Cas. 899; 37 M. 462; 26 M. L. J. 189; (1914) M. W. N. 205; 1 L. W. 251.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 2506 OF 1913.

April 1, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Seshagiri Aiyar.

SATHYABHAMA—PLAINTIFF—APPELLANT

versus

KESAVACHARYA—DEFENDANT—RESPONDENT.

Hindu Law—Maintenance to widow provided for by agreement in writing—Subsequent unchastity—Rights, if forfeited—Starvation allowance, when allowed.

The rule that by subsequent unchastity a Hindu widow forfeits her right to maintenance, applies even where that right is secured to her by an agreement in writing. [p. 397, col. 2.]

Nagamma v. *Virabhadra*, 17 M. 392; *Bhup Singh* v. *Lachman Kunwar*, 26 A. 321; A. W. N. (1904) 13, distinguished.

An unchaste Hindu widow, if she repents of her conduct and leads a moral life on the date of suit, is entitled to at least a starvation allowance. [p. 398, col. 2.]

Visalatchi Ammal v. *Annasamy Sastri*, 5 M. H. C. R. 150; *Parami Ramayya* v. *Mahadevi*, 5 Ind. Cas. 960; 12 Bom. L. R. 196; 34 B. 278; *Kandasami Pillai* v. *Murugammal*, 19 M. 6; *Chirukula Nagalakshmamma* v. *Chirukula Visvanatha Sastri*, 16 Ind. Cas. 389; 23 M. L. J. 284, distinguished.

Roma Nath alias *Ramanund Dhur Poddar* v. *Rajonimoni Dasi*, 17 C. 674 at p. 678, followed.

Second appeal against the decree of the District Court of South Canara, in Appeal Suit No. 46 of 1913, preferred against that of the Court of the District Munsif of Puttur, in Original Suit No. 334 of 1912.

Mr. *H. Balakrishna Rao*, for the Appellant.

Mr. *B. Sitarama Rao*, for the Respondent.

JUDGMENT.—This is a suit by a widow against her deceased husband's brother for maintenance. There was an agreement on on the 30th April 1906 by which the amount was fixed. The plea of the defendant is that since the date of the agreement, the plaintiff had been leading an immoral life and that consequently she is not entitled to claim maintenance. The Courts below have found that she did lead an immoral life, but that, at the time of the suit, she had reformed her ways and was living with her people. Mr. B. Sitarama Rao wanted to argue that she had gone wrong with a *Sudra*, that that entails upon her degradation from caste and that consequently she is not entitled to any maintenance. But there is no finding that the pregnancy which is found, was caused by cohabitation with the *Sudra*. We cannot allow that question to be argued in second appeal.

On the facts found by the Courts below the question for consideration is, whether the plaintiff is not entitled to what is called "starving allowance" from the defendant. It was argued in appeal that the fact that the maintenance was secured by a deed differentiated this case from *Nagamma* v. *Virabhadra* (1). We cannot accept this contention. The instrument is only evidence of the amount which is payable as maintenance. The basis of the claim against the defendant being the duty to maintain, the fact that it is secured by a deed in writing is not a reason for holding that subsequent unchastity would not work a forfeiture. The decision in *Bhup Singh* v. *Lachman Kunwar* (2) related to a compromise which was arrived at regarding the claim of the widow for possession of the property as heiress. It

(1) 17 M. 392.

(2) 26 A. 321; A. W. N. (1904) 13.

was held that the subsequent unchastity of the widow did not deprive her of this property. That decision has no bearing upon the present case. The right to maintenance is dependent upon texts which do not affect succession or inheritance.

There is no direct authority upon the question. The text of Manu in Chapter XI, section 189, applies to all women entitled to maintenance. Under that text if a woman becomes unchaste, she is entitled to a starving allowance. The Prayaschitha Kanda of Yajnavalkya Smrithi, (verses 297 and 298) lays down the rules regarding provisions to be made for women who have misconducted themselves. It has been suggested by the learned Vakil for the respondent that the verses only apply to cases of women who have committed sins other than immorality; but the concluding portion of the commentary of Vijnaneswara on the Smrithi makes it clear that the two verses are intended to cover cases of unchaste women. The commentary is this: "To those women who though have suffered degradation (from caste) and for whom the rites of presenting (disconnecting) water libations, etc., have been performed accommodation, (that is), a small cottage built of straws and leaves should be given in the proximity of the main (building of the) house. Similarly food that is just sufficient for the maintenance of life and also raiment of a low description *along with (the protection) of preventing her from being enjoyed again by another man should be given.*" This last sentence makes it clear beyond doubt that the commentator had in mind the case of fallen women. The text and the commentary, it is conceded, apply to all women alike whether they be wives, widows of co-parceners or mothers. Therefore, according to Manu and Yajnavalkya women who have gone wrong should be given some maintenance. The punishment for their unchastity is that they lose their right to the ordinary rate of maintenance. As against these two texts, the well-known text of Narada has been quoted which says that if a widow of a co-parcener is guilty of immorality, her maintenance should be resumed. This statement is quoted and commented upon by all the Smrithi writers (Mayukha, section 8, placitum 6; Smrithi Chandrika, Chapter XI, section 34, and Viramitrodaya, Chapter III, Part I, section 10). But in none of these texts there is any provision for a woman who had repented and was subsequently leading an honest life. It is not to be presumed from the omission to provide for such a contingency, that the presumption once made is to be irrevocable and that the fallen woman who had reformed is to be denied even a starving allowance. This question was raised in *Visalatchi Ammal* v. *Annasamy Sastry* (3) but was left undecided. In *Nagamma* v. *Virabhadra* (1) the learned Judges, following certain Bombay decisions, held that a widow who had misconducted herself was not entitled to maintenance. In the latest Bombay case, *Parami Ramayya* v. *Mahadevi* (4), the earlier cases are not approved. In the Madras case, the question whether subsequent reformation would make any difference was not considered. In *Kandasami Pillai* v. *Murugammal* (5), the learned Judges based the decision on the ground that the fallen woman had tried to foist upon her husband a child who had been born of adulterous intercourse and it was decided that such a woman was not entitled even to a starving allowance. This decision in *Kandasami Pillai* v. *Murugammal* (5) was considered by Miller and Sankaran Nair, JJ., in *Subhayya* v. *Bhavani* (6), and the learned Judges were of opinion that it should be confined to cases where the woman was continuing to lead an immoral life. In *Chirukula Nagalakshmamma* v. *Chirukula Visvanatha Sastri* (7), the wife was not shown to have repented of her misconduct. Mr. B. Sitarama Rao argued that the decision in *Subhayya* v. *Bhavani* (6) should not be extended to widows of co-parceners. As pointed out already, both the text of Manu and that of Yajnavalkya make no distinction between wives and other women, and we see no reason on principle why the widow of a co-parcener should be in a less advantageous position than the wife on the question of being allotted a starving allowance. There are observations in *Roma Nath* alias

(3) 5 M. H. C. R. 150.
(4) 5 Ind. Cas. 960; 34 B. 278; 12 Bom. L. R. 196.
(5) 19 M. 6.
(6) 24 Ind. Cas. 390.
(7) 16 Ind. Cas. 389; 23 M. L. J. 289.

Ramanund Dhur Poddar v. *Rajonimoni Dasi* (8) to the effect that widows who had repented of their misconduct should be given a bare maintenance. The recent decision in *Parami Ramayya* v. *Mahadevi* (4), although it related to the case of a wife contains observations regarding the rights of other women to compassionate allowance. We see no reason for not applying the principle enunciated in that decision to the case before us. We think that the widow is entitled to some maintenance, although she is not entitled to the rate provided for in the deed. The Courts below have found that Rs. 24 a year may be awarded to her in this behalf. We accept that finding. We reverse the decrees of the Courts below and decree maintenance at Rs. 24 a year, from January 1911 till the date of suit. Each party will bear his or her own costs throughout.

Appeal allowed; *Decree reversed.*

(8) 17 C. 674 at p. 678.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 3 OF 1908-1909 OF BIJNOR DISTRICT.

November 10, 1909.

Present:—Mr. Porter, S. M., and Mr. Baillie, J. M.

Musammat SOHANIA—DEFENDANT—APPELLANT

versus

JAGJIT SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (*II of* 1901), *s.* 22—Jat *widow succeeding to her husband's holding—Re-marriage when new Rent Act in force—Life-interest in holding, effect on—Hindu Widows' Re-marriage Act* (*XV of* 1856), *s.* 2, *applicability of.*

The Hindu Widows' Re-marriage Act, XV of 1856, applies to the widows of those castes only among whom re-marriage was illegal before the passing of the above Act, and the widows of those castes in which re-marriage was prevalent at the time of the passing of the Act do not lose their interest in the property of their former husbands.

Therefore, a *Jat* widow who succeded to the holding of her husband while the Rent Act of 1881 was in force, does not lose by remarriage her life-interest in the holding.

Second appeal from an order of the Commissioner, Rohilkhand Division, dated the 22nd July 1909, reversing that of the Assistant Collector, Bijnor District, in a case of ejectment.

JUDGMENT.

PORTER, S. M.—The circumstances of this case are somewhat peculiar. The land in suit was the occupancy holding of one Mokha, who died in 1300 *Fasli*. He left a widow, the present appellant, who under the then Rent Act became entitled to a life-interest in the holding, but for some reason or another the name of the deceased's mother was entered and only after her death that of the present appellant. Appellant has since married again, and the respondent seeks to eject her on the ground that by re-marriage she has lost her life-interest.

The Commissioner has upheld this contention relying on section 2, Act XV of 1856. There are, however, several decisions by the Allahabad High Court to the effect that that section does not apply to the castes in which the re-marriage of widows was lawful before Act XV of 1856 was passed. There can be no question that among *jats* the custom of re-marriage of widows is of old standing. In these circumstances, I think this Court should accept the law as laid down by the Allahabad High Court and hold that appellant has not lost by re-marriage her life-interest in the holding.

On this ground I would set aside the Commissioner's decree and restore the decree of the Assistant Collector. Parties may be left to bear their costs in both Appellate Courts.

BAILLIE, J. M.—I agree.

Appeal allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 3137 OF 1913.

March 22, 1915.

Present:—Mr. Justice Fletcher and Mr. Justice Teunon.

MOHENDRA NATH MANDAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

NARENDRA KRISHNA CHATTERJEE—PLAINTIFF—RESPONDENT.

Bengal Drainage Act (*VI of* 1880), *ss.* 26 (1), 42, 44,

MOHENDRA NATH v. NARENDRA KRISHNA.

—Drainage charge—Instalments, recovery of—Mistake —Limitation.

Section 44 of the Bengal Drainage Act is merely a permissive section and does not control the right of a land-holder or a superior tenant to recover the instalments under the two sections 42 and 44. [p. 400, col. 1.]

A mistake about the year of the instalment cannot save limitation. [p. 400, col. 2.]

Appeal against the decree of the Additional District Judge, Hughly, dated the 8th of July 1913, affirming that of the Munsif, first Court, Howrah, dated the 10th of June 1912.

Babu *Nandalal Sarkar*, for the Appellants.

Babus *Surendra Chandra Sen* and *Hari Charan Mukherjee*, for the Respondent.

JUDGMENT.

FLETCHER, J.—This is an appeal from a decision of the learned Additional District Judge of Hughly, dated the 8th July 1913, affirming the decision of the Munsif. The suit was brought by the plaintiff to recover certain instalments in respect of the drainage charge. The facts which are simple appear to be as follows:—The defendants' father sold the property to the plaintiff. He concealed from the plaintiff at the time of sale the fact that the property was subject to the drainage charge. The plaintiff on his purchase granted a tenancy of the property to the defendants' father and he now sues the defendants in respect of the moneys that he has paid as such charge. As regards the claim, if it had been against the estate of the father of the defendants, apparently that would be barred under the provisions of the law of limitation, but the plaintiff claims to recover these instalments under the provisions of the Bengal Drainage Act. The only question that has been raised is as to whether, in order to enable the plaintiff to sue, it is essential that the mode and time of payment ought to be settled by the Collector under the provisions of section 44. The Collector has not been applied to in this case. But it seems to me that that is merely a permissive section and does not control the right of a land-holder or a superior tenant to recover the instalment under the two sections 42 and 44. The limitation on the right of the landlord or the superior tenant is that the tenant shall not be liable to pay more than 1/10th of the total amount in one year. It is not suggested that the amount sued for in the present case is more than 1/10th of the total amount.

The only point that has got any substance in this case is as to the instalment which became due in 1907. The learned District Judge has said: "It is conceded for the defendants that if the Bengal Tenancy Act regulates the question the claim for 1907 is in time." That concession might or might not have been made. But the gentleman who conducted the case in the Court below on behalf of the defendants was not authorised to concede anything that was not in accordance with the law, and, if it is shown that that is an error, we are bound to put it right. The fact is that the parties have got a difficulty in dealing with the European dates as compared with the dates of the Bengali Calendar. That is not an important thing. But what did really happen is that this instalment fell due on 30th *Chaiyat* 1313 B. S. That was the last day of the Bengali year. That date corresponds with the 13th April 1906. It was urged in the lower Appellate Court that the date was in 1907. That was clearly a mistake The last date on which the suit could be maintained for that instalment would be 1st *Bysakh* 1317 B. S. The Judge considered it to be 1318 If that is so, that instalment which was called the 1907 instalment but which was really the 1906 instalment, was barred by limitation.

Another question that has been raised in this appeal is as to interest. Interest was claimed in the plaint in a lump sum. It is not shown on what principle that sum was arrived at or what was the rate charged. Section 26 (1) of the Bengal Drainage Act provides that interest shall have to be paid at the rate of 4 per cent. No question was raised as regards this in either of the Courts below, and we must take it that the parties were content that the interest charged for had been properly arrived at, if payable. The question is not purely a question of law but a mixed question of law and fact, on which no finding has been made by the lower Appellate Court to enable us to consider whether the question has been purely considered or not. The result is that subject to the variation that I have stated, namely, as to the instalment that is called the 1907 instalment but which is really the 1906 instalment being barred by

limitation, the present appeal stands dismissed. In the circumstances, as both parties have partly succeeded in the appeal, I think there should be no order as to costs of this Court.

TEUNON, J.—I agree.

Appeal partly allowed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 173 OF 1914-1915 OF PARTABGARH DISTRICT.

March 30, 1915.

Present:—Mr. Holms, S. M., and Mr. Campbell, J. M.

MATA PRASAD—APPELLANT

versus

Babuain SHEO RAJ KUAR—RESPONDENT.

Oudh Rent Act (XXII of 1886), s. 5—Occupancy rights—Mortgage, if loss of proprietary rights—Foreclosure, effect of—Loss of proprietary rights after annexation—Accrual of occupancy rights.

Under section 5 of the Oudh Rent Act, occupancy rights arise only when there has been a complete loss of proprietary rights and do not arise when the proprietor retains part of his proprietary rights, as in the case of a mortgage. In the case of a mortgage, complete loss of proprietary rights occurs only when a decree for foreclosure is obtained. [p. 401, col. 2.]

Occupancy rights arise under section 5 of the Oudh Rent Act, XXII of 1886, not only in favour of those proprietors who have lost their proprietary rights before the date of annexation of Oudh (13th day of February 1856), but also in favour of those who have so lost their rights between that date and 24th day of August 1866. [p. 402, col. 1.]

Akbari Begam v. *Badri Prasad*, 5 O. C. 176 at p. 179 and *Suraj Bakhsh* v. *Bhagwandin*, Selected Decision No. 7 of 1903, explained and discussed.

Second appeal from an order of the Additional Commissioner, Fyzabad Division, dated the 8th October 1914, reversing that of the Assistant Collector, Partabgarh District, in a case of ejectment.

JUDGMENT.

HOLMS, S. M.—(*March 30th*, 1915).—The mortgage of the proprietary rights of the appellant's ancestors took place in 1855, and there was a foreclosure some three years later, that is to say, after the year of annexation. It has been held by the Board in *Suraj Bakhsh* v. *Bhagwandin* (1) that a temporary mortgage would not give rise to an occupancy right under section 5 of the Rent Act, and in this opinion I concur. The wording of the section is "tenants who have lost all proprietary right", and in my view this does not apply to persons who retain part of their proprietary right. The respondent argues that section 5 is confined to loss of proprietary right by an act of law. His only argument in support of this contention is that section 7A is more specific, and I cannot accept it.

The facts of the present case are somewhat peculiar. The loss of proprietary right took place about a year after annexation, but some eight years before the 24th of August 1866 and some 10 years before Act XIX of 1868 by which rights of occupancy were created. *Suraj Bakhsh* v. *Bhagwandin* (1) lays down:—"The history of the section, which was enacted after discussion with the *taluqdars* of Oudh as a compromise in order to secure some concession in favour of village proprietors who had lost proprietary rights by the inclusion of their villages in *taluqas* and were not entitled to under-proprietary rights under Act XXVI of 1868, shows that it was intended to apply to those persons and those only who had lost their proprietary rights before annexation." The appellant's Pleader argues that this view goes further than the appeal before the Board warranted, and that at any rate, the section covers losses of proprietary rights between annexation and August 24 1866. In *Akbari Begam* v. *Badri Prasad* (2), which was followed in *Bhoga Singh* v. *Pokhar Singh* (3), Mr. Chamier wrote:—"Apart from its history the section itself is quite plain. On the face of it, it applies only to tenants who or whose predecessors had been in possession as proprietors at some time within thirty years next before February 13th, 1856, but who had lost their proprietary rights and had become mere tenants by August 24th, 1866".

One thing is clear, that section 5 was not intended to have prospective effect and extend to losses of proprietary right which took place after Act XIX of 1868 and probably not to losses which took place after August 24th, 1866. The Board in *Suraj Bakhsh* v. *Bhagwandin* (1) did not discuss a case of the nature now before me

(1) Selected Decision No. 7 of 1903.

(2) 5 O. C. 176 at p. 179.

(3) 8 O. C. 353.

and the appellant argues that the Board have in consequence laid down a wider proposition than is justified.

The Board in *Suraj Bakhsh* v. *Bhagwandin* (1) do not appear to have had their attention drected to the opinion of Mr. Chamier, Additional Judicial Commissioner, in *Akbari Begam* v. *Badri Prasad* (2) decided in 1902, though they discussed an older decision of the Judicial Commissioner of 1885. Had their attention been so directed, possibly the Board would have modified the passage in their decision quoted above. Chapter IV of the Introduction of Syke's Compendium of Oudh Taluqdari Law gives a brief history of the recognition of tenants' rights of occupancy in Oudh, and I feel considerable doubt if the history affords any justification for refusing occupancy rights when the former proprietors lost their proprietary rights after annexation but prior to 24th August 1866, though it undoubtedly does when they lost their proprietary rights after that date. The arguments in *Suraj Bakhsh* v. *Bhagwandin* (1) are chiefly directed to the latter case. To refuse occupancy rights in the former case would necessitate reading into section 5 a limitation for which its plain language affords no justification.

I would, therefore, hold that the appellant has a right of occupancy in the land in suit and setting aside the order of the Additional Commissioner restore that of the Assistant Collector, respondent paying costs in all the Courts.

Mr. CAMPBELL, J. M.—I entirely agree.

Appeal allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1444 OF 1912.

January 28, 1915.

Present:—Mr. Justice Holmwood and Mr. Justice Walmsley.

NAGESUR PERSHAD SINGH AND OTHERS —PLAINTIFFS—APPELLANTS

versus

BINDESHWARI PROSAD SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Decree, sale under—Fraud, allegation of —Execution, who may come in in—Party having no interest in property when decree passed, right of.

Where the plaintiffs had no interest in the property at the time the mortgage-decree was passed and the property was not ancestral:

Held, that they could not come in in execution to set aside the decree. [p. 403, col. 1.]

Debendra Nath Bhattacharjee v. *Prasanna Kumar Chakravarti*, 5 C. L. J. 328, followed.

Appeal against the decree of the District Judge, Shahabad, dated the 1st March 1912, affirming that of the Subordinate Judge, Second Court of that District, dated the 9th of November 1910.

Babus *Provas Chandra Mitra* and *Surendra Madhab Mullick*, for the Appellants.

Babus *Umakali Mukherjee* and *Raghu Nath Singh*, for the Respondents.

JUDGMENT.

HOLMWOOD, J.—These second appeals arise out of suits brought by the plaintiffs to set aside certain mortgage-decrees and sales held in accordance therewith, on the ground that they were tainted with fraud and that they were illegal and the sales were equally so, and that decrees which purported to be against their father did not bind the plaintiffs.

It is conceded that at the time the decrees were passed the plaintiffs were not in existence and, therefore, had no cause of action as regards setting aside the decrees. But the prayers of their plaint show that this is the main ground of their case, the sales being merely subsidiary. The first prayer clumps the decrees and sales together. The second is clearly based on the contention that the decrees being illegal, the sales held under them must also be illegal. On the plaint itself there seem to be many grounds on which the suit is not maintainable. The first we have already stated, that the plaintiffs were not alive at the time the decrees were passed. The second has been stated by the learned Subordinate Judge and not noticed by the Judge in appeal except in general agreement, namely, that on paragraphs 4, 5, 6 and 7 of the plaint it must be held that the reconveyance of the shares of Bhabhutar and Ganput, whom the plaintiffs claim to represent by means of the *hiba-bil-ewaz*, made the properties the self-acquired properties of Bhabhutar and Ganput and if it ever was ancestral property, which does not seem to be asserted, it ceased to be so. Then there is the ground taken in para-

graph 4 of the written statement that the plaintiffs have not specifically mentioned any instance of fraud in their plaint. In dealing with this the learned Judge in the Court below has pointed out that the only allegation in regard to the decree is contained in paragraph 9, and on analysing that in the light of the fact that the plaintiffs were not in existence, he found that that refers to some parties who are not before the Court and it is not known who they are, so that there is substantially no allegation of fraud against the decree which was obtained after contest and which was never contested in execution by the plaintiffs' ancestor. If, therefore, the plaintiffs had no interest in the property at the time the decree was passed and the property was not ancestral property, it is difficult to see how they can seek to come in in execution.

It is argued on the authority of the case to which one of us was a party, the case of *Debendra Nath Bhattacharjee* v. *Prasanna Kumar Chakravarti* (1), that they can bring this suit on the basis of the alleged frauds in execution only, and that whether it be treated as an application under section 47 or as a regular suit is a matter of form and not of substance, as was pointed out in that case. In a passage at the end of the judgment which is *obiter* it was laid down, if there was fraud in the execution proceedings it will be open to the party affected by the fraud to make an application under section 244, Civil Procedure Code; if instead of an application he presents a plaint in the Court competent to deal with the matter, the defect is one of form rather than of substance and there is no real want of jurisdiction, and this is supported by a large number of authorities, and we have no desire to differ from it in any way, as it has nothing to do with the present case which is based essentially upon the prayer to set aside the decree. As the plaintiffs were not interested in the decree they cannot now come in in execution and that alone is sufficient to show that their suit is not maintainable.

The appeals are, therefore, dismissed with costs.

WALMSLEY, J.—I agree that the appeals should be dismissed.

Appeals dismissed.

(1) 5 C. L. J. 328.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1000 OF 1913.

April 17, 1915.

Present:—Mr. Justice Piggott.

PANNA LAL—DEFENDANT—APPELLANT

versus

RAMESHAR SAHAI—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 134, 148—Mortgage · Mortgagee selling absolute interest in mortgaged property—Redemption—Limitation.

A mortgagor's right to redeem subsists until it has been extinguished by act of parties or order of a Court. Act of parties means act of parties to the mortgage transaction. No assertion of adverse title on the part of a mortgagee during the continuance of a mortgage can set time running against the mortgagor so as to deprive the latter of his right to redeem within a period of sixty years. [p. 406, col. 1.]

If a mortgagee sells the mortgaged property out-and out to a third person, the possession of the vendee does not become adverse against the owner of the equity of redemption from the date of the sale, and a suit for redemption would lie under Article 148 of the Limitation Act. [p. 405, col. 2.]

Second appeal from a decision of the Additional Subordinate Judge of Moradabad, dated the 21st July 1913.

Dr. *S. C. Banerji*, (with him the Hon'ble Mr. *Gokul Prasad*), for the Appellant.

The Hon'ble Dr. *Sunder Lal* (with him Mr. *Gulzari Lal*), for the Respondent.

JUDGMENT.—I have stated the facts of this case at some length in my remand order of July the 3rd 1914. The finding of the lower Appellate Court on the remanded issue puts it beyond question that the plaintiff is the successor-in-interest of the original mortgagor. The essential facts may, therefore, be recapitulated. On the 24th of January 1867 the predecessor-in-title of the present plaintiff mortgaged by conditional sale a house in the town of Chandausi to one Hazari Lal and put him in possession. On June the 15th, 1873, Hazari Lal sold this shop to Panna Lal, the defendant-appellant. There had been no foreclosure of the mortgage by conditional sale. In the deed of June the 5th, 1873, Hazari Lal recited that the shop in question had come into his possession under a mortgage by conditional sale, but that he was now in possession as a full owner. He did not say that he had foreclosed the mortgage. He undoubtedly purported to sell the shop itself and not any mortgagee rights in respect of the same. The lower Appellate Court has found that the vendee,

Panna Lal, did not in fact believe that his vendor had power to convey an absolute interest in the shop.

I must pause to note that this finding is challenged in argument on behalf of the appellant. It is contended that it was not fairly open to the lower Appellate Court to arrive at this finding. The learned Subordinate Judge held that the very recital in the sale-deed of 1873 was calculated to put the vendee on his guard, that the vendee made no sort or kind of inquiry but went into the transaction with eyes shut. He has, however, gone further than this. Relying partly on the wording of the document and partly on certain facts and circumstances regarding the location of the shop, residence of the parties and so on, and partly on certain oral evidence, he has come to the conculsion that, when the vendee chose to accept his vendor's assertion that he was in full proprietary possession of the shop, he had good reason for believing that this assertion was not true, and did not in fact believe it to be true. Sitting as a Court of second appeal, I am not prepared to hold that the lower Appellate Court had not before it materials on which it was entitled to arrive at the above finding.

If this finding cannot be disturbed, it seems to me that, according to a long course of decisions in this Court, this suit for redemption must succeed and the plea of limitation set up by the defendant-appellant must be overruled. I refer to *Bhagwan Sahai* v. *Bhagwan Din* (1), *Kampta Prasad* v. *Bakar Ali* (2) and *Husaini Khanam* v. *Husain Khan* (3). It has been contended on behalf of the appellant that these decisions are inconsistent with later opinion in this Court itself. On this point reference is made to the case of *Behari Lal* v. *Muhammad Muttaki* (4). I have also been referred to a case decided elsewhere by one of the learned Judges of this Court, namely, *Dal Singh* v. *Gur Prasad* (5), and it has been contended that the same learned Judge has recently re-affirmed the view taken by him in Oudh in an unreported decision in Second Appeal No. 547 of 1914 pronounced by him on March 11, 1915. Further, I have been asked to consider that the current of decisions of this Court with regard to the application of Article 134 of the first Schedule to the Limitation Act (IX of 1908) is inconsistent with the opinions pronounced by other High Courts. There would certainly appear to be a clear consensus of opinion to the contrary in the Bombay High Court, reference being made to *Baiva Khan Daud Khan* v. *Bhiki Sabza* (6), *Yesu Ramji Kalnath* v. *Balkrishna Lakshman* (7), *Pandu* v *Vithu* (8) and *Ramchandra* v. *Sheikh Mohidin* (9). Other cases to which I have been referred in argument may be found reported as *Ram Kanai Ghosh* v. *Raja Sri Sri Hari Narayan Singh Deo Bahadur* (10) and *Chettokulam Prasanna Venkatachela Reddiar* v. *Collector of Trichinopoly* (11). Finally it was suggested that the latest decision of this Court relied upon on behalf of the plaintiff-respondent, namely, that in *Husaini Khanam* v. *Husain Khan* (3), proceeds upon a view as to the effect of a mortgage by a trustee or a mortgagee amounting to a "purchase" within the meaning of Article 134 of the first Schedule to the Limitation Act, or I should say to a transfer of the property in question within the meaning of the same Article as it appears in Act IX of 1908, and is inconsistent with the pronouncement of their Lordships of the Privy Council in *Abhiram Goswami Mohant* v. *Shyama Charan Nandi* (12).

With regard to a good deal of this argument I think it is sufficient to say at present that, although the Article of the Limitation Act in question refers to transfers both by trustees and by mortgagees, it may well be that by reason of the provisions of the Transfer of Property Act (IV of 1882) different considerations may govern the application of this Article in cases where a transfer has been made by a trustee or by a mortgagee respectively. On this point I desire to add a few words presently. I mention it merely for the sake of noting that

(1) 9 A. 97; A. W. N. (1886) 303.
(2) A. W. N. (1881) 122.
(3) 29 A. 471; A. W. N. (1907) 133; 4 A. L. J. 375.
(4) 20 A. 482; A. W. N. (1898) 123.
(5) 2 Ind. Cas. 250; 12 O. C. 84.
(6) 9 B. 475.
(7) 15 B. 583.
(8) 19 B. 140.
(9) 23 B. 614.
(10) 2 C. L. J. 546.
(11) 24 Ind. Cas. 369; (1914) M. W. N. 587; 26 M. L. J. 537.
(12) 4 Ind. Cas. 449; 6 A. L. J. 857; 14 C. W. N. 1; 11 Bom. L. R. 1234; 19 M. L. J. 530; 10 C. L. J. 284; 36 C. 1003.

the Calcutta and Madras cases to which I have referred above were both cases of transfer by trustees. For the same reason I find nothing in the decision of *Behari Lal* v. *Muhammad Muttaki* (4) to conflict with the course of decisions of this Court governing transfers by mortgagees. All the older cases of this Court relied upon by the present respondent are not even referred to, much less overruled, by the Full Bench which decided *Behari Lal* v. *Muhammad Muttaki* (4). It seems to me, therefore, that I might content myself with saying that I have before me at least three reported cases, each decided by a Bench of this Court, in favour of the respondent's contention that the present suit is not, upon the findings arrived at by the lower Court, barred by limitation. Sitting as a single Judge of this Court I am bound by the decisions above referred to.

I desire, however, as the matter has been fully argued before me, to place on record my opinion that the decision which I propose to pass may be supported independently of the authorities above referred to, by a line of reasoning somewhat different to that which has been followed by other learned Judges of this Court. The suit as brought is against the legal representatives of the original mortgagee and against Panna Lal as transferee of the mortgagee rights. It is on the face of it a suit for redemption of a mortgage and governed by the provisions of Article 148 of the first Schedule to the Indian Limitation Act (IX of 1908). Such a suit is undoubtedly maintainable within the prescribed period of sixty years, against either a mortgagee or any transferee of mortgagee rights. When, therefore, the defendant Panna Lal pleads that the suit as against him is barred by limitation by reason of the provisions of Article 134 of the first Schedule to the Limtiation Act, it seems to me that his pleading requires some further analysis. He must be taken to plead that he is not a transferee of the mortgagee rights, but a person who has somehow come into possession of the property in suit, and that his possession can only be disturbed by means of a suit for ejectment. Now it is quite conceivable that, in a case like the present, the original mortgagor (or his successor-in-interest) might have gone to the original mortgagee (or his successors) and redeemed the mortgage out of Court, receiving in return a full discharge of the mortgage-debt and the mortgagee's claims. If, after having done this, he found himself obstructed by the defendant Panna Lal in his attempt to enter into possession of the mortgaged property, any suit which he might bring against Panna Lal would clearly be a suit for recovery of possession of the kind contemplated by Article 134 already mentioned. Whatever view might be taken as to the meaning of that Article, it could not be denied that the suit was governed by it. In the present case the controversy in reality is whether Article 134 applies at all. The answer to this question must depend on whether Panna Lal is a transferee of the mortgagee rights or is simply a person who has come into possession of the property in suit under a title adverse to that of the original mortgagor.

I venture to suggest that on this view of the case three possible contentions are open: (1) It might be said that the Court will not go beyond the terms of Panna Lal's document of title. He holds what purports to be a sale-deed of the property out and out. Therefore, he cannot be treated as a mere transferee of the mortgagee rights. The suit as against him would, therefore, not be a suit for redemption at all, but a suit for recovery of possession. (2) It might be contended that the Court will not go behind the actual status of the parties to the transaction embodied in the sale-deed of June 5th, 1873; or the legal effect of the said deed. The vendor under that deed purported to convey something which he did not possess, namely, full proprietary rights in respect of the house in suit. He did, however, possess some rights in respect of the house, namely, mortgagee rights. The legal effect of the deed, therefore, would be to convey to the transferee whatever rights Hazari Lal possessed at the time of the transfer. Those rights being rights of a mortgagee, Panna Lal became in law a transferee of the mortgagee rights. A suit for redemption will, therefore, lie as against Panna Lal and the period of limitation for such a suit is sixty years. (3) The case may be looked at from the point of view which has been actually taken in the reported decisions of this Court which I am prepared to follow. If it had been found that Panna Lal entered into

possession of the house in dispute under the sale-deed of June 5th, 1873, in the honest belief that he had obtained full proprietary rights in the said house by reason of that deed, and with the obvious and avowed intention to exercise the rights of a full proprietor, he would, under this view of the case, be entitled, as the learned Judges of this Court said, to the "protection" of Article 134 aforesaid. In effect, as it seems to me, this view of the case involves holding that Panna Lal's possession became adverse against the owner of the equity of redemption from the date of the sale in his favour.

On either of the last two views the suit as brought is within time. I do not desire to discuss the matter further, beyond remarking that, if the learned Judges who have accepted the first of the views set forth above with regard to the operation of Article 134 of the first Schedule to the Indian Limitation Act are right in the interpretation which they have put on the words of that Article, considered by themselves, it seems to me that a conflict of principles becomes involved between the provisions of that Article and those of section 60 of the Transfer of Property Act (IV of 1882). A mortgagor's right to redeem subsists until it has been extinguished by act of parties or order of a Court. Act of parties must mean act of the parties to the mortgage transaction. I take it to be settled law that no assertion of adverse title on the part of a mortgagee during the continuance of a mortgage could set time running against the mortgagor so as to deprive the latter of his right to redeem within a period of sixty years. The sale by Hazari Lal in favour of Panna Lal was, so far as the vendor was concerned, simply an assertion of adverse title as against the mortgagor. This, I take it, could not operate so as to extinguish his right to redeem, or set time running against the mortgagor. If anything can be held to have set time running against him, it must be Panna Lal's entry into possession under the terms of the sale-deed in his favour. Now assuming for the sake of argument that the present suit had been brought within twelve years of the sale of June the 5th, 1873, it is worth while to consider what sort of suit the mortgagor would have been bound to bring. If he had sued Panna Lal for ejectment as a trespasser he would most undoubtedly have been met by a plea that if Panna Lal took nothing else under this sale-deed he had at least acquired Hazari Lal's rights as a mortgagee, and that the suit against him should be one for redemption and not for ejectment. Yet if the view which seems to have been taken by the Bombay High Court regarding the operation of Article 134 to the first Schedule of the Limitation Act is correct, it would seem to follow that, if the mortgagee in possession chose, even on the very day after entering into possession, to execute a deed purporting to sell the property itself, and not his mortgagee rights therein, to a third party, he could thereby compel the mortgagor to sue for redemption within twelve years of the sale, or to lose his rights by operation of the law of limitation. I find it very difficult to believe that this is either the intention of the Legislature or the effect of the provisions of the law which I have been considering. The result is that I dismiss this appeal with costs, including fees on the higher scale.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 788 OF 1914.

August 10, 1914.

Present:—Mr. Justice Woodroffe and Mr. Justice Coxe.

MADHU SUDAN PAL AND ANOTHER—PETITIONERS

versus

PARBATI SUNDARI DASSYA AND OTHERS—OPPOSITE PARTIES.

Insolvent Debtor's Act (11 & 12 *Vict. C.* 21), *s.* 46, *scope of—Leave to appeal—Concurrent jurisdiction of High Court with District Judge—District Judge refusing leave to appeal—High Court, power of, to grant leave to appeal.*

A High Court has concurrent jurisdiction with the District Judge to grant leave to appeal under section 46 of the Insolvency Act and if the District Judge refuses leave to appeal, the High Court is not debarred from granting it. [p 407, col. 1.]

In the matter of an application for leave to file an appeal to the High Court from the orders of the District Judge of Dacca, passed in Insolvency Case No. 125 of 1912 and dated

respectively the 4th May, 10th June and 4th July 1914.

Dr. *Sarat Chandra Bysack* and Babu *Bepin Chandra Bose*, for the Petitioners.

Babu *Prakash Chandra Mazumdar*, for the Opposite Parties.

JUDGMENT.

WOODROFFE, J.—The matter in respect of which an order for leave to appeal is sought, is a question whether the property described in the application should be re-sold. There is no appeal on the question whether the Court was right in refusing to set aside the order passed for default of the 10th June, except so far as the effect of that order was to affirm the order for sale. To make this matter clear, I desire to record the fact that the applicant states that he is prepared to argue this appeal on the materials now on the record without further evidence, oral or documentary.

The order of the 4th May was, in my opinion, an order under the Insolvency Act and though the Judge has refused leave to appeal under section 46, there is a concurrent jurisdiction in us to grant leave to appeal and I would accordingly do so. The appeal is admitted and there is no necessity to make a further application under Order XLI.

The Rule, therefore, is made absolute and the costs will be dealt with upon the hearing of the appeal.

COXE, J.—I agree.

Rule made absolute.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 6 OF 1914-15 OF BALIA DISTRICT.

May 8, 1915.

Present:—Mr. Holms, S. M., and Mr. Campbell, J. M.

Maharaja KESHO PRASAD SINGH—PLAINTIFF—APPELLANT

versus

RAMANAND GIR—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 11—Math, whether can acquire occupancy rights—Mahant—Chela—Succession.

An association like a *math* cannot be treated as an occupancy tenant under section 11 of the Tenancy Act. [p. 407 col. 2.]

Parmanand Singh v. *Mahant Ramanand Gir*, 21 Ind. Cas. 43; 11 A. L. J. 761; 35 A. 474, not followed.

Selected Decision No. 19 of 1912, followed.

Per *Campbell, J. M.*—A *chela* cannot inherit the occupancy rights of his *guru*. [p. 408, col. 1.]

Second appeal from an order of the Commissioner, Benares Division, dated the 25th June 1914, reversing that of the Assistant Collector of Ballia District, in a case of ejectment.

JUDGMENT.

HOLMS, S. M.—(*April 22nd*, 1915.)—The Collector has found, as a matter of fact, that the occupancy land in suit has been part of the *math* property for a very long time, and the appellant urges that there was no evidence to support this finding. I have looked at the evidence and think there is. It is true that the land has been recorded in the *patwari's* papers as occupancy tenancy of particular *mahants*. The appellant urges that it was acquired originally by *Mahant* Budhram Gir, and that, when he was removed in 1903, the land ceased to be recorded in his name, although one would naturally have expected that the dismissed *mahant* would have clung to his own occupancy tenancy. Moreover, the appellant himself in the present plaint describes Sheolochan as occupancy tenant of the land, whereas he could not be occupancy tenant in his own right as he only held it for five years. I consider then that the *mahants* have been managing the land on behalf of the *math*. It is not necessary then to consider the question whether, when a *mahant* dies who has held an occupancy tenure, he is succeeded by his *chela* or not. The real question is that decided in Selected Decision No. 19 of 1912, whether or not an association like a *math* can be treated as a tenant having a right of occupancy in land under section 11 of the Tenancy Act. On the other side, I am referred to the High Court decision in *Parmanand Singh* v. *Mahant Ramanand Gir* (1), who happens to be the defendant in the present case, in which it was held that the manager of a *math* could acquire an occupancy holding on behalf of the *math*. Sir Duncan Baillie, in Selected Decision No. 19 of 1912, has given in considerable detail his reasons for his

(1) 21 Ind. Cas. 43; 11 A. L. J. 761; 35 A. 474.

finding, whereas the learned Chief Justice has dealt with the question somewhat briefly. I am not convinced that Selected Decision No. 19 of 1912 has been wrongly decided I would, therefore, set aside the order of the Collector and restore the order of the Assistant Collector, respondents paying costs throughout.

CAMPBELL, J. M.—I agree with the Senior Member. If we follow Selected Decision 19 of 1912 the *math* cannot be treated as the occupancy tenant of the land, and if it is argued that the manager of the *math* should be considered the occupancy tenant, respondent, has no status, as by Selected Decision 8 of 1904 a *chela* cannot inherit the occupancy rights of his *guru*.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 686 OF 1914.

May 20, 1915.

Present:—Justice Sir George Knox, KT.

RAM HARAKH PATHAK AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAM SARAN PATHAK AND OTHERS—PLAINTIFFS—RESPONDENTS.

Jurisdiction, consent of parties whether can give where Court has none—Arbitration—Award—Decree in terms of award—Both parties consenting to appeal being heard against such decree, effect of.

A decree passed in the terms of an award not being appealable, the parties to the decree cannot, by giving consent to an appeal being heard and the case being decided again on the merits, give the Appellate Court jurisdiction to entertain an appeal against such decree. [p. 409, col. 1.]

Second appeal from a decision of the Additional Subordinate Judge, Gorakhpur, dated 27th February 1914.

Mr. *Jang Bahadur Lal*, for the Appellant.

Mr. *Brij Nath Vyas*, for the Respondent.

JUDGMENT.—The plaintiffs, now respondents, sued on a bond. The defendants pleaded payment. The matter in dispute was referred to arbitration; the arbitrator decided in favour of the plaintiffs. Objections were taken by both parties. The lower Court, after considering the objections, dismissed them and drew up a decree in terms of the award. From that decree an appeal was filed to the Court of the Additional Judge. The Additional Judge accepted the appeal and on the 16th of August 1912 entertained an application signed by one of the plaintiffs and the Vakil engaged for both plaintiffs on the one side, and by the defendant Ram Harakh and a Pleader who appeared for both defendants on the other. The application was to the effect that both parties agreed that the appeal should be accepted (*manzur*) and that the case should be decided on the merits. The Additional Judge ordered that the appeal is accepted and the case be decided on the merits. Some evidence was taken and the case remained on in the Court of the Additional Judge until the 4th of April 1913. Then, so far as the record shows, the case went automatically to the Court of the Subordinate Judge of Basti. No doubt there must have been some order, but whether that was an order passed by the District Judge or by the Additional Judge does not appear. There remains the fact that on the 5th of April the case appeared in the Court of the Subordinate Judge of Basti and he began to exercise jurisdiction upon it. It remained in that Court until the 21st of January 1914, when we are told that by an order of the District Judge of Gorakhpur the case was made over to the Court of the Additional Subordinate Judge of Gorakhpur; that officer held that no appeal lay under the circumstances to the Court of the Additional Judge, that the admission or agreement of parties was on a point of law and was to the effect that a certain Court should re-try the case, that this agreement was not binding on the plaintiffs, and that it did not give that Court or the present Court any jurisdiction to hear the appeal. He accordingly dismissed the appeal.

It is obvious that the record is incomplete, that there are papers which ought to be on the record, which are not there now, and the absence of these papers has caused the waste of a whole day of time by this Court. I expect

the learned District Judge to look into the matter and see to whom it is owing that this record has been drawn up in such an incomplete way.

The defendants have come here in appeal and have submitted a memorandum of appeal consisting of seven pleas. The *first* is to the effect that the learned Additional Judge had no jurisdiction to set aside the order of his predecessor dated the 16th of August 1912. I do not know, nor can I ascertain from the record, who the predecessor of the learned Additional Judge was. So far as the record shows Mr. Rose was the only Additional Judge who dealt with this case. The *second* plea is to the effect that the agreement of the parties dated the 16th of August 1912 was binding on both the plaintiffs and the defendants and the plaintiffs have no right to resile from the same. There is no doubt that the procedure adopted by the learned Additional Judge in passing that order of the 16th August 19 2 was very erratic. The order in question was a decree based upon an award. From that decree no appeal lay to the Additional Judge and he had not the least power to adopt the procedure which he afterwards did. The *3rd* and *4th* pleas are practically to the same effect. The *fifth* plea is to the effect that the plaintiffs were estopped from questioning the jurisdiction of the Court to hear the appeal on the merits. This follows my decision on the preceding plea. *Then* there is a plea to the effect that even if the appellants' Vakil made any admission on a point of law, it is not binding on the appellants. The *last* plea is that the Additional District Judge being seized of the case, the order of transfer to the Court of the Additional Subordinate Judge was bad in law. I cannot find the order of transfer on the record and it is impossible to say what that order was. In the absence of the order it must be persumed to have been rightly made until the contrary is shown. A great deal of argument was addressed to me and several cases cited as to the power of the District Judge to withdraw an appeal from a Subordinate Court when that Court has gone to some length in the case. I quite agree with the contention that it is most inexpedient for orders of this nature to be passed, but I cannot say that such orders are illegal, specially when I am not satisfied as to the circumstances under which the order was passed.

The result then is that we are carried back to the appeal which was filed in the Court of the Additional District Judge, no appeal lay and everything that followed must be swept aside as without jurisdiction and I come back, though not quite by the same road, to the decree of the 30th of May 1912.

I dismiss this appeal with costs, including fees in this Court on the higher scale.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 32 OF 1914-15 OF BULANDHASHR DISTRICT.

April 3, 1915.

Present:—Mr. Holms, S. M., and Mr. Campbell, J. M.

MOHAMMAD YUSUF KHAN—APPELLANT

versus

Musammat NANHI—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 22—Succession—Uncle sharing in cultivation with nephew.

An uncle, if he shared in cultivation with his nephew at the latter's death, can succeed to the latter's holding. [p. 409, col. 2.]

Where a nephew died and was succeeded by his widow, who re-married and thus ceased to have an interest in the husband's holding but remained in possession, and the uncle thereupon claimed the holding:

Held, that the uncle should be recorded as an occupancy tenant. [p. 410, col. 1.]

Per *Campbell, J. M.*—An uncle is no heir to his nephew under section 22 of Act II of 1901. [p. 410, col 1.]

Third appeal from the order of the Commissioner of the Meerut Division, dated the 27th October 1914, confirming that of the Collector of Bulandshahr District in a case of correction of *jamabandi*.

JUDGMENT.

CAMPBELL, J. M.—(*March 23rd*, 1915). —The Collector and Commissioner have found that Khushia shared in the cultivation of his nephew Harsukh during the latter's lifetime, and this finding of fact cannot be disputed in revision.

But this application raises two interesting points of law which require consideration.

The *first* is, "can an uncle succeed to the rights of a nephew under section 22". I

think the answer to this must be in the negative. The sub-section (*e*) says clearly and definitely that a collateral to succeed must be "the nearest male relative in the male line of *descent*" and the whole trend of section 22 is in the same direction. Paragraph (*a*) also refers to a lineal *descendant* in the male line of *descent* and a father is carefully excluded from inheritance.

I think that the section must be read literally and that this excludes Khushia from any right of inheritance.

The *next* point is whether the widow being in sole possession of the occupancy holding of her first husband and the other claimant Khushia being out of possession, any order could be passed, even if Khushia were recognised as entitled to succession, to record him as an occupancy tenant, with the widow as the sub-tenant, or whether the widow could not claim to be recorded as a non-occupancy tenant since her occupancy rights lapsed on re-marriage. In such a case I am of opinion that a collateral could claim to be recorded as the occupancy tenant, as there would be considerable danger of his rights, as a reversioner lapsing if he could not claim them until the widow died or was ejected. For the reasons above given, I would set aside the orders of the Commissioner and Collector and restore the orders of the Assistant Collector, to the effect that Khushia has no title to ask for the removal of the widow's name and the substitution of his own.

I would make him to pay the widow's and the *zemindar's* costs in all Courts.

HOLMS, S. M.—(*April 2nd*, 1915).—I am unable to find any decisions which throw light on the question of whether a man can succeed to the occupancy holding of his brother's son under section 22 (*e*). The words "Nearest collateral male relative in the male line of descent" seem to me to mean the nearest male collateral in the male line of descent from a common ancestor. Line of descent means a line drawn from any person in a genealogical tree downwards and not upwards, so the words in section 22 must refer to the line of descent from a common ancestor. It is true that it is somewhat anomalous that in the case of a self-acquired occupancy tenancy the father could not succeed to it on his son's death, whereas the father's brother could, if he had shared in the cultivation. But an uncle is as much a collateral in the male line of descent as a cousin.

I would dismiss the appeal with costs.

As regards the second point raised by my colleague, I would leave it to the Collector to settle how the widow's name should be recorded, if she still remains in possession after her late husband's uncle has been recorded as occupancy tenant.

CAMPBELL, J. M.—The appeal stands dismissed with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 7 OF 1907-08 OF FARRUKHABAD DISTRICT.

May 11, 1908.

Present:—Mr. Porter, S. M., and Mr. Darrah, J. M.

BHAWAN—PLAINTIFF—APPELLANT

versus

ZAHUR ALI—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 4 (12)—Grove—Improvement—Land—Plaint once admitted, whether can be rejected subsequently.

The planting of trees in holding is an improvement within the meaning of section 4 (12) of the Agra Tenancy Act. [p. 411, col. 1.]

Therefore, a grove is land within the meaning of the Tenancy Act. [p. 411, col. 1.]

A plaint once admitted cannot be afterwards rejected on the ground of any defect subsequently discovered in it. [p. 411, col. 1.]

Second appeal from an order of the Commissioner, Agra Division, dated the 4th September 1907, reversing that of the Assistant Collector, Farrukhabad District, in a case of assessment of rent.

JUDGMENT.

PORTER, S. M.—(*May 2nd*, 1908.)—This is a second appeal in a suit under sections 150, 156, Agra Tenancy Act, for the assessment of rent on certain rent-free land. In the Court of first instance defendant-respondent claimed proprietary rights in the land, and under section 199 of the Act defendant-respondent was required to institute a civil suit for the determination of the question of title. The Civil Court found that defendant-respondent had no proprietary rights in the land. The Assistant Collector then

proceeded to assess the land to rent, and fixed the amount at Rs. 35 per annum.

On appeal the Commissioner held that as the land in suit had been judicially found in 1904 to be planted with trees, which constituted a grove, and as no change in the character of the land had been shown to have taken place since the date of that finding, the area in suit did not come within the definition of land in section 4 (2) of the Agra Tenancy Act.

The Commissioner, therefore, dismissed the suit.

I do not think the Commissioner's finding can be sustained. It is clear from the record that the land is cultivated. The planting of trees in a holding is an "improvement" as defined in section 4, clause (12), of the Act; and section 88 of the Act lays down the conditions under which trees may be planted by tenants. It would be absolutely inconsistent with these clear provisions of the Act to hold that a holding or part of a holding planted with trees is not "*land*" within the scope of the Act.

Further "rent" is defined in clause (3) of section 4 as "whatever is .....to be paid or delivered by a tenant for land held by him, *or on account of groves*", *etc.* The term 'grove' means a collection of trees standing on land. It seems to me impossible to hold that a land-holder may sue for the rent of a grove under the provisions of the Tenancy Act, but that the land on which the grove stands lies outside the provision of the Act.

The Commissioner also found that the plaint was inadequately stamped, but has not based his decree on this defect. It has been held by the High Court that a plaint once admitted cannot be afterwards rejected on the ground of any defect subsequently discovered in it. Plaintiff-appellant must be required to make good the deficiency, if this has not already been done.

Subject to the making good of the deficiency in the Court-fees, I would set aside the decree of the Commissioner, and restore the decree of the Assistant Collector with costs in this and lower Appellate Courts.

DARRAH, J. M.—I concur. I have recently come to the conclusion in another case that a grove must be considered to be "land" within the meaning of the Tenancy Act. I, therefore, hold the same view as the Senior Member.

Appeal allowed.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION NO. 21 OF 1915.

May 11, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Tudball.

RAM AUTAR TEWARI—DEFENDANT—APPLICANT

versus

DEOKI TEWARI—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code, s. 115, *Sch. II, cl.* 15—*Award, setting aside of—Appeal, maintainability of.*

An order of a Court setting aside an award on the ground of its invalidity on account of misconduct of the arbitrators is appealable. [p. 412, col. 2.]

Ganga Prasad v. *Kura*, 28 A. 408; A. W. N. (1906) 64; 3 A. L. J. 168, *Kalyan Das* v. *Piary Lal*, 4 A. L. J. 256; A. W. N. (1907) 110, not approved of.

Shyama Charan Pramanik v. *Prolhad Durwan*, 8 C. W. N. 390; *Ram Jiwan* v. *Nawal Singh*, 5 A. L. J. 644; A. W. N. (1908) 242; 4 M. L.T. 400; *Damodar Trimbak* v. *Raghunath Hari*, 26 B. 551; 4 Bom. L. R. 267 and *Achuthayya* v. *Thimmayya*, 31 M. 345; 18 M. L. J. 228; 3 M. L. T. 315, referred to.

Civil revision against an order of the Additional District Judge, Gorakhpur, dated the 24th October 1914.

Mr. *Jang Bahadur Lal*, for the Applicant.

Mr. *Ishwar Saran*, for the Opposite Party.

JUDGMENT.—This application for revision arises out of a suit filed in the Court of a Munsif. The parties agreed to refer the matters in difference between them to arbitration and an order of reference was made accordingly. The time for completing the award was extended from time to time up to December 2nd, 1912. On the case being called on on that date, it was found that the award had not been filed. The Munsif then made an order superseding the arbitration and fixed December 10th for the hearing of evidence. On December 5th the arbitrators filed an award purporting to have been made on December 2nd, but the Munsif held that the award had not been made in time and he declined to re-call his order superseding the arbitration. Ultimately he tried the case out and dismissed it. The plaintiff appealed to the District

Judge, and one of his grounds of appeal was that the award had been made in time, and, therefore, the arbitration should not have been superseded The Additional Judge held that the Munsif was wrong in holding that the award had not been made within time merely because it had not been filed in Court within the time limited, and that he should have enquired whether it had been made by the arbitrators within that time. Accordingly he remanded the case under Order XLI, rule 23. The Munsif after inquiry dismissed the suit again, holding that the award had not been made within time, and also that it was invalid on account of misconduct by the arbitrators. The plaintiff appealed and the Additional Judge found that the award had been made within time, and he remitted an issue on the question of misconduct The Munsif found on the issue in favour of the plaintiff. The Additional Judge agreed with the Munsif and passed a decree in accordance with the award which was in favour of the plaintiff. The defendant has applied to this Court for revision of the order of the Additional Judge, on the ground that the Munsif's second order holding that the award was invalid on account of misconduct of the arbitrators could not be interfered with by the Additional Judge. No appeal lies against the order of a Court under paragraph 15 of the 2nd Schedule to the Code of Civil Procedure setting aside an award, and it is contended that the order cannot be challenged in appeal against the decree in the suit, because even if it is erroneous it does not affect the decision of the case within the meaning of section 105 of the Code. The applicant relies upon the decisions of this Court in *Ganga Prasad* v. *Kura* (1) and *Kalyan Das* v. *Piary Lal* (2). In the latter case Aikman, J., merely followed the former which was a decision by two Judges. The learned Judges who decided the former case profess to follow the decision of Banerjee, J., in *Shyama Charan Pramanik* v. *Prolhad Durwan* (3), but an examination of the judgment of Banerjee, J., shows that he was of opinion that an Appellate Court was entitled in an appeal against a decree to interfere with the order of the Court of first instance setting aside an award. He held that a second appeal lay against the decision of the Appellate Court and he sent the case back in order that certain evidence might be taken. The judgment of Banerjee, J., seems to us to give no support whatever to the view taken in *Ganga Prasad* v. *Kura* (1). The decision in the last-mentioned case and the decision in *Kalyan Das* v. *Piary Lal* (2), which follows it, seem to stand quite alone. They are inconsistent with several decisions of this Court beginning with the Full Bench decision in *Nanak Chand* v. *Ram Narain* (4) and ending with the decision of Knox and Griffin, JJ., in *Ram Jiwan* v. *Nawal Singh* (5), with the decision of the Bombay High Court in *Damodar Trimbak* v. *Raghunath Hari* (6) and with a long string of cases in the Madras High Court ending with *Achuthayya* v. *Thimmayya* (7). It seems to us that an order of a Court setting aside the award of an arbitrator and deciding that the case shall be tried by the Court is an order affecting the decision of the case within the meaning of section 105 of the Code. It has been held that the words "affecting the decision of the case" in section 105 mean "affecting the decision of the case on the merits," but even so we think that the order of the Munsif setting aside the award was liable to be challenged in appeal against the decree. As long ago as 1870 Sir R. Couch and Kemp, JJ., held that such an order affected the decision on the merits, see *Mothooranath Tewaree* v. *Brindabun Tewaree* (8). The weight of authority is clearly against the applicant and we are of opinion also that the order of the Munsif was liable to be challenged in appeal against the decree. It is not suggested that there is any other ground upon which we could in revision interfere with the order of the learned Additional Judge. This application is dismissed with costs.

Application dismissed.

(1) 28 A. 408; A. W. N. (1906) 64; 3 A. L. J. 168.
(2) 4 A. L. J. 256; A. W. N. (1907) 110.
(3) 8 C. W. N. 390.
(4) 2 A. 181.
(5) 5 A. L. J. 644; A. W. N. (1908) 242; 4 M. L. T. 400.
(6) 26 B. 551; 4 Bom. L. R. 267.
(7) 31 M. 345; 18 M. L. J. 228; 3 M. L. T. 315.
(8) 14 W. R. 327.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 558 OF 1910.

March 17, 1915.

Present:—Mr. Justice Sharfuddin and Mr Justice Coxe.

UDIT NARAIN CHOWDHURY AND OTHERS—DEFENDANTS—APPELLANTS

versus

MATHURA PRASAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 54—Sale by registered instrument or by delivery of possession—Bond, where to be registered—Intention to sell or mortgage, want of—Registration law, fraud on.

Per *Sharfuddin, J.*—Under section 54 of the Transfer of Property Act the sale of immoveable property of value less than Rs. 100 may be made either by a registered instrument or by delivery of the property. [p. 414, col. 1.]

A Registrar has no jurisdiction to register a bond where the person giving the bond has no property in the district. [p. 414, col. 2.]

Harendra Lal Roy v. *Hari Dasi Debi*, 23 Ind. Cas. 637; 27 M. L. J. 80; (1914) M. W. N. 462; 16 M. L. T. 6; 18 C. W. N. 817; 19 C. L. J. 484; 16 Bom. L. R. 400; 12 A. L. J. 774; 41 C. 972 (P. C); 1 L. W. 1050, followed.

Makhan Lal Pal v. *Bunku Behari Ghose*, 19 C. 623 (F. B.), followed.

Appeal against the decree of the District Judge of Darbhanga, dated the 1st of September 1910.

Babu *Sorashi Chandra Mitter*, for the Appellants.

Babus *Chandra Sekhar Banerjee* and *Sib Chandra Palit*, for the Respondents.

JUDGMENT.

SHARFUDDIN, J. This is an appeal against the judgment and decree of the District Judge of Darbhanga, dated the 1st September 1910.

The learned District Judge decreed the suit of the plaintiff and hence the present appeal by the defendants. In order to understand the grounds urged against the judgment of the lower Court, it is necessary to refer to certain facts antecedent to the institution of the present suit.

The suit is to recover a sum of Rs. 10,243-6-0, principal and interest on a registered mortgage bond dated the 27th February 1902 executed by the defendant No. 1, Udit Narain Choudhury, as head and manager of a Hindu joint family of which the other defendants are members.

The plaintiff's mother, *Musammat* Moharani Bibi, inherited the property of her father, Brij Bhukhan Lal. While she was in possession of the property, she sold a share in *Mouza* Mohammadpore Bowari in 1884 to Nena Choudhury, father of Udit Narain. All the time the members of Nena's family were joint, but in 1899 there was a partition and the property in Mohammadpore Bowari fell to the share of Nena, who had originally purchased it as the manager of a joint family including himself and his brother and their issue.

Moharani Bibi died in 1890 and Ram Anugrah Persad, generally known as Polai Lal Mahta, became guardian of the plaintiff who at the time was a minor. In 1901 the plaintiff filed a suit for setting aside the *kobala* executed by his mother, Moharani Bibi, in favour of Nena Choudhury during his minority, on the ground that the sale was made without legal necessity and the property was conveyed for an inadequate price. At that time the plaintiff filed seven other suits of a similar nature to cancel alienations of property made by his mother in favour of other persons.

On the 27th February 1902 a petition of compromise with the permission of the Court was filed in the suit, in which it was stated that Udit Narain was to be allowed to retain the property which his father had bought from Moharani Bibi in consideration of a payment of Rs. 14,000. It was stated in the petition that Rs. 6,000 of this sum had been paid in cash and that Udit Narain on his own behalf and as manager of the joint family, consisting of himself and the other defendants in that case and in this, had executed a mortgage-bond for the balance, *i.e.*, Rs. 8,000. This bond of Rs. 8,000 is dated the 27th February 1902, and is the bond in suit.

Udit Narain alleges that this bond was a sham transaction and it was never intended to be enforced. He gives a most absurd explanation why and with what object he subjected himself to a liability of Rs. 8,000. I do not think it is at all necessary to refer to his story, as the suit should have been decided on another ground.

One of the issues raised is this: "Whether the share of *Mouza* Kolooha Jairampore, *Chakla* Nai, does not belong to the

defendants; if so, whether the bond in suit is invalid and inoperative for being registered in the Mozafferpore registration office."

It appears that in the bond for Rs. 8,000 executed by Udit Narain two properties were mortgaged, namely, Mohammadpore in the Darbhanga District and one *kowri* of Kolooha in the Mozafferpore District. The question is whether this small share of Kolooha belonged to Udit, and if it did not belong to him, whether the registration of the bond in the Mozafferpore District was invalid, and whether if invalid, the bond is enforceable.

On behalf of the plaintiff it is urged that this share in Kolooha was purchased by Udit from one Usman (P. W. No. 1).

This witness says:—"I sold a share of one *kowri* in Kolooha, a *kobala* was executed, but it was not registered. The price was Rs. 30. I do not remember who witnessed the execution. It was executed two or three days before the execution of the bond in suit. I do not remember if Polai was present. I sold the property at the request of Udit Narain, who wanted to register it in Mozafferpore in order to complete the transaction quickly and had no property in the district. He said if there was delay in registration the compromise might fall through."

It is apparent from the above statement that as Udit had no property in the District of Mozafferpore and as he was anxious to see that the bond was quickly registered, he asked Usman to sell to him a small share in Kolooha.

Under section 54 of the Transfer of Property Act the sale of immoveable property of value less than Rs. 100 may be made either by a registered instrument or by delivery of the property.

The value of 1 *kowri* in Kolooha is said to be only Rs. 50 and the sale-deed admittedly was not registered and hence in order to effect a proper and binding sale, possession of the share should have been delivered to Udit. There is admittedly no evidence that any delivery ever took place. The sale, therefore, was not complete when the bond executed by Udit was registered. That being the case, he had no property in the District of Mozafferpore when the bond was presented for registration in the Mozafferpore registration office and hence the Registrar of that office had no jurisdiction to register that bond, and that bond, therefore, did not create any liability against Udit Narain. It was so held by their Lordships of the Judicial Committee in the case of *Harendra Lal Roy* v. *Hari Dasi Debi* (1). The facts of this reported case are these.—A property not belonging to a lady, alleged to be situated within the original jurisdiction of this High Court, was entered in the schedule of the mortgaged properties attached to a mortgage-deed for the purpose of securing registration in the Calcutta registry office. Their Lordships held "that the entry of such a property was a fictitious entry and represented no property that the mortgagor possessed or intended to form part of his security. Such an entry intentionally made use of by the parties for the purpose of obtaining registration in a district where no property actually charged and intended to be charged in fact existed, was a fraud on the Registration Law and no registration obtained by means thereof was valid." It appears that the High Court had passed a decree on the strength of the mortgage and their Lordships held that "the High Court had no jurisdiction to make the decree, and the deed not having been registered in accordance with the Registration Act the mortgagee had no title to maintain the suit."

As to the provisions of section 54 of the Transfer of Property Act, it was held in the case of *Makhan Lal Pal* v. *Bunku Behari Ghose* (2) that the transfer by the sale of tangible immoveable property of value less than Rs. 100 can be effected only by one of the two modes mentioned in section 54, clause 3, of the Transfer of Property Act, *viz.*, by a registered instrument or by delivery of possession.

On the legal aspect of the transaction the appellant is bound to succeed, but we have no doubt that the defence set up by the appellant was a most dishonest defence. His story of the sham transaction in order to oblige Polai is a story which cannot be believed. In the above circum-

(1) 23 Ind. Cas. 637; 41 C. 972 (P. C.); 27 M. L. J. 80; (1914) M. W. N. 462; 16 M. L. T. 6; 18 C. W. N 817; 19 C. L. J. 484; 16 Bom. L. R. 400; 12 A. L. J. 774 1 L. W. 1050.

(2) 19 C. 623 (F. B.).

stances, the suit is dismissed and the appeal decreed.

COXE, J.—I agree. The circumstances of the case leave no doubt that the parties never intended that the share of Kolooha should really be sold to Udit Narain or mortgaged to Polai Lal. The so-called sale was a mere device to evade the Registration Act.

Appeal decreed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 13 OF 1910-1911 OF ALLAHABAD DISTRICT.

March 23, 1912.

Present:—Mr. Baillie, S. M., and Mr. Broun, J. M.

RAMANUJ DAS—DEFENDANT—APPELLANT

versus

JANKI DAS—PLAINTIFF—RESPONDENT.

Res judicata—*Suit for ejectment of tenant—Previous suit for arrears of rent—Relationship of landlord and tenant not found to exist.*

A *mahant* of a temple brought a suit for ejectment, on the ground that he was a *muafidar* of the land in question and the defendant his tenant paying him a cash rent. Defendant alleged that he was the *pujari* and held the land as such and had never paid rent. In a previous suit between the parties for arrears of rent, the Collector had decided that the relationship of landlord and tenant did not exist between the parties, as an agreement under which the defendant was alleged to have agreed to pay rent was not proved:

Held, that the former decision operated as *res judicata*.

Second appeal from an order of the Commissioner, Allahabad Division, dated the 15th August 1911, reversing that of the Assistant Collector, Allahabad District, in a case of ejectment.

JUDGMENT.

BALLIE, S. M.—(*March 19th*, 1912).—The plaintiff in this suit for ejectment claims to be the *mahant* of a temple. The defendant, whose ejectment is sued for, claims to be the *pujari*. Plaintiff alleges that he, as *mahant*, is *muafidar* of the land in question and that the defendant holds as his tenant paying him a cash rent. Defendant alleges that he holds as *pujari*, he does not and has never paid rent for the land and that he is not liable to ejectment at the instance of the plaintiff. The Court of first instance, with reference to an appellate decision of the Collector in an arrear of rent case, found that the matter was *res judicata*, that the Collector had decided that the relationship of landlord and tenant did not obtain between parties. On this ground he dismissed the suit.

The Commissioner, on the other hand, finds that the Collector's decision was simply that the agreement fixing the amount of rent had not been proved and that, therefore, it did not make the question now in issue *res judicata*. In this matter I agree with the Court of first instance rather than the Commissioner. Before the Collector, appellant made exactly the same claim as he now makes, that he held as *pujari* independently of respondent and that he had never paid rent. The respondent alleged to an agreement by the appellant to pay rent. The Collector found that the agreement was not proved. It was this agreement, and this agreement only, which, according to the plaintiff, now respondent, brought the relationship of landlord and tenant into existence. When it was found that there had been no agreement, it was also found that the relationship of landlord and tenant did not exist: defendant's claim was in fact supported. I consider that the matter was made *res judicata* by the Collector's decision and that the Court of first instance rightly dismissed the suit.

A few words may be said in regard to appellant's claim that a question of proprietary right was involved and that, therefore, the Commissioner's decision should be cancelled on that ground. The evidence on record in the case does not enable me to decide whether a question of proprietary title is or is not involved. A *muafidar* is not, as such, a proprietor. He may acquire a right to be declared a proprietor by prescription, but whether this prescription exists in the present case there is no evidence on record to show. It is, however, unnecessary to arrive at any definite conclusion on this subject, inasmuch as the appellant's appeal is upheld.

I would allow the appeal with costs on respondent throughout.

BROUN, J. M.—I concur.

Appeal allowed.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 22 OF 1915.

May 10, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

UTMA KUAR—APPLICANT—APPELLANT

versus

BHAGWANTA KUAR—OPPOSITE-PARTY—RESPONDENT.

Guardians and Wards Act (VIII of 1890), ss. 12, 25—Guardian of minor's person—Court's power to put minor in possession of guardian.

Where a person has been appointed guardian of the person of a minor, the proceedings cannot be regarded as complete until the guardian has obtained effective possession of the person of the ward. If the guardian is not in such possession, the Court should take action under section 12 of the Guardians and Wards Act (VIII of 1890) to place the minor in his possession. [p. 417, col. 1.]

Sham Lal v. *Bindo*, 26 A. 594; A. W. N. (1904) 135; 1 A. L. J. 266, referred to.

First appeal from an order of the District Judge, Azamgarh, dated the 7th November 1914.

Mr. *Sital Prasad Ghose*, for the Appellant.

Mr. *Hamilton*, for the Respondent.

JUDGMENT.—This is an appeal by a guardian lawfully appointed under the Guardians and Wards Act, VIII of 1890. The facts are peculiar. *Musammat* Utma Kuar applied to the District Judge of Azamgarh to be appointed guardian of the person and property of her minor daughter, Chandra Kuar. She stated in her application that the minor had been removed from her care and custody by her married daughter, *Musammat* Bhagwanta Kuar, sister of the said minor; but she did not ask the Court to take action under section 12 of Act VIII of 1890. Notice was issued to *Musammat* Bhagwanta Kuar, and certain matters having been inquired into by the Court, an order was passed on the 26th of August 1914 appointing *Musammat* Utma Kuar guardian of the person of her minor daughter, and a formal certificate of guardianship was issued to her dated 31st August 1914. On 15th September 1914 *Musammat* Utma Kuar presented an application to the Court, alleging that she was still unable to obtain possession of the person of the minor and asking the Court to take steps to cause the minor to be placed in her charge. This application was rejected by the learned District Judge, on the ground that he had no jurisdiction to take any action in the matter under the provisions of Act VIII of 1890 and that *Musammat* Utma Kuar's only remedy was by way of a regular suit. According to the principles laid down by this Court in *Sham Lal* v. *Bindo* (1), with which we entirely concur, no regular suit for the purpose suggested could have been brought. We are satisfied that the minor Chandra Kuar became a ward of the Court from the date of the order appointing *Musammat* Utma Kuar to be her guardian and on general principles the District Judge became thereby empowered to enforce, for the benefit of the minor, all the provisions contained in the Guardians and Wards Act, VIII of 1890. One of these provisions is to be found in section 24, which lays down that a guardian of the person of a ward is charged with the custody of the ward and must look to his (or her) support, health and education. *Musammat* Utma Kuar was asking the Court to assist her to perform the duties imposed upon her by the section above quoted, and we are quite satisfied, on general principles alone, that she was entitled to the assistance of the Court. The matter has been argued before us on various technical grounds. An objection has been taken on behalf of the respondent that the order of the District Judge, whether right or wrong, is one against which no appeal lies under the provisions of section 47 of Act VIII of 1890. It has also been argued that whatever powers the Court possesses by way of controlling the possession of the person of a minor ward, its jurisdiction is limited by sections 12 and 25 of the Act itself. Neither of these sections, it has been contended, applies to the present case. Over the question whether an appeal lies or not we are disposed to pass lightly. If we are satisfied that the learned District Judge has in fact rejected the application of *Musammat* Utma Kuar upon wrong grounds, then he has refused to exercise jurisdiction in a matter in which it was incumbent upon him to exercise such jurisdiction. If we cannot interfere by way of appeal, we can interfere by way of revision, as laid down by section 48 of Act VIII of 1890. With regard to sections 12 and 25 of the said Act, we think it possible that

(1) 26 A. 594; A. W. N. (1904) 135; 1 A. L. J. 266.

either or both of these sections might be applied. On the whole, if the matter is to be dealt with as a technical question with reference strictly to the wording of Act VIII of 1890, the preferable view seems to us to be that the Court below could have taken action, and was bound to take action, under section 12 of the Act. In view of the provisions of section 24 of the Act to which we have already referred, the appointment of *Musammat* Utma Kuar to the guardianship of the person of this minor ward could not be regarded as complete until she had obtained effective possession of the person of the ward, so as to enable her to discharge the duties laid upon her by that section. It is quite true that section 12 of the Act provides for the temporary custody of a minor in the *interim* between application being made to the Court and the final conclusion of the necessary proceedings for the appointment of a guardian of the person of the minor, but as we have already pointed out those proceedings are really not complete until the guardian of the ward has obtained the custody of the minor. We think, therefore, that it was still open to the Court below to take action under section 12 of the Act. An alternative view would be for the Court to proceed on the assumption that what ought to have been done had been done, and that the custody of the minor had technically been made over to the lawfully appointed guardian from the date of such appointment, in this view the provisions of section 25 would apply. From any point of view we are satisfied that the Court below was wrong and its order cannot be sustained. We set it aside and remand the case to the Court below with directions to re-admit the same to the file of pending applications and dispose of it according to law. Costs of this appeal will be costs in the cause and can be dealt with by the Court below when finally disposing of the matter.

Case remanded.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 4 OF 1914-15 OF MUZAFFARNAGAR DISTRICT.

March 18, 1915.

Present:—Mr. Campbell, J. M.

BALDEO—DEFENDANT—APPELLANT

versus

Babu JAMBU PRASAD—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 22—Occupancy tenancy—Distant collateral relative sharer in cultivation with the deceased occupancy tenant—Nearer collateral relative alive but not sharer in cultivation—Succession.

A distant collateral who shared in cultivation with a deceased occupancy tenant cannot claim occupancy rights in succession to the deceased when a nearer collateral relative is alive but cannot succeed because he did not share in cultivation. [p. 418, col. 1]

Marama v. *Mahra*, Petition No. 6 of 1910-11, not followed.

Shankar Lal v. *Dalip Singh*, 17 A. 33; A. W. N. (1894) 194, followed.

Nakched Upadhya v *Ram Sabhat Ram Tiwari*, 9 Sel. Dec. 1910, referred to.

Second appeal from an order of the Commissioner, Meerut Division, dated the 17th September 1914, reversing that of the Assistant Collector, Muzaffarnagar District, in a case of ejectment.

JUDGMENT.—This case raises a point, upon which the different members of the Board have held divergent opinions for some time past. The question is whether a distant collateral, who admittedly shared in cultivation with his relative, a deceased occupancy tenant, can claim occupancy rights in succession, when he was not the *nearest* collateral relative to the deceased.

Mr. Baillie in *Nakched Upadhya* v. *Ram Sabhat Ram Tiwari* (1) expressed the view that the "nearest male relative" means the nearest male relative who shared in the cultivation: and that the contrary view appeared to him entirely irrational. Mr. Reynolds, however, pointed out that this was an *obiter dictum*, as the question was not then in issue, and declined to express an opinion. The question came directly in issue in *Marama* v. *Mahra* (2), an unreported decision, a copy of which has been filed in the present record.

Mr. Tweedy then wrote that "It has been held by the Board and the High Court

(1) 9 Sel. Dec. 1910.
(2) Petition No. 6 of 1910-11.

that nearer a male collateral who *does not* share in the cultivation does not exclude a more remote collateral who *does* share:" and wished to follow what he thought was the established case-law governing the matter. Mr. Reynolds, however, in a carefully reasoned judgment strongly dissented. And there the matter rests. I have not been referred to any rulings by the Board and the High Court in support of Mr. Baillie's and Mr. Tweedy's views and the only High Court ruling shown to me, *Shankar Lal* v. *Dalip Singh* (3), is entirely opposed to them. This judgment admittedly referred to Act XII of 1881, but it is, I think, equally applicable to the present Tenancy Act.

I am entirely in accord with Mr. Reynolds' reading of section 22 of the Tenancy Act: and think with him that that section must be read strictly and literally, as it makes such important alterations in the ordinary law of succession. Section 22 says clearly that failing the other heirs mentioned in paragraphs (*a*) to (*d*), the nearest collateral male relative shall succeed to an occupancy holding, provided that no such collateral relative shall be entitled to inherit who did not share in the cultivation of the holding at the time of the tenant's death.

I consider that it is a deliberate misinterpretation of clear words to read into this section any collateral relative other than the *nearest*. This the appellant admittedly is not. Agreeing with the Commissioner in his interpretation of section 22, I uphold his order and dismiss this appeal with costs.

Appeal dismissed.

(3) 17 A. 33; A. W. N. (1894) 194.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 485 OF 1913.

May 14, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

BHARATH CHAUBE AND OTHERS—DEFENDANTS—APPELLANTS

versus

GAYA CHAUBE AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence—Compromise in execution Court—Registration, if necessary—Compromise, whether admissible in evidence.

The joint holders of a decree entered into a compromise among themselves as to the manner in which the decree should be executed and their petition of compromise presented to the execution Court and acted upon:

Held, that the compromise did not require registration: [p. 419, col. 2.]

Held, further, that the compromise was admissible in evidence and binding upon the parties by reason of the order to that effect which was passed upon it by the Court executing the decree. [p. 420, col. 1.]

Bindesri Naik v. *Ganga Saran Sahu*, 20 A. 171; 25 I. A. 9; 2 C. W. N. 129; *Mohamed Musa* v. *Aghore Kumar Ganguli*, 28 Ind. Cas. 930; 17 Bom. L. R. 420; 21 C. L. J. 231; 28 M. L. J. 548; 19 C. W. N. 250; 17 M. L. T. 143; 2 L. W. 258; 13 A. L. J. 229, referred to.

Second appeal from a decision of the District Judge of Ghazipur, dated the 15th January 1913.

Mr. *Bajpai*, for the Appellants.

Mr. *Abdul Majid*, (with him Messrs. *Hamidullah Khan* and *Haribans Sahai*), for the Respondents.

JUDGMENT.—This is a defendant's appeal in a suit for possession which arose out of certain previous litigation. There was a *zemindari* share of a 4 anna 8 pies belonging to one Harnam Singh. There were two incumbrances on this share, one was a mortgage of Rs. 931 in favour of the plaintiffs-respondents now before us. The other was a charge of Rs. 1,200 due on account of a premium lease in favour of the present defendants-appellants. Harnam Singh sold this share, and a suit for pre-emption was brought in which both parties to the appeal now before us appeared as joint plaintiffs. The result was that their right of pre-emption was decreed and it was held that a sum of Rs. 3,300 represented the sale price, apart from incumbrances. The Court, therefore, passed a decree for pre-emption of the entire share, jointly in favour of all the plaintiffs then before it, on payment of Rs. 1,169. In view of the fact that

the incumbrances on the property were unequal in amount and different in nature, the pre-emption decree as passed was calculated to lead to difficulties in the execution department, and it is clear that it did so. One set of plaintiffs, who are the plaintiffs-respondents now before us, paid into Court the entire sum of Rs. 1,169 and asked for possession. Objections were raised by the other set of plaintiffs, the defendants-appellants now before us, and eventually a petition of compromise was presented to the Court executing the pre-emption decree. That petition was to the effect that possession over a share of 2 annas 8 pies should be given to one set of plaintiffs (the respondents now before us), and over a share of 2 annas to the other set of plaintiffs, the appellants now before us. It was further provided that the payment of Rs. 1,169 should be treated as having been made on behalf of all the decree-holders, pre-emptors, and that the holders of the premium lease should give up their rights under the same. The order passed on this petition was that the parties should be considered bound by it and the decree executed accordingly. Unfortunately at a later stage the Court executing the pre-emption decree seems to have felt some difficulty about duly carrying out its own order. It had directed possession over a share of 2 annas 8 pies to be given to one set of plaintiffs, the present respondents. An objection was put in by the other set of plaintiffs (the present appellants) to the effect that, though proprietary possession might be given, the executing Court was not entitled to eject them from their possession as lessees. On this the Court said that all it was concerned with in executing the decree was to give proprietary possession to the parties in accordance with the terms of the compromise, and it passed orders accordingly. The present suit as brought by the plaintiffs-respondents was to recover possession of a share of 2 annas 8 pies. As it happened, the lease in favour of the opposite party covered a share of 4 annas 3 pies only, and it has been finally decided by the Courts below that the present plaintiffs are, as a matter of fact, in actual possession of a share of 5 pies and had no need to sue in respect of the same. The question, however, remains as to the claim of the plaintiffs to obtain actual possession over the share of 2 annas 3 pies, in respect of which the defendants-appellants are asserting their rights to continue in possession under the terms of their lease. The case went to trial in the Courts below on a number of issues, all of which have been decided in favour of the plaintiffs. An important question of fact was whether the sum of Rs. 1,169 paid into Court by the present respondents actually came out of their pockets, or whether some portion of the same was contributed by the defendants-appellants. This point has been found in favour of the plaintiffs on the evidence, and if the finding is correct, there is certainly no equity in favour of the defendants-appellants. The one contention on behalf of the latter which we have to consider is as to the admissibility in evidence of the compromise filed in the execution Court. Undoubtedly that compromise has been admitted in evidence by the Courts below and has been made the basis of many of their findings. It has been contended before us that, if this document were ruled out as inadmissible, even the finding with regard to the payment of Rs. 1,169, though proceeding on the face of it upon other evidence, would require to be re-considered. We have been referred to a great deal of case-law on the subject, which we do not propose to discuss in detail. The position of the parties before the execution Court was that of joint holders of a decree, which on the face of it merely entitled them to recover possession of a certain *zemindari* property on payment of a certain sum. The decree, as it stood with reference to the litigation out of which it arose, was an imperfect decree, and apart from the compromise entered into by the parties it is quite possible that the decree could not have been executed without an application to the Court which passed it to amend it or to bring it into conformity with the judgment. The joint decree holders were undoubtedly entitled to enter into a compromise amongst themselves as to the manner in which that decree should be executed, and their petition of compromise presented to the execution Court did not as such require registration. It was a petition to a competent Court and in so far as it was submitted to and was acted upon judicially, it was undoubtedly binding upon the parties, vide *Bindesri Naik* v. *Ganga Saran Sahu* (1),

(1) 20 A. 171; 25 I. A. 9; 2 C. W. N. 129.

The petition was so far acted upon that proprietary possession was given to the two sets of decree-holders in accordance with its terms. To this extent, at any rate, the document was admissible in evidence, and if it was admissible in evidence, it was not possible for the Courts to take into consideration one part of it and exclude another part. Moreover, we are of opinion that, on the facts of this particular case, the question of the manner in which the joint decree-holders were entitled to enjoy the fruits of their decree was so intimately connected with the question of the satisfaction or extinction of the charges which the two sets of decree-holders severally held on the property, the subject-matter of the decree, that the one question could not be dealt with without the other. We are, therefore, of opinion that this petition of compromise, although unregistered, was admissible in evidence and binding upon the parties, by reason of the order to that effect which was passed upon it by the Court executing the decree. In principle the case is closely analogous to a case decided by their Lordships of the Privy Council, *Mahomed Musa* v. *Aghore Kumar Ganguli* (2), and on principles of equity we have no doubt that these defendants-appellants ought to be held bound by the terms of the compromise, of which they have already taken advantage by obtaining proprietary possession over a share of 2 annas in respect of which they paid no money into Court. For these reasons we are of opinion that this appeal must fail, and we dismiss it accordingly with costs, including in this Court fees on the higher scale.

Appeal dismissed.

(2) 28 Ind. Cas 930; 13 A. L. J. 229; 17 Bom. L. R. 420; 21 C. L. J. 231; 28 M. L. J. 548; 19 C. W. N. 250; 17 M. L. T. 143; 2 L. W. 258.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2611 OF 1912.

April 8, 1915.

Present:—Mr. Justice Holmwood and Mr. Justice Walmsley.

HIRANAND OJHA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SATISH CHANDRA ROY AND OTHERS—DEFENDANTS—RESPONDENTS.

Chota Nagpur Encumbered Estates Act (VI of 1876), ss. 3, 12, 22—Manager, order of, effect of—Civil Courts, jurisdiction, of while estate held by Revenue Authorities—Interest, accumulation of, rendering estate insolvent—Deputy Commissioner's work—Manager, power of, to render interest on original debt.

Where the Manager of an encumbered estate is the principal necessary party and there is no allegation that he, in making the order he did in pursuance of the Chota Nagpur Encumbered Estates Act, was not acting *bona fide*:

Held, that section 22 of the Act will alone bar the suit. [p. 420, col. 2]

It is clear from the provisions of sections 3 and 12 and other sections of the Act that during the time that an estate is held by the Revenue Authorities under the Act, a Civil Court has no jurisdiction to interfere on a suit brought by the creditors. The creditors have their remedy against any order of the Manager before the Deputy Commissioner and the Commissioner. [p. 421, col. 1.]

Where the Manager finds that the accumulation of interest, whether under a Civil Court decree or under any other kind of debt, would render the estate insolvent, he must at once get the Deputy Commissioner to release the estate. [p. 421, col. 1.]

If, therefore, the Manager does not possess the power to reduce the interest on the original debt as contracted, the operation of the Act would not only frequently but in every case prove infructuous. [p. 421, cols. 1 & 2.]

Appeal against the decree of the Judicial Commissioner, Chota Nagpur, dated the 22nd May 1912, affirming that of the Munsif, Palamow, dated the 22nd February 1911.

Babu *Karunamoy Bose*, for the Appellants.

Babu *Ram Charan Mitra*, for the Respondents.

JUDGMENT.

HOLMWOOD, J.—We have considered every section of the Chota Nagpur Encumbered Estates Act VI of 1876, and the rules made thereunder, and we are clearly of opinion that this suit is not maintainable. The Manager is the principal necessary party and there is no allegation that he, in making the order he did in pursuance of the Act, was not acting *bona fide*. Section 22, there-

fore, will alone bar the suit. But it is clear from the provisions of section 3 and section 12 and other sections that during the time that the estate is held by the Revenue Authorities under the Act the Civil Court has no jurisdiction to interfere on a suit brought by the creditors. The creditors have their remedy against any order of the Manager before the Deputy Commissioner and before the Commissioner. As a matter of fact in this case they went to the Deputy Commissioner and got the only grievance, which they had urged, removed. The Deputy Commissioner allowed them to retain possession of the portion of the property which they had purchased under a decree for Rs. 1,100.

The other question, which was raised before the Commissioner and which is practically the question before us was that the Manager had no jurisdiction to reduce the interest to 3 per cent. This objection was not pressed before the Deputy Commissioner, who held that the reduction of the interest to 3 per cent. was the only possible means of saving the estate from insolvency. Now it is obvious that the decree of the Civil Court could not have exceeded the principal of the original debt, except by the accumulation of interest. It was, therefore, the only question that had to be decided, whether the interest which had merged in the decree must be taken to be a part of the principal. That point was apparently argued, but not precisely in that form before the Deputy Commissioner, and it was agreed on all sides that 3 per cent. interest was the only possible basis upon which the creditors could get any relief. If he had not accepted this, the estate would have had to be restored to the owner and then the jurisdiction of the Civil Court undoubtedly would have revived; but, as the Judge points out, that would be flying in the face of the Act and undoing the benefits which the Act has intended to confer, and it is obvious that in every case this must be so; for, if the Manager finds that the accumulation of interest, whether under a Civil Court decree or under any other kind of debt, would render the estate insolvent, then he would have at once to get the Deputy Commissioner to release the estate. If, therefore, he did not possess the power to reduce the interest on the original debt as contracted, the operation of thl Act would, as the learned Judicial Commissioner has pointed out, not only frequentey but in every case prove infructuous.

The appeal is, therefore, dismissed with costs.

WALMSLEY, J.—I agree.

Appeal d'smissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 612 OF 1914.

May 20, 1915.

Present:—Justice Sir George Knox, KT.

BHARAT DUAJ DAMODAR DAS—PLAINTIFF—APLELLANT

versus

MAHABBAT AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal—Order of Record Officer, appeal from—Jurisdiction.

No appeal lies to the District Judge from an order of the Record Officer. [p. 421, col. 2.]

Second appeal from a decision of the Additional District Judge of Etawah, dated the 3rd of March 1914.

Mr. *M. L. Agarwala*, for the Appellant.

The Hon'ble Mr. *Abdul Raoof*, for the Respondents.

JUDGMENT.—The plaint in this case sets out that certain land is held by the defendants as a *muafi* grant from the *zemindar*. The plaintiff says that he is no longer willing to allow the land to remain rent-free and he asks that a decree be passed for recovery of the *muafi* land. The plaint was instituted, as the description shows, in the Court of the Record Officer, District Etawah. The Record Officer heard the case and passed orders for resumption of the land and the ejectment of the defendants. The defendants went into appeal in the Court of the Additional District Judge, Etawah. That officer held that the plaintiff had failed to prove that the grant was a resumable grant at the pleasure of the grantor; further, that the defendants had acquired proprietary rights therein.

The plaintiff comes in appeal here and says that no appeal lay to the District Judge from the order of the Record Officer. This

plea appears to be a good plea and must prevail. The appeal is decreed, but the memorandum of appeal to the lower Appellate Court will be sent back to that Court for return to Mahabbat and others, if they apply to the same, in order to be presented to the Court having jurisdiction.

Appeal decreed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 10 OF 1913.

April 20, 1915.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

V. V. NAGAPPA CHETTY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

A. R. M. S. RAMANATHAN CHETTY AND OTHERS—DEFENDANTS—RESPONDENTS.

Interest, payment of, when saves bar of limitation—Evidence to prove such payment—Pattis—*Debtor—Party to such arrangement—Limitation Act (IX of 1908), s. 19—Contract of guarantee—Consideration—Actual release of claim necessary and not mere promise.*

A creditor cannot by a mere unilateral act of payment of interest by the debtor save the bar of limitation. [p. 422, col. 2.]

Kariyappa v. *Rachappa*, 24 B. 493; 2 Bom. L. R. 378; *In re Tricumdass Mills Co., Ltd.*, 11 Ind. Cas. 552; 13 Bom. L. R. 482, distinguished.

Where an agreement between a debtor and the creditor, that a credit in the latter's book of a certain amount in favour of the former should be treated as "payment of interest" by the debtor, is relied on to save the bar of limitation, the evidence must show that the debtor was a party to the arrangement and the accounts charging interest sent to the debtor from time to time were accepted by him. [p. 422, col. 2.]

The release of a claim against one person is a consideration for guarantee of payment by another only when that claim is given up, and not when there is a mere promise. [p. 423, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge of Ramnad at Madura, in Original Suit No. 264 of 1911.

Messrs. *S. Srinivasa Aiyangar* and *K. Raja Aiyar*, for the Appellants.

Messrs. *C. V. Ananthakrishna Aiyar* and *V. Krishnaswami Aiyar*, for the Respondents.

JUDGMENT. This is an appeal from the decree of the Subordinate Judge of Ramnad dismissing the plaintiffs' suit to recover a certain sum of money which was advanced to the defendants Nos. 5 and 6 by the 1st defendant's father who is said to have undertaken subsequently to pay the money to the plaintiffs in case of default by defendants Nos. 5 and 6. The Subordinate Judge found that the suit against defendants Nos. 5 and 6 was barred by limitation and as far as defendants Nos. 1 and 2 are concerned, there was no consideration for their father's undertaking to pay. The date of the loan is 7th July 1901. The suit itself was instituted only on the 3rd August 1911.

The plaintiffs' case in effect is that as the interest fell due, a sum was advanced to the debtor equivalent to that interest, which was discharged with that amount, and the defendants thus became indebted to the plaintiffs in two principal sums which must be treated as a new loan, though it clearly represented the original amount and its interest. There was in this case really no loan advanced, but what happened is described thus by the plaintiffs' 1st witness:

"Every 6 months or one year interest statements are prepared in the case of loans advanced to other firms. The interest is entered in the accounts. Even if no payment is made, the amount is credited and debited in the accounts. Copies of these accounts are sent to the firm owing money. Such accounts were in this case sent to defendants Nos. 5 and 6." There is no evidence that these defendants either acknowledged receipt of these accounts or that they accepted the liability to pay the consolidated amount. It is argued that in order to save the bar of limitation no actual payment is necessary and that the evidence shows an agreement between the parties intended to have the effect of discharging the interest that was due, and that this has the same effect as payment of money. The answer to this argument is that the arrangement or agreement must be one to which the debtor was a party, and the creditor cannot by an unilateral act without the assent of the debtor save the bar of limitation. In the case relied on by the appellants, *Kariyappa* v. *Rachappa* (1), there was a mutual settlement. The accounts had been gone into by the parties and the balance struck. This constitutes payment of the smaller debt. It is not the mere existence or a statement in writing of

(1) 24 B. 493; 2 Bom. L. R. 378.

a demand that constitutes a payment. It is only the striking of the balance when there are debts due on both sides that constitutes it. In *In re Tricumdas Mills Co. Ltd.* (2), as also in the other cases cited, there was an arrangement entered into between the parties at the time the accounts were struck whereby the interest was added to the capital and the whole was treated as a new loan. In this case no such arrangement has been proved and we cannot, therefore, hold that these entries, adding interest to the capital made only by the creditor without the consent of the debtor, constituted a new loan. We, therefore, find that the plaintiffs' claim to recover money from defendants Nos. 5 and 6 is barred by limitation, and had become barred on 2nd February 1906, the later payments not reviving it. The next question is whether the plaintiffs are entitled to recover the amounts from defendants Nos. 1 to 4. The plaintiffs' case is that 1st defendant's father, Chokalingam Chetty, was appointed as their agent in May-June 1901, and that he, as their agent, lent a sum of Rs. 10,068-4-6 on their behalf to the defendants Nos. 5 and 6 without the plaintiffs' consent. The debt has been discharged in part and part of it still remains unpaid. When Chockalingam Chetty's connection with the agency ceased in 1906 plaintiffs' new agent, Raman Chetty, insisted that "this debt which was advanced without the plaintiffs' knowledge and in order to oblige debtor, should be excluded from the accounts as an old one uncollected or that the said person should pay it up in cash. Thereupon the plaintiffs and the said Raman Chetty (the new agent) agreed and (thereupon) the said amount was debited as Nadappu account in the name of the A. Rm. A. M. S. shop of the 5th and 6th defendants in the said Raman Chetty's new account on the 29th *Jhai* of *Visvavasu* year (11th February 1906) as for 21st instant (3rd February), showing therein (also) the suretyship of the said Chockalingam Chetty. A letter was also obtained from the said Chockalingam Chetty on the 1st *Masi* of the said *Visvavasu* year (12th February 1906) in the name of the said Raman Chetty in his capacity as agent of the plaintiffs' shop specifying the particulars of the said suretyship." It is not proved in this case that on the date of Chockalingam Chetty's surety-bond the plaintiffs were entitled to recover the account from Chockalingam. The release of a claim or the compromise of a doubtful claim would, no doubt, have been a sufficient consideration for the undertaking by Chockalingam Chetty to pay, but in this case the plaintiffs did not give up their claim against defendants Nos. 5 and 6. The persons who were entitled even after this agreement to recover the money from the defendants Nos. 5 and 6 were the plaintiffs and they have now sued to recover that amount. The money was not advanced to the defendants Nos. 5 and 6 on any guarantee given by the 1st defendant. On the date of Exhibit A the claim against defendants Nos. 5 and 6 was barred by limitation.

We are, therefore, of opinion that the Subordinate Judge is right in holding that there was no consideration.

We, therefore, dismiss the appeal with costs.

Appeal dismissed.

(2) 11 Ind. Cas. 552; 13 Bom. L. R. 482.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 289 OF 1911.

March 31, 1915.

Present:—Mr. Justice D. Chaterjee and Mr. Justice Chapman.

ABDUL GHAFOOR MIAH—DEFENDANT No. 1—APPELLANT

versus

Haji Khundakar ALTAF HOSAIN AND OTHERS—PLAINTIFFS AND OTHERS—DEFENDANTS—RESPONDENTS.

Mutwalli—*Civil Procedure Code (Act V of* 1908), *s.* 92, *scope of reliefs under*—Mutwalli, *appointment of, by founder*—Mutwalli, *when and how can resign* mutwalliship—*Appointment by founder, how far affects original deed of* wakf.

Where the plaintiff does not claim any of the reliefs under section 92 of the Code of Civil Procedure and does not ask the Court to appoint him a *mutwalli*, but only asks to declare that he is the rightful *mutwalli*, and where the defendant is not sued for recovery of possession:

Held, that the suit is incompetent. [p. 424, col. 2.]

A *mutwalli* who is not himself the appropriator cannot renounce and appoint another *mutwalli*. [p. 425, col. 1.]

If the *mutwalli* appointed by the founder says, "I resign my *mutwallishiip*", this declaration has no effect unless it is made in the presence of the

ABDUL GHAFOOR MIA v. ALTAF HOSAIN.

founder or the *Cadi*, who would thereupon remove him. [p. 425, cols. 1 & 2.]

An appointment of *mutwalli* by the founder cannot enure against the express terms of the original deed of *wakf* and must terminate with the life of the *wakif*. [p. 425, col. 2.]

Nawab Khajeh Salimulla Bahadur v. *Abul Khayer Mohammad Mustafa*, 3 Ind. Cas. 419; 11 C. L. J. 304; 37 C. 263; 14 C. W. N. 497, distinguished.

Appeal against the decree of the Subordinate Judge, Murishabad, dated the 27th of May 1911.

Babus *Mohendra Nath Roy* and *Nares Chandra Sinha*, for the Appellant.

Mr. *Z. R. Zahid* and Babu *Hari Bhusan Mukherjee*, for the Respondent.

JUDGMENT.—*Musammat* Atibunnissa and her husband, Hossein Ali, jointly executed a deed of *wakf* on the 4th of *Sravan* 1270. Certain properties mentioned in schedule *ka* to the plaint were the subject of dedication. Under this deed Hossein Ali was to be *mutwalli* for his life and Atibunnissa after him for her life. After their death without children the nearest relative, who was also *dianutdar* or honest, was to succeed as *mutwalli*, but on his death the successor would be not necessarily his heir-at-law but one amongst the near relatives of the dedicators who was *dianutdar*.

Hossein Ali died in 1279 and in 1282 Atibunnessa executed another deed of *wakf* in respect of the properties in schedule *ka* and additional properties in schedule *kha*. This *towliatnama* was revoked and in 1284, 1289, 1291, 1297, she executed different *towliatnamas*, but none of them came into operation and she continued to act as *mutawalli* until 1894, when she executed three documents one after another in favour of Abdul Gafoor, father of defendant No. 1. The first document was dated the 25th March, and relinquished some of the *wakf* properties in favour of Abdul Gafoor. The second document was a *towliatnama* in favour of Abdul Gafoor in respect of *ka* and *kha* properties and the third document was an *ekrarnama*, dated the 27th September, confirming the *towliat*, and agreeing that neither she nor her heirs or representatives would object to the same. In 1899 she applied for permission to sue as a pauper for setting aside the documents of 1894 as procured by fraud and undue influence. The permission was refused and she died in 1905 without bringing any suit. In 1907, Khoka Mia, the father of the plaintiff, brought a regular suit for declaration of his title to the *wakf* properties and recovery of possession. To that suit defendant No. 1 pleaded, saying he was in lawful possession as *mutwalli* under the *towliatnama* of 1894. Khoka died pending suit and the plaintiff and his brothers, defendants Nos. 2 and 3 were brought in as his heirs. The suit was decreed by the first Court, but was dismissed by the High Court on the ground that all the heirs of Khoka Mia could not be *mutwallis*. A fresh suit by the person who would be the *mutwalli* was permitted, and accordingly this suit has been brought.

The pleas of the defendant, amongst other things, were that Khoka Mia was not the step-brother of Atibunnissa and that the suit was barred by limitation.

The first Court decreed the suit in respect of the properties in schedule *ka*, holding that Khoka was the step-brother of Atibunnissa and that the suit was not barred by limitation.

Defendant No. 1 appeals and on his behalf it has been argued (1) that the suit is incompetent as not in compliance with the provisions of section 92 of the Civil Procedure, Code, (2) that Khoka Mia is not proved to be the step-brother of the *wakif*, Atibunnissa, (3) that the suit is barred by limitation.

As regards the *first* point, it was not taken in the Court below, and even if it had been taken, the plaintiff does not claim any of the reliefs under section 92. He does not ask the Court to appoint him a *mutwalli* but to declare that he is the rightful *mutwalli* and that defendant is not, and for recovery of possession.

As regards the *second* point, we agree with the learned Subordinate Judge that Khoka Mia was the son of Naziruddin and the step-brother of Atibunnissa. We are not prepared to believe the document called *shafeenama* as a genuine document. It never saw the light of day before it was produced in this case; the entry of its being filed in a previous case is suspicious. In any case it was not filed in the previous suits of Khoka Mia in which it would have been very cogent evidence. Nor are we very much pressed by the application made by Hossein Ali and Dost Ali ignoring its existence, or by the petition of Atibunnissa

for drawing the pension of her father. Khoka was admittedly illiterate and Hossein Ali and Dost Ali were influential men. They succeeded in keeping him in the background as if he were nobody. It is proved, however, by the evidence of respectable relatives that he and his family lived in the family residence at Shahpore, until in consequence of an open rupture he had to leave the place. The most potent evidence, however, in his favour is the *kobala* executed in his favour by Atibunnessa Bibi on the same date on which she executed the *wakfnama* of 1282. The two documents are executed on the same date, attested by many of the same witnesses and registered by the same *am-mukhtar*, this *kobala* describing Khoka as the son of Khondkar Naziruddin. There is no explanation why he was so described and why the relative witnesses attested the document containing such a description. There is a rent-decree which described Khoka as the son of Moyez, but assuming that the same person is meant, this was after the rupture and even then it is not made out that he was so described to the knowledge of Atibunnissa. It is quite possible, as is suggested at the Bar, that his mother was not of the same rank with the father and he was not, therefore, looked upon as the equal of Atibunnissa, but there is no evidence of that even and the admission of Atibunnissa cannot be got over.

The *next* question is limitation. It is contended that as Abdul Gafoor was put in possession under the *towliatnama* of 1894, his possession became adverse from that time or at all events from July 1898 when, according to the application of Atibunnissa for permission to sue as a pauper, he set up a title in denial of her rights.

It is said that a *mutwalli* cannot renounce and appoint another *mutwalli*. That may be so in respect of a *mutwalli* who is not himself the appropriator. Atibunnissa in the *towliatnama* of 1894 expressly says that she was acting in her double capacity. She renounced in her capacity of *mutwalli*, but appointed Gafoor in her capacity of the *wakif*. It is laid down in the Kunyah: "If the *mutwalli* appointed by the founder says, 'I resign my *mutwallishíp*' this declaration has no effect unless the declaration is made in the presence of the founder or the *Cadi*, who would thereupon remove him:" Fatawa Mahdiya, Volume II, page 575, quoted in *Nawab Khajeh Salimulla Bahadur* v. *Abdul Khayer Mohammad Mustafa* (1). Here the founder herself made the renouncement to herself and made the appointment herself; such an appointment by the founder is quite distinguishable from an appointment by one *mutwalli* of another without the intervention of the founder or the *Cadi*. This appointment, however, cannot enure against the express terms of the original deed of *wakf*, and must terminate with the life of the *wakif*. This case is, therefore, clearly distinguishable from the case of *Nawab Khajeh Salimulla Bahadur* v. *Abdul Khayer Mohammad Mustafa* (1).

So far as the *wakf* of 1270 was concerned, *i.e.*, in respect of the *ka* properties, the vacancy occured on the death of Atibunnissa in 1905 and the plaintiff was quite within time in 1910.

As found by the learned Subordinate Judge the plaintiff is quite eligible for the post of *mutwalli* and his brothers do not compete with him.

We, therefore, agree with the learned Subordinate Judge and dismiss the appeal with costs. Hearing fee Rs. 150.

Appeal dismissed.

(1) 3 Ind. Cas. 419; 11 C. L. J. 304; 37 C. 263; 14 C. W. N. 497.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1009 OF 1913.

May 20, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

MUNNA LAL—DEFENDANT—APPELLANT

versus

KALIKA BAKHSH SINGH AND OTHERS—PLAINTIFFS AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Wajib-ul-arz—*Rights* inter se—*Construction*—Ek-jaddi *co-sharer*—*Preferential right.*

Where a *wajib-ul-arz* provided: "The right of purchase of the price, which a stranger may give, shall be prior in favour of the *ek-jaddi* co-sharer, after that with the co-sharers in the *mahal*, after they refuse the property may be sold to a stranger":

MUNNA LAL *v.* KALIKA BAKHSH SINGH.

Held, that the *ek-jaddi* co-sharer had a preferential claim over a co-sharer in a the *mahal*. [p. 426, col. 1.]

Gurdial v. *Mathura Singh*, 6 Ind. Cas. 920; 7 A. L. J. 610, referred to.

Second appeal from a decision of the Sessions and Subordinate Judge of Jaunpur, dated the 28th of May 1913.

The Hon'ble Mr. *Gokul Prasad*, for the Appellant.

Mr. *Haribans Sahai*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption. The plaintiff has been found to be an *ek-jaddi* co-sharer with the vendor. We may assume, (although it was not admitted in the Court below) that the defendant-vendee is a co-sharer in the *mahal* but not *ek-jaddi*. The defendant pleaded, amongst other pleas' that the right of pre-emption only arose in the case of a sale to a stranger and that in any event the sale had taken place after the plaintiff had refused to purchase. The Court below has decided against the defendant, hence the present appeal.

In the entry in the *wajib-ul-arz* a number of words are left to be understood. The meaning, however, seems to be pretty clear. It may be literally translated as follows:—

"The right of purchase at the price which a stranger may give shall be prior (in favour of) the *ek-jaddi* co-sharer, after that with the co-sharers in the *mahal*, after they refuse the property may be sold to a stranger." The only reason for holding that this limits the right of pre-emption to a case where the property is sold to a stranger, is the introduction of the words "at the price which the stranger may give". The clause appears to us to be very similar to the clause in the *wajib-ul-arz* referred to in the case of *Gurdial* v. *Mathura Singh* (1). In that case the *wajib-ul-arz* extract was translated as follows:—

"If any co-sharer should wish to sell or mortgage his property, then first he shall transfer it to a co-sharer in the *patti* and after that to other *pattidars* of the *mahal* and after that to the owners of the other *mahals* and in case of their refusal, he is at liberty to transfer it to an outsider at the same price as a stranger would be willing to give". In this case it was held that the words "at the price a stranger would be willing to give" were introduced for the purpose of regulating the price. It seems to us that where the custom, (as proved by the record in the *wajib-ul-arz*) is that the co-sharer desirous of selling his property must first offer it to his co-sharer in the *patti* and after him to other co-sharers and that if they refuse he can sell to a stranger, it can hardly be said that a co-sharer who has sold to a stranger after he has offered to sell to the persons entitled one after the other according to the priority of their right, has violated the custom merely because he has not concluded his bargain with the stranger before he made the offer. Of course the offer must be a *bona fide* offer and if the persons having a right of pre-emption wanted to know the price or any other particular, they would be entitled to be informed. We need hardly say that the vendor would not be entitled to sell the property for a less price than the price he mentioned to the pre-emptors.

It is contended on behalf of the defendant that in the present case the vendor offered the property to the plaintiff before the sale-deed was executed and that the plaintiff refused to purchase. It is contended that the Court below in finding this issue against him had in its mind that it was necessary that the whole contract should have been communicated to the plaintiff, and that his (the plaintiff's) refusal to purchase was of no consequence until the entire contract was so communicated. This no doubt might have been the view taken by the Court below. We have, therefore looked at the evidence of the witnesses on this part of the case. The vendee said that when he had arranged to buy, he told the vendor to call the other co-sharers including the plaintiff, that they were called and that he asked them if there would be any dispute about the property, that they said "no," that he might have that sale-deed executed. Another witness stated that he and some of the other co-sharers happened to be passing by the place where the vendee spread his bricks, that they went over when the vendee called them and they were informed about the sale and that they said they did not want to purchase,

(1) 6 Ind. Cas. 920; 7 A. L. J. 610;

It is quite clear that the Court below disbelieved this evidence and did not decide the issue merely on the ground that the price had not been fixed. The two witnesses, it is to be observed, do not tell quite the same story. We must consider the finding of the Court below to be a finding of fact that the plaintiff did not refuse to purchase the property. In this view the appeal fails and is dismissed with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 120 OF 1914-15 OF BUDAUN DISTRICT.

May 25, 1915.

Present:—Mr. Holms, S. M., and Mr. Campbell, J. M.

DORI SINGH—PLAINTIFF—APPELLANT

versus

LOCHAN—DEFENDANT—RESPONDENT.

Tenant goes away on pilgrimage—Cousin cultivates and manages holding—Tenant does not return—Presumption of death—Co-sharing explained—Co-sharing possible, though tenant absent.

An occupancy tenant went away on a pilgrimage after arranging with his cousin for the cultivation of his holding and the payment of rent. During the absence of the tenant the cousin collected rent for the portion held in sub-tenancy and cultivated the remainder of the holding himself:

Held, that these facts amounted to a sharing with the tenant (though he was not present in the village), whose death must be presumed after a lapse of seven years from his leaving the village.

Sharing does not necessarily imply cultivation by two or more persons.

Second appeal from an order of the Commissioner, Rohilkhand Division, dated the 30th November 1914, reversing that of the Assistant Collector of Budaun District in a case of ejectment.

JUDGMENT.

CAMPBELL, J. M.—Only one point is argued. The facts of the case are fairly clear. The name of Tara Chand was recorded as occupancy tenant up to 1314 *Fasli*, in which year he was recorded as *mafkudul-k'abar*, and his cousin, Lochan, as in possession. About a couple of years ago, the *patwari* struck out Tara Chand's name altogether as he had

heard that he had died. As Tara Chand, when he went off on pilgrimage, had arranged for his cousin, Lochan, to carry on the cultivation, the *patwari* should not have entered him as *mafkudul-khabar* under the rules. There was no presumption of death until Tara Chand had not been heard of for seven years. The only question for decision is:—Did Lochan, the defendant, share in the cultivation of the holding at the time when Tara Chand was presumed to have died? It is clear that during Tara Chand's absence Lochan undertook the whole management of the holding, collected rent for the portion held in sub-tenancy, and cultivated the remainder of the holding himself. The appellant's point is that, as Tara Chand in his absence had nothing to do with the cultivation of the holding, there could be no sharing which implies cultivation by two or more persons. This is a somewhat narrow and distinctly inequitable view to take. I am inclined to think that a share means any share up to the entire cultivation of the holding.

I agree then with the Commissioner's view and dismiss the appeal with costs.

HOLMS, S. M.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2359 OF 1912.

March 29, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Seshagiri Aiyar.

SANKARAN NAIR—DEFENDANT No. 3—APPELLANT

versus

K. K. KOCHAPPU MENON AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1, 2, 4 AND 5—RESPONDENTS.

Anubhavam *tenure—Denial of landlord's title, whether works forfeiture of tenancy.*

Where land is held on *anubhavam* tenure, the denial of the landlord's title not directly addressed to the landlord does not work a forfeiture of the tenancy. [p. 429, col. 1.]

Thikkillath Tarawad Karnavan v. *Vadakka Chattibikath Manchu Nair*, 27 Ind. Cas. 863; 2 L. W. 102;

Abbakka Shethi v. *Seshamma*, 25 Ind. Cas. 944; (1914) M. W. N. 915; 16 M. L. T. 442, followed.

Second appeal against the decree of the Court of the Subordinate Judge of South Malabar at Calicut, in Appeal Suit No. 329 of 1911, preferred against that of the District Munsif of Chowghat, in Original Suit No. 42 of 1910.

FACTS.—The plaintiff, a *jenmi*, sued to evict the defendant from the plaint holding which had been granted so far back as 1814 by a predecessor of the plaintiff to an ancestor of the defendant on a service tenure, known as *anubhavam* in Malabar. The cause of action alleged was the denial of the plaintiff's *jenmi title by the defendant in a recent mortgage deed.* The lower Court held that it was forfeited by the said denial of title, and decreed the plaintiff's suit. The defendant preferred this appeal to the High Court.

Mr. K. P. M. Menon, for the Appellant, contended that the tenure was similar to the *adima jenm* of Malabar, and was not forfeited unless the stipulated services were discontinued or their performance refused inspite of notice. See Malabar Gazetteer, Volume I, page 307, and *Thikkillath Tarawad Karnavan* v. *Vadakka Chattibikath Manchu Nair* (1). Denial of title did not entail forfeiture in such cases. The English doctrine of forfeiture embodied in section 111, Transfer of Property Act, was inapplicable to tenures created before the passing of that Act. See *Abbakka Shethi* v. *Seshamma* (2).

Mr. C. V. Ananthakrishna Aiyar, for the Respondents:—The tenure was not the same as *adima jenm* but was only a species of *saswatham* which would be forfeited on denial of title like any other ordinary permanent lease. See Moore's Malabar Law, pages 308, 309. The decided cases showed that non performance of service was not the only ground on which forfeiture could be effected.

This second appeal coming on for hearing on the 10th March 1914, the Court delivered the following

JUDGMENT.—The lower Appellate Court says in paragraph 12 of its judgment that under Exhibit I, Chathunni's right was coupled with an obligation to perform certain services. But we do not find in Exhibit I, which was produced in a mutilated condition, any such obligation imposed. In Exhibit B produced by the 5th defendant, as a copy of Exhibit I in its unmutilated state, such a condition appears, but the District Munsif has given *prima facie* good grounds for treating it with suspicion. The Subordinate Judge has not referred to Exhibit B at all.

Before disposing of this second appeal, we think it necessary to obtain definite findings from the lower Appellate Court on the following issues:

1. Is Exhibit B a true copy of the original deed, Exhibit I, in its unmutilated condition? Were any conditions attached to the *anubhavam* grant made under Exhibit I? (In coming to a conclusion on this question, the lower Appellate Court will also consider whether there is any explanation for the use of the word *adima* in the course of the recitals in Exhibits II and XI).

2. Was any rent paid or service rendered to the 5th defendant's family by the original grantees and their descendants and their alienees at any time after date of Exhibit II, and when were such services or payments of rent discontinued? (This issue will arise only if on the 1st issue, it is decided that there were such services to be rendered or rent payable).

Fresh evidence may be adduced on both sides except as regards the genuineness of Exhibit B. The findings should be submitted within four months from date of receipt of records by the lower Appellate Court and ten days will be allowed for filing objections.

In compliance with the above order the Subordinate Judge of South Malabar at Calicut submitted the following

FINDINGS.—I have been directed by the High Court to submit findings on the following issues:

"1. Is Exhibit B a true copy of the original deed, Exhibit I, in its unmutilated condition; were any conditions attached to the *anubhavam* grant made under Exhibit I?

"2. Was any rent paid or service rendered to the 5th defendant's family by the

(1) 27 Ind. Cas. 863: 2 L. W. 102

(2) 25 Ind. Cas 944; 16 M. L. T. 442; (1914) M. W. N. 915.

original grantees and their descendants and their alienees at any time after date of Exhibit II, and when were such services or payments of rent discontinued ?"

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5. According to the plaintiff, the conditions were payment of 1 *fanam* and 1 bunch of plantains in the shape of rent, and the rendering of some service on occasions of marriages and deaths in the grantor's family. There is no evidence that any service was at any time rendered. As to the payment, there is the evidence of the 1st defendant (plaintiff's 1st witness), and of the 5th defendant (defendants' 3rd witness). The former states that he and his father paid rent up to 1067. This statement, which was made in examination-in-chief, was withdrawn by him in cross-examination as being incorrect. The 5th defendant speaks to having received rent from the 2nd defendant from 1067 up to 1075. This is denied by the 2nd defendant. In these circumstances the evidence of the 1st defendant and the 5th defendant cannot be considered to be trustworthy. I find the 2nd issue in the negative.

This second appeal coming on this day for final hearing on receipt of the findings of the lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the findings of the learned Subordinate Judge.

As the Munsif points out (and it was in fact admitted before him), this suit is based solely on the alleged forfeiture of the defendant's tenancy on account of his denial of the landlord's title.

Following *Thikkillath Tarawad Karnavan* v. *Vadakka Chattibikath Manchu Nair* (1) and *Abbakka Shetthi* v. *Seshamma* (2), we hold that the acts of the 3rd defendant relied on in the plaint have not worked a forfeiture of the tenancy as alleged.

The lower Appellate Court's decree is set aside and that of the Munsif restored with costs in all Courts on plaintiff.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 51 AND 121 OF 1910 AND 120 AND 183 OF 1911.

July 8, 1913.

Present:—Mr. Justice Chitty and Mr. Justice Teunon.

IN NOS. 51 & 121 OF 1910

JAGANNATH MARWARI—PLAINTIFF—APPELLANT

versus

Raj Kumar Thakur GIRIDHARI SINGHA AND OTHERS—DEFENDANTS—RESPONDENTS.

IN NOS. 120 & 183 OF 1911.

BISWA NATH GORAI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SURENDRA MOHAN GHOSE AND OTHERS—DEFENDANTS—RESPONDENTS.

Manbhum Kismats, *nature of, guided by the rule of primogeniture—Maintenance grants to younger branches of family*—Khorposhdar, *interest of, limited*—*Leases, liability to pay rent under*—*Sub-soil rights*—Khorposh *grants, heritable, when determinable*—*Title-deed, forged, effect of.*

In the Nawagarh *zemindari* in Manbhum, Chota Nagpur, *kismats* descend, by the rule of primogeniture, on the eldest sons, maintenance grants being made to the younger branches of the family. Each *kismat* is, to all intents and purposes, regarded as an impartible estate. [p. 432, col. 2.]

The interest of a *khorposhdar*, though more than an interest for one life, is nevertheless a limited interest, liable to be defeated at any time by the failure of heirs, and, therefore, resumable by the proprietor for the time being. [p. 433, col. 1.]

Where the plaintiff's lessors have no title whatever to the sub-soil and are thus incapable of conferring such a title on the plaintiff, he cannot get possession of the land demised in any form. [p. 433, col. 2.]

Moneys paid by compulsion of legal proceedings, cannot be recovered even if paid within the period of limitation. [p. 434, col. 1.]

Marriott v. *Hampton*, 7 T. R. 269; 2 Esp. 546; 4 R. R. 439; 101 E. R. 969; 2 Sm. L. L. C. 421, followed.

Khorposh grants are heritable in the male line and determinable only on the failure of male heirs. [p. 432, col. 2.]

Where it was found that the leases to the plaintiff were only of sub-soil rights, the surface rights being expressly reserved to the lessors:

Held, that the leases conveyed nothing whatever to the plaintiff. [p. 434, col. 2.]

Where it is found that the title-deed on which the plaintiff's suit is based is a forgery:

Held, that the plaintiff's suit must necessarily fail. [p. 435, col. 1.]

Appeals against the decrees of the Subordinate Judge of Manbhum, dated the 15th of December 1910.

JAGANNATH MARWARI *v.* GIRIDHARI SINGHA.

IN NOS. 120 and 183.

Mr. *B. Chakravarti*, Babus *Gopal Chandra Sarkar*, *Sarat Chandra Dutt* and *Rishendra Nath Sirkar*, for the Appellants.

Dr. *Rash Behari Ghose*, Babus *Umakali Mukherjee*, *Dwarka Nath Chakravarti*, *Mohendra Nath Roy*, *Bepin Behari Ghose*, *Biraj Mohan Mazumdar*, *Bankim Chandra Mukherjee*, *Ramani Mohan Chatterjee*, *Lalit Mohan Ghose*, *Suresh Chandra Dass*, *Karunamoy Ghose*, *Srish Chandra Dey* and *Sarat Chandra Bose*, for the Respondents.

IN NO. 51

Babu *Surendra Nath Ghosal*, for the Appellant.

Babus *Dwarka Nath Chakravarti*, *Bepin Behari Ghose*, *Bankim Chandra Mukherjee*, *Ramani Mohan Chatterjee* and *Ramesh Chandra Sen*, for the Respondents.

IN NO. 121.

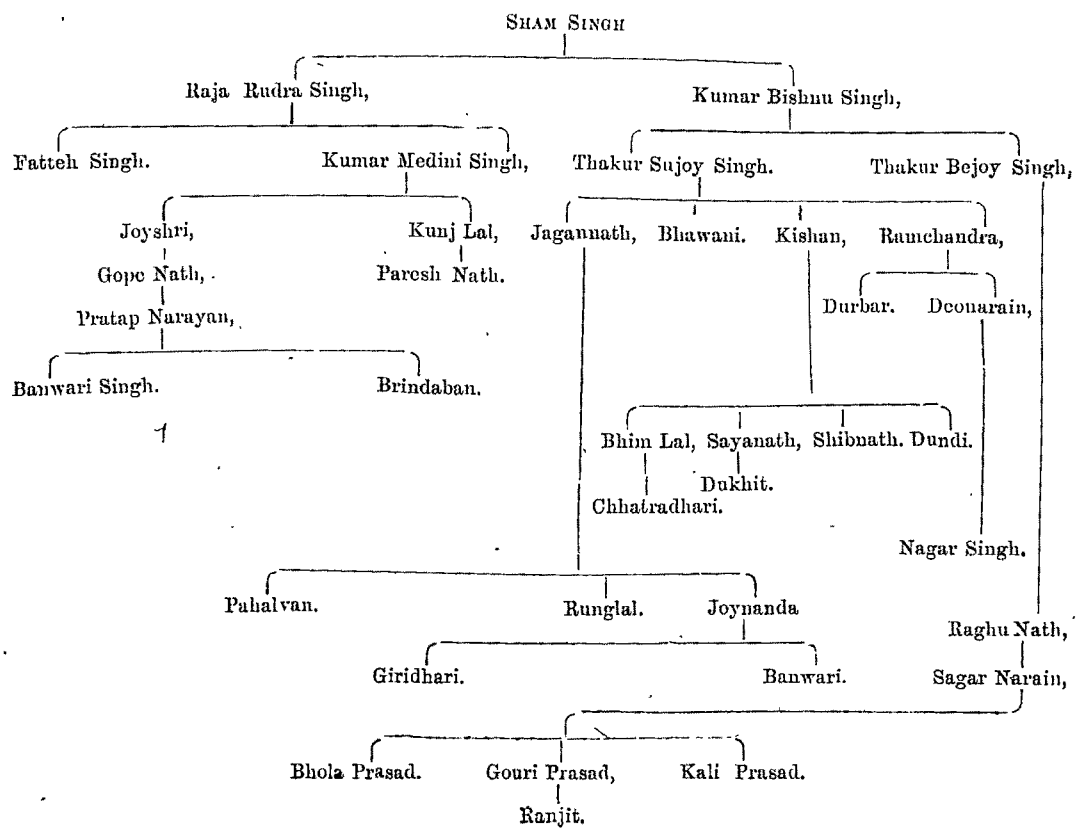
Babu *Surendra Nath Ghosal*, for the Appellant.

Babus *Ramani Mohan Chatterjee* and *Ramesh Chandra Sen*, for the Respondents.

JUDGMENT.

IN APPEALS NOS. 120 AND 183 OF 1911.

The two suits out of which these two appeals arise (Suits Nos. 331 and 332 of 1909) relate to 650 *bighas* of coal lands in *Mouza* Barora appertaining to *Pergannah* Nawagarh, *Kismat* No. 3. The *zemindari* Nawagarh, *Kismat* No. 3, belongs to Giridhari Singh Thakur, defendant No. 5, he having succeeded to that estate as the eldest son of Joy Nandan Singh Thakur. It appears that many years ago *Pergannah* Nawagarh was divided into four *kismats*, each of which formed a separate estate, and each of which appears to have descended, according to the rule of primogeniture, on the eldest sons. The accompanying genealogical table will show the relation-



ships in the family of the *zemindars*. The family is governed by the *Mitkashara* School of Hindu Law. 8 annas of *Mouza* Barora was vested in Chhatradhari Singh, Nagar Singh, Dukhit Singh and Amrita Kumari as *kho-poshdars*. What their precise interests in the land were, we will discuss later. By a *mourusi mokarari patta*, dated 23rd March 1895, these four persons settled the sub-soil rights in 500 *bighas* of land comprised in the 8 annas share of *Mouza* Barora with Surendra Mohan Ghose, defendant No. 1, and by a similar *patta* of even date, they settled another 150 *bighas* comprised in the same 8 anna share of the *mouza* with defendant No. 2, Jogmaya Debi, wife of Nilmadhab Bajpai. By a lease dated 19th May 1901, the defendant No. 1 made a *dar-mokarari* settlement of the sub-soil rights in the 500 *bighas* with defendant No. 36, Dina Nath Gorain, and, by a similar lease dated 14th January 1901, the defendant No. 2 made a *dar-mokarari* settlement of the sub-soil rights in the 50 *bighas* with the same person. In the *mourusi mokarari pattas*, the property is described as "our long-possessed 8 annas share in *Mouza* Barora". The *salamis* paid by the defendants Nos. 1 and 2 were Rs. 1,250 and Rs. 312-8-0 respectively, the rents for the 500 and 150 *bighas* being Rs. 562-8-0 and Rs. 140-10-0. By his *dar-mokarari patta* the defendant No. 1 took from Dina Nath Gorain a *salami* of Rs. 6,500, reserving an annual rent of Rs. 3,000, while the defendant No. 2 by her *dar-mokarari patta* took a *salami* of Rs. 1,800 and reserved an annual rent of Rs. 900. The *salamis* under the *dar-mokarari pattas* were duly paid; but it does not appear that the lessee even received actual possession of any of the lands demised. Plaintiffs claim to be entitled to the benefits of these *dar-mokarari pattas* as members of the Gorain family, Dinanath having taken the leases and paid the *salami* as *benamidar* of the whole family. This is not now disputed and the Gorain family is here represented by the plaintiffs on the one side and defendant No. 36 and the sons of defendant No. 37 on the other. On 29th December 1895, Giridhari Singh, defendant No. 5, purported to execute in favour of defendant No. 1 a *chhar sanad*, admitting all terms of the *patta* which had been granted in favour of defendant No. 1 in respect of the 500 *bighas* of land. For this he received Rs. 500; on the following day, 30th December 1895, he executed a deed of release in favour of Nagar Singh, Chhatradhari Singh, Dukhit Singh and Amrita Kumari, whereby he purported to release to them the absolute right in 8 annas of *Mouza* Barora, stating that it was their "ancestral *lakhiraj matratran* property." On 15th April 1902, defendant No. 5 executed a *mourusi mokarari patta* in favour of his eldest son, Ram Bahadur Singh, defendant No. 6, of the surface and sub-soil rights of the whole *Mouza* Barora; and the defendant No. 6 thereupon, by several leases, let out the underground rights to different persons; among others, he made a lease in favour of defendant No. 35 of 919 *bighas*. That lease is dated 28th January 1908 and was given in the name of Gopi Nath Gorain, the eldest son of Nanda Lal. Among other persons claiming to be lessees of this property was Jagannath Marwari, defendant No. 34, who brought two suits which are the subjects of appeals Nos. 51 and 121 of 1910 with which we shall presently deal. It should be stated that, though the total area leased out to the Gorains was said to be 650 *bighas*, the entire area of Barora, as measured, is only 1,113 *bighas*, so that, in any case, the plaintiffs would not be entitled to the sub-soil rights in more than 556½ *bighas*. As defendant No. 5 and also defendant No. 35 had, according to the plaintiffs, infringed their rights, the plaintiffs brought these two suits to have it declared that they were entitled to a 10-anna 5-*gunda* share in the 650 *bighas* of *Mouza* Barora and that possession might be given to them by demarcation by metes and bounds jointly with the defendant No. 35. They asked, in the alternative, that, if it were found that the defendants Nos. 1 and 2 had no title to the sub-soil beneath any portion of the 650 *bighas*, a decree might be passed for reduction of the rent in proportion to the area to which they might be found to have no title and for a refund of a proportionate amount of the *salami*. They claimed *khas* possession of such of the lands as might fall to their share and asked for mesne profits. As a further alternative, they asked that if it were found that defendants Nos. 1 and 2 had no title whatever to the sub-soil in the 650 *bighas*, a decree might be passed against defendants Nos. 1 and 2 for a return of the *salami* which they (plaintiffs) had paid and any rent which had been recovered

against them, such amounts to be refunded with interest.

On the suits coming on for hearing, the learned Subordinate Judge found that the lessors of defendants Nos. 1 and 2 were *khorposhdars* of the property, that they held under a maintenance grant made to their ancestor Kumar Bishnu Singh, such grant being heritable in the male line and determinable only with the failure of male issue. He decided, however, that the defendant No. 5 was estopped from denying the right of defendants Nos. 1 and 2 and the plaintiffs as conferred by the leases in question. He accordingly decided that the plaintiffs were entitled to a decree for partition of the sub-soil of *Mouza* Barora and separate possession of the coal lands falling to their shares. The decrees, in the form in which they have been passed, cannot be supported and, moreover, are not acceptable to any of the parties except defendants Nos. 1 and 2. The plaintiffs have appealed and their appeal is supported by the other members of the Gorain family, who are represented by defendant No. 36 and the sons of defendant No. 37. The respondents, who oppose the appeal, are defendants Nos. 1 and 2 who are anxious to have the decrees of the Subordinate Judge in these two cases maintained. There is, third party in this case who may be described as the Mahato defendants. They are in possession by virtue of certain leases and if no relief is given to the plaintiffs by way of possession they do not desire to contest the matter. If, however, the plaintiffs are given anything by way of possession, the Mahato defendants object, and desire to press the cross-objections which they have filed.

In this Court the plaintiffs have maintained that the decrees of the Subordinate Judge are based on a wrong assumption of law and, to some extent, of fact. They, therefore, now desire to give up their claim for possession of the coal lands in *Mouza* Barora and to fall back upon their alternative claim for a return of the *salami* and the rents which they have paid to defendants Nos. 1 and 2.

The first question to be considered is, what were the precise rights of Nagar Singh, Chhatradhari Singh, Dukhit Singh, and Amrita Kumari in the lands which they purported to lease out to defendants Nos. 1 and 2? The evidence on this point is somewhat meagre, but we think that it is sufficiently clear that the several *kismats* of Nawagarh descended, by the rule of primogeniture, on the eldest sons, maintenance grants being made to the younger branches of the family. Each *kismat* was, to all intents and purposes, regarded as an impartible estate. *Kismat* No. III, for instance, has descended to the eldest sons since the time of Bishnu Singh on no less than four occasions; and Giridhari Singh, defendant No. 5, now holds it on those terms. With regard to the character of the *khorposh* grants, we think that the learned Subordinate Judge has correctly found that these grants were made for the maintenance of the junior branches and were heritable in the male line and ended only with the failure of male heirs. Though Nagar Singh in his evidence has declined to admit it, there can be no doubt that that is the nature of the grant. We have an instance of resumption on the death of Bhowani Singh, the great uncle of Giridhari, without heirs. There is one instance of a *sanad* granted to Nagar Singh by Giridhari Singh on 19th March 1868. That merely states that the grantor executes the *khorposh sanad* to the grantee, his sons and grandsons, *moghali* rent of Re. 1 having been paid in respect of a 4-anna share in *Mouza* Barora thus granted. The most important document in this connection is Exhibit D9, a decree in Suit No. 62 of 1852 dated 24th July 1852. From that the history of these *khorposh* grants clearly appears. There are other documents (Exhibit D to D3 & D5 to D7) also indicating the nature of these grants. These purport to be sales but are rather leases of *khorposh* lands, two by Nagar Singh and five by Bhimlal Singh to the Mahatos, and were executed on various dates from 4th December 1867 to 2nd April 1876. They were clearly granted for purposes of cultivation, and in several of them that is expressly stated. We must hold on the evidence before us that these *khorposh* grants were to the grantee and his descendants in the male line, terminable with the failure of such descendants. That the *khorposhdars* did not possess the sub-soil rights in the lands granted to them is conceded by all the parties other than defendants Nos. 1 and 2, and they did not very strenuously contest the point. The interest of a *khorposhdar*

though more than an interest for one life was nevertheless a limited interest, liable to be defeated at any time by the failure of heirs, and thereupon resumable by the proprietor for the time being. This would not be an interest sufficient to carry with it the sub-soil rights. We hold, therefore, that Nagar Singh and his co-sharers had no right to make the settlements of the sub-soil rights with defendants Nos. 1 and 2, which they purported to make.

For defendants Nos. 1 and 2 it was argued, *first*, that the plaintiffs having been granted decrees could not prefer these appeals against them. There is, however, no provision of law to prevent them. It was open to them, as they had claimed alternative reliefs, to say that the relief granted was not in accordance with law and that they would prefer the other. It is of the less importance in this case, as there are cross-objections by the Gorain defendants in which the whole matter would be open to review. Moreover, Order XLI, rule 33, confers on the Appellate Court the power to pass such decree as ought to have been passed or to pass such further or other decree as the case may require.

The *next* argument for defendants Nos. 1 and 2 was that defendant No. 5 was in some way estopped from disputing the title which Nagar Singh and his co-sharers had purported to confer on defendants Nos. 1 and 2. It was said that the *chhar sanad* of 29th December 1895 and the releases of the following day debarred him. No question, however, of estoppel really arises as between the plaintiffs and defendant No. 5. The sole question is: had Nagar Singh and his co-sharers a title to the sub-soil rights in 8 annas of *Mouza* Barora as *khorposhdars* or otherwise, which they could pass on to defendants Nos. 1 and 2? As *khorposhdars* they clearly had no such title. The *chhar sanad* and releases could not perfect any such title in them, for the simple reason that from 20th November 1876 until 1st July 1901 the estate of Giridhari Singh was being managed for him under the Chota Nagpur Encumbered Estates Act, VI of 1876. By section 3 of that Act during the period mentioned and, therefore, at the date of the deeds in question, Giridhari Singh was wholly incompetent to make any such disposition of his property. It was not a case of a merely voidable agreement as the Subordinate Judge appears to think. The *chhar sanad* does not purport to effect an alienation, but as an admission it could not in any way bind the estate to that end. The learned Pleader for defendants Nos. 1 and 2 laid much stress on the letters, Exhibits A15, A13, and A14 said to have been written by Giridhari Singh to defendant No. 1 on 3rd and 22nd February and 10th March 1902. The Subordinate Judge has found these letters to be genuine. We have doubts as to the correctness of that finding, but even if they be genuine in the sense that Giridhari Singh wrote or had them written, they do not carry the case much further. They were evidently written with a purpose to make out that he, at any rate, was not putting obstacles in the way of the Gorains getting possession. As an assertion of that fact they are palpably false, as the other evidence shows. It follows then that the plaintiffs' lessors having had no title whatever to the sub-soil and being incapable of conferring such a title on the plaintiffs, the suit so far as it claimed possession in any form must necessarily fail. We have then to consider the alternative claim for refund of the *salami* and the rents paid. They do not stand on precisely the same footing. So far as the refund of *salami* is concerned, the plaintiffs' claim is, in our opinion, barred by limitation. This is not a case of there having been a consideration for the contract which afterwards failed. If it were, Article 97 of Schedule II of the Limitation Act, 1877, would apply and the period would be three years from the date when the consideration failed. Here there was never any title in defendants Nos. 1 and 2 and the plaintiffs were never put in possession. There was never any consideration at all for the contract. In that view of the case the Article applicable is Article 62 and the period is three years from the dates when the money was paid, *i.e.*, on 19th May 1901 and 14th January 1901 respectively. As these suits were not filed until 13th August 1901, the claim for refund of the *salami* is clearly barred. The claim for refund of the rents paid appears to us to be equally unsustainable though on somewhat different grounds. It appears that in respect of the 500 *bighas* three suits were filed against the

plaintiffs and their co-sharers by defendant No. 1 and decrees obtained on 18th March 1905 for rent for 1309 and 1310, on 12th September 1906 for rent for 1311 and 1312 and on 15th January 1909 for rent for 1313 and 1314. In the case of the first decree the claim is barred by limitation. The other two are within three years before suit filed. Similarly in respect of the 150 *bighas* defendant No. 2 filed two Suits No. 27 of 1905 and No. 32 of 1907 and obtained decrees. These amounts, even if paid within the period of limitation, cannot be recovered, being moneys paid by compulsion of legal proceedings. The principle laid down in *Marriott* v. *Hampton* (1) is applicable to this country. The plaintiffs had an opportunity of reasoning this question in those suits, and not having done so they cannot successfully maintain this action for refund on the very same ground. Moreover, the facts of the case point to the conclusion that defendants Nos. 1 and 2 were fully aware of their lessors' want of title, and entered into the leases with their eyes open.

The result is that except for a declaration that they are no longer liable to pay rent under the leases of 19th May 1901 and 14th January 1901 to defendants Nos. 1 and 2 respectively, the plaintiffs' suit must fail. We accordingly modify the decree of the Subordinate Judge and confine it to the declaration just mentioned. The cross-objections both of the Gorains and of the Mahatos have become unnecessary and are dismissed. Under the circumstances we leave the several parties to bear their own costs in both the Courts.

IN APPEAL No. 51 OF 1910

This appeal arises out of Suit No. 365 of 1908 which was decided by the Subordinate Judge of Purulia just a year before he decided Suits Nos. 331 and 332 of 1909, with which we have dealt in Appeals Nos. 120 and 183 of 1911. The plaintiff in this suit, which has been dismissed by the Subordinate Judge, is Jagannath Marwari, defendant No. 34 in the two later suits. He filed this suit to establish his title to and recover possession of the sub-soil rights in 500 *bighas* out of a moiety of *Mouza* Barora by virtue of two leases for 551 years executed in his favour, one on 24th September 1904 by Nagoar Singh and the other on 2nd December 1904 by Chhatradhari Singh, each for 250 *bighas*. The plaintiff in this case further claimed under a lease for 999 years, dated 17th February 1908 and granted to him by defendants Nos. 19 to 21, the successors-in-interest of Bhagi Mahato, who, the plaintiff alleged, had on 27th May 1884 purchased from Nagaor Singh a one-anna share of the said *mouza* and certain land called "Dhab". The Subordinate Judge in this case held that Nagaor Singh and Chatradhari had no right to the sub-soil in *Mouza* Barora; that they were *khorposhdars*, the grants for maintenance being tenable for the life of the grantee only, and that the plaintiff had accordingly taken nothing by the *pattas* of 1904 or 1908. The suit was dismissed and the plaintiff has appealed. In order to avoid the expense and trouble of printing a number of papers and a mass of evidence, the plaintiff applied to this Court to dispense with such printing and obtained an order to that effect on his undertaking to accept and be bound by the findings of fact of the Subordinate Judge. The appeal has proceeded on that footing.

This appeal is analogous to Appeals Nos. 120 and 183 of 1911 and this judgment should be read with reference to our judgment in those appeals.

It was argued for the appellant that the findings should at least be consistent in all the cases. The same Subordinate Judge has in this suit held that the *khorposh* grants were only for the lives of the grantees. In the other two suits he held that they were heritable in the male line and determinable only on the failure of male heirs. The second view is, in our opinion, the correct one. It does not materially affect this case, inasmuch as in neither view would the *khorposhdars* possess the sub-soil rights or have the power to alienate them. Then it was urged that Nagaor Singh and Chhattradhari both being alive at the date of suit, the suit could not be dismissed as regards their interest. The leases to the plaintiff, however, were only of sub-soil rights, the surface rights being expressly reserved to lessors. The leases, therefore, conveyed nothing whatever to the plaintiff. For the reasons given in our other judgment no ques

(1) 7 T. R. 269; 2 Esp. 546; 4 R. R. 439; 101 E. R. 969; 2 Sm. L. C. 42].

tion of estoppel arises which can assist the plaintiff. The plaintiff having taken nothing by his leases whether directly from Nagoar Singh and Chhatradhari or indirectly through the defendants Nos. 19 to 21, is not entitled to any relief in this suit. The appeal is accordingly dismissed with costs, one set to be divided between the defendants-respondents who have appeared. The rights of the various defendants as between themselves will not be affected by this judgment.

IN APPEAL NO. 121 OF 1910.

The Suit No. 366 of 1908 out of which this appeal arises relates to certain coal lands in *Mouza* Pipratarh and *Mouza* Attalis. The plaintiff-appellant is the same as in Appeal No. 51 of 1910 and he has given a similar undertaking in this case to be bound by the findings of fact of the Subordinate Judge. As the finding in this case is that the title-deed on which the plaintiff's suit is based is a forgery, it follows that the plaintiff's suit must necessarily fail. The appeal is accordingly dismissed with costs, one set to be divided between the defendants-respondents who appeared.

Appeals Nos. 120 *and* 183 *partly allowed*;

Appeals Nos. 51 *and* 121 *dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 233 OF 1913.

March 17, 1915.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

Raja Kumara VENKATA PERUMAL RAZ BAHADUR VARU, MINOR, RAJA OF KARVETNAGAR, BY HIS NEXT FRIEND W. A. VARADACHARIAR—PLAINTIFF—APPELLANT

versus

VELAYUDA REDDI AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), *ss.* 14, 54—*Contract for sale of immoveable property, whether creates vested interest—Rule against perpetuities—Contract, whether enforceable against survivors of joint Hindu family.*

Under section 54 of the Transfer of Property Act a contract for the sale of immoveable property does not by itself create any interest in the property. It does not run with the land and is not binding upon a purchaser without notice. [p. 436, col. 1.]

Nor does such a contract fall within the scope of section 14 of the Transfer of Property Act, but it is enforceable against the surviving members of a joint undivided Hindu family. [p. 436, cols. 1 & 2.]

Kolathu Aiyer v. *Rangavadhyar*, 18 Ind. Cas. 203; 24 M. L. J. 84; 13 M. L. T. 179; 38 M. 114; (1913) M. W. N. 163, distinguished.

Kurri Veerareddi v. *Kurri Bapireddi*, 29 M. 336; 1 M. L. T. 153 (F. B.); 16 M. L. J. 395, followed.

Appeal against the decree of the Court of the Subordinate Judge of North Arcot, in Original Suit No. 30 of 1912.

FACTS.—A suit was filed by the next friend of the minor Raja of Karvetinagar, as trustee of the Tirutani Devastanam, for specific performance of an agreement to sell certain villages in the Samastanam entered into by one K. Venkataraya Reddi, with the Regulation Collector of Karvetinagar Estate. Venkataraya Reddi died and the suit was filed against the surviving members of his family. The Subordinate Judge of North Arcot dismissed the suit, on the ground that the agreement not having fixed any time for performance of the contract offended the rule against perpetuities contained in section 14 of the Transfer of Property Act, following the decision in *Kolathu Aiyer* v. *Rangavadhyar* (1). This appeal is against that decree and judgment.

Messrs. *L. A. Govindaraghava Aiyar* and *A. Venkataraghava Aiyar*, for the Appellant.

Messrs. *C. V. Ananthakrishna Aiyar* and *N. A. Vaidyanatha Aiyar*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff from a decree dismissing his suit for specific performance of a contract of sale in favour of a temple of which he is the trustee, entered into between the Regulation Collector of Karvetinagar who was at the time the Dharmakarta of the temple and the late Venkataraya Reddy who was then the managing member of the family of the defendants. Under the agreement of sale the plaint lands were to be conveyed to the temple for a sum of Rs. 16,000, whenever the trustee pays that amount from the Devastanam funds. The Subordinate Judge dismissed the suit, on the ground that the plaint contract is void as offending the rule against perpetuities; and the only question before us for decision is whether his judgment on this

(1) 18 Ind. Cas. 203; 24 M. L. J. 84; 13 M. L. T. 179; 38 M. 114; (1913) M. W. N. 163.

point is right. A suit, Original Suit No. 40 of 1902, was filed against the late Vekataraya Reddy as the managing member of his family for the recovery of the village of Veeraraghavapuram, which was in the possession of his family. Venkataraya Reddy defended the suit, and the suit was eventually compromised by the registered agreement which is now sought to be enforced. Venkataraya Reddy died in December 1905, and the defendants are the members of his family. The defendants were asked by the plaintiff to receive the sum of Rs. 16,000 and convey the suit lands to the temple, but they have not done so.

The material part of the agreement is as follows: "We both . . have entered into a compromise and I have agreed under that compromise to sell . . . these five villages and all my rights therein for Rs. 16,000 to the Devastanam of the said Subramaneswara Swamiar. Whenever the said price of Rs. 16,000 is paid to me from the said Swamiar Devastanam funds, I agree to execute a sale-deed for the said five villages at that very time for the said Subramania Swami Devastanam and deliver possession of the said villages to the said Devastanam." The Subordinate Judge is of opinion that as this plaint agreement fixes no time for its performance but leaves it indefinitely to the promisee to choose his own time and as it provides that the promisor shall convey the properties whenever the price happens to be paid out of the funds of the temple and the suit has now been brought after the death of Venkataraya Reddy against he surviving members of the family, such a contract is invalid and unenforceable as infringing the rule against perpetuities, and he relies on the case of *Kolathu Aiyer* v. *Rangavadhyar* (1). We are of opinion that his decision cannot be supported. Under section 54 of the Transfer of Property Act a contract for the sale of immoveable property does not by itself create any interest in the property. Such a contract does not run with the land and is not binding upon a purchaser unless he takes with notice. It does not create an interest in the land, and is not, therefore, within the scope of section 14 of the Transfer of Property Act. If this contract created an interest in the land, then even a purchaser without notice would have been bound by it. In the case of *Kolatha Aiyer* v. *Rangavadhyar* (1), the learned Judges Benson, and Sundara Aiyar, JJ., say that there is no substantial difference in the law to be applied in India and in England, as the Specific Relief Act lays down that an agreement for the sale of land may be specifically enforced against any person claiming under the vendor, except against a *bona fide* purchaser for value without notice (section 27), and the Indian Trusts Act also lays down that a transferee taking with notice of a prior contract in favour of another must hold the property obtained under his transfer as trustee for the previous promisee (section 91). We are unable to agree with this view. It is opposed to the Full Bench judgment in *Kurri Veerareddi* v. *Kurri Bapireddi* (2). The judgment of the learned Chief Justice in that case fully explains the law, and he points out there that section 54 was intended to prevent the question being raised as to whether the law of England as to the legal effects of a contract of sale of land applied in this country. The same view was also taken in a subsequent judgment [*Avula Charamudi* v. *Marriboyina Raghavalu* (3)] by Aiyling and Tyabji, JJ., who disagreed with Benson and Sundara Aiyar, JJ. All the authorities are considered in these two judgments and we do not think it necessary to refer to them in detail.

It is also clear that Venkataraya Reddy entered into the contract as the managing member of the family, and we are of opinion for the reasons above stated that the decision of the Subordinate Judge holding that the contract cannot be enforced for the reasons assigned by him, cannot be sustained.

We reverse the decree of the Subordinate Judge and direct him to restore the suit to his file and dispose of it in accordance with law. The costs will be provided for in the revised decree.

Appeal allowed.

(2) 29 M. 336; 1 M. L. T. 153 (F. B.); 16 M. L. J. 395.

(3) 28 Ind. Cas. 871; 28 M. L. J. 471.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 351 OF 1914.

May 12, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

F. S. OLD—DEFENDANT—APPELLANT

versus

J. A. SHAIL—PLAINTIFF—RESPONDENT.

Lease—Lease of house at Mussoorie for "season", when terminates.

In the absence of evidence to the contrary a lease of a house at Mussoorie for the 'season' continues to the end of the year.

Second appeal from the decision of the District Judge of Saharanpur, dated the 21st February 1914.

Mr. *Wallach*, for the Appellant.

Mr. *Nihal Chand*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit in which the plaintiff claims possession of a house at Mussoorie, called "Oak Bush." The Courts below have given the plaintiff a decree. The defendant appeals. In the plaint the plaintiff alleges that the defendant was his tenant during the season of 1913 either from month to month or for the season, and that on the 14th of October 1913 he gave him notice to vacate the house on the 31st of October 1913 as the tenancy would expire on that date. The suit was instituted on the 19th of November 1913. It is said that the defendant had a lease from the plaintiff's predecessor-in-title covering this very period, that this document could not be given in evidence because it was unregistered; the defendant is said to have another lease which will entitle him to possession of the house from the 1st of January 1915. It seems to us that the defendant must be deemed to have been at least a tenant for the season. Having regard to the way in which the rent is paid, it is quite clear that he was not a tenant from month to month. If the defendant was tenant for the "season," he could only be put out at the end of the season of 1913, and it lay upon the plaintiff to prove by clear evidence that the "season" at Mussoorie terminated on the 31st of October. It is quite clear that the plaintiff never proved that the season terminated on the 31st of October. We are not, of course, called on to decide questions of fact, but it

seems to us that the "season" would ordinarily continue to the end of the year, and we think that this ought to be the assumption in the absence of evidence to the contrary. If the "season" did not terminate before the 19th of November 1913, then the suit was premature. It is contended on behalf of the respondent that this ground was not taken in the written statement. The defendant pleaded that the plaintiff could not terminate his tenancy at the time he alleged and, in our opinion, this clearly cast the onus on the plaintiff of proving such facts as entitled him to possession of the house on the date on which the suit was brought. We allow the appeal, set aside the decrees of both the Courts below and dismiss the plaintiff's suit with costs in all Courts. Costs in this Court will include fees on the higher scale.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3359 OF 1912.

February 12, 1915.

Present:—Mr. Justice Fletcher and Mr. Justice Mullick.

BISESHWAR RAY CHOWDHURY—PLAINTIFF—APPELLANT.

versus

JUDHISTHIR NATH AND OTHERS—DEFENDANTS—RESPONDENTS

Cause of action—Arrears of rent—Re-settlement, arrears after—Cause of action, whether same—Bengal Tenancy Act (VIII of 1885), ss. 104H, 111 A—Record of Rights, preparation of, finality of.

A 're-settlement', or new contract of lease, contemplates a new obligation and a new contract to pay new rent and is not the same cause of action as the rent which becomes due under the original contract for letting. [p. 438, col. 2.]

It is not open to a Court to go behind the Record of Rights to ascertain what, in fact, is the true nature of the tenancy between the parties. [p. 438, col. 2.]

A Record of Rights, prepared during the settlement of Government revenue under the provisions of sections 104H and 111A of the Bengal Tenancy Act, is conclusive, subject to the right of the tenant to bring a suit as mentioned in section 104H (3) of the Bengal Tenancy Act. [p. 438, col. 2.]

Appeal against a decree of the Officiating Subordinate Judge, first Court, Backerganj,

dated the 11th July 1912, modifying that of the Munsif, 4th Court, Patnakhali, dated the 11th of March 1912.

Babus *Brojolal Chakravarti*, for Babu *Trailokho Nath Ghose*, for the Appellant.

Babu *Gunada Charun Sen*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiff against the judgment and decree of the Subordinate Judge, first Court, Backerganj, varying the decree of the Munsif.

The suit was brought by the plaintiff to recover certain arrears of rent in respect of a piece of land situate in the limits of a Government *khas mahal*. The plaintiff obtained from the Government what is known as a settlement of a portion of the land within the *khas mahal*. That settlement, or lease, expired in the year 1313; and then, in accordance with the usual practice, apparently the Government proceeded to re-settle the property with the tenants, and when that was done they granted a fresh settlement to the plaintiff. The settlement to the defendants, who are the tenants, was for an increased rent, and the tenants were entered on the Record of Rights as tenants of one holding. Now the plaintiff in 1316 instituted against the defendants a suit to recover arrears of rent down to 1313. That suit was decreed; then the present suit was instituted in 1318 to recover rents from the date when the re-settlement with the plaintiff from the Government took place, namely, 1314, down to the date of the suit.

The Munsif decreed the suit in full.

On appeal to the learned Subordinate Judge, he varied the decree of the Munsif in two ways. *First* of all, he held that the rent that had accrued due up to the year 1316 formed part of the same cause of action as that sued for in the other suit for rent, and that, therefore, under the provisions of rule 2, Order II, of the first Schedule of the Code of Civil Procedure, the plaintiff must be taken to have abandoned his right to sue for that portion of the rent. He *further* held that there were, in fact, two different tenancies in respect of the land and that the plaintiff was only entitled to recover from the defendant No. 1 the proportionate amount of the rent.

Against that decision the plaintiff has appealed to this Court.

I have no doubt that the learned Subordinate Judge is wrong on both points. What is called the re-settlement, that is, the new contract of lease, contemplates that there was a new obligation and a new contract to pay new and increased rent. That, clearly, is not the same cause of action as the rent which became due under the original contract for letting which expired in 1313. I am unable to agree with the view taken by the learned Subordinate Judge with regard to that.

Then, on the *second* point, the appellant before us has urged, and I think rightly urged, that it was not open to the Subordinate Judge to go behind the Record of Rights prepared in this case. That Record of Rights was prepared during the settlement of the Government revenue; and, under the provisions of section 104H and under section 111A of the Bengal Tenancy Act, subject to the right of the tenant to bring a suit, as mentioned in section 104H (3), the Record of Rights is conclusive. I think the learned Subordinate Judge was wrong when he went behind the Record-of-Rights to ascertain what, in fact, was the true nature of the tenancy between the parties. In my view the variation made by the learned Subordinate Judge in the decree of the Munsif is wrong, and I think we ought to allow this appeal and restore the decree of the Munsif with costs in all the Courts.

MULLICK, J.—I agree.

Appeal allowed.

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL NO. 335 OF 1915.

May 18, 1915.

Present:—Justice Sir George Knox, KT.

AMBIKA PERSHAD—DECREE-HOLDER—APPELLANT

versus

SALAMAT KHAN—JUDGMENT-DEBTOR—RESPONDENT.

Mortgage—Redemption decree—Failure to pay

within time fixed—Payment before decree absolute—Mortgagor if entitled to redeem.

In a redemption suit the mortgagor decree-holder who fails to pay the redemption money upto the date fixed for payment but pays it before the decree is made absolute, is entitled to redeem the property on such payment.

Execution second appeal from a decision of the District Judge of Azamgarh, dated the 23rd December 1914.

Mr. *Ishwar Saran* (with him Mr. *Perm'shwor Dyal*), for the Appellant.

Mr. *Shafiuzzaman*, for the Respondent.

JUDGMENT.—Ambika Pershad, the appellant, has obtained a decree against Salamat Khan, the respondent. This was based upon a compromise arrived at between the parties, according to which the appellant was entitled to redeem the property, if he paid Rs. 2-8. Regarding the payment of Rs. 2-8 the decree says in one place that it is to be paid on *Phagun Sudi purnamashi*. In another place it is said that Rs. 2-8 was to be paid at the time of obtaining possession. The date *Phagun Sudi purnamashi* had passed when the decree-holder came into Court with an application to execute the decree. He, however, brought Rs. 2-8 with him and prayed that they might be made over to the judgment-debtors. The Court accepted Rs. 2-8, but does not seem to have passed any definite orders about it. The Court of first instance, however, recognising that Rs. 2-8 had been paid before proceedings in execution commenced, granted the application. The judgment-debtors objected that the time for payment had passed and money could no longer be received and the application for execution should be dismissed. The Court of first instance did not accept this contention and allowed the proceeding to continue; but on appeal the learned District Judge set aside the Munsif's decision and ordered that the execution case should be dismissed. The case has come here in appeal and the contention is raised that inasmuch as the decree had not been made absolute, the appellant was entitled to redeem the property on payment of Rs. 2-8.

This plea appears to me to be a valid one and prevails. I set aside the order of the lower Appellate Court and direct that Court to replace this case upon its roll of pending appeals and to determine it according to law. Costs will follow the event.

Order set aside.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1045 OF 1912.

March 29, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

ALAMANAYAKUNIGARI NABI SAB, MINOR, BY NEXT FRIEND AND MOTHER FAKIR BEE—DEFENDANT No. 3—APPELLANT

versus

MURUKUTI PAPIAH AND OTHERS—PLAINTIFFS AND DEFENDANT No. 1 AND LEGAL REPRESENTATIVES OF PLAINTIFF—RESPONDENTS.

Muhammadan Law—Gift—Necessity for delivery of possession—Minor, donee—Donor, de facto guardian—Gift of land—Delivery of possession how to be proved—Transfer of Property Act (IV of 1882), ss. 6 (a), 43—Transferor representing himself to be an absolute owner when he is not—Subsequent acquisition of title by inheritance—Transfer, validity of.

Where the transferor represents himself to be absolute owner of the property transferred, when he is not, and on a date subsequent to the transfer, acquires title to such property by inheritance, the transfer is not a transfer *spes successionis* and invalid under section 6 *(a)* of the Transfer of Property Act but is one under section 43 of the Transfer of Property Act and is enforceable against the transferor. [p. 441, col. 2.]

Ramasami Naik v *Ramasami Chetti*, 30 M. 255 at p. 262; 2 M. L. T. 167; 17 M. L. J. 201; *Nurul Hossaen* v. *Sheosahai Lal*, 20 C. 1; 19 I. A 221; *Rashmoni Dasi* v. *Surja Kanta Roy Chowdhry*, 32 C. 832; 9 C.W. N. 1019; 2 C. L. J. 6, *Pandiri Bangaram* v. *Karumoory Subbaraju*, 8 Ind. Cas. 388; 8 M. L. T. 285; 34 M. 159, distinguished.

The principle of section 43 of the Transfer of Property, Act applies equally both to sales and mortgages. [p. 441, col. 2.]

Under Muhammadan Law, it is essential for the validity of a gift that there should be a transfer both of ownership and possession. What this possession is, is a question of fact in each case. Where the donor is the *de facto* guardian of the minor donee, a mere declaration of intention to hold the property on behalf of the minor is quite sufficient. But it is necessary that the person in whose possession the property is must be in a position to act on behalf of the owner; where he is not, the declaration would be of no effect. Everything depends upon the intention with which possession was held by the donor subsequent to the gift. [p. 443, cols. 1 & 2.]

Humera Bibi v. *Najm-un-nissa Bibi*, 28 A. 147 at p. 152; 2 A. L. J. 778; A. W. N. (1905) 222; *Mata Din* v *Ahmad Ali*, 13 Ind. Cas. 976; 34 A. 213 at p. 222; 16 C. W. N. 338; 11 M. L. T. 145; (1912) M. W. N. 183; 9 A. L. J. 215; 15 C. L. J. 270; 14 Bom. L. R. 192; 15 O. C. 49; 23 M. L. J. 6; 39 I. A 49, cited.

Where the property gifted is land, which can be enjoyed by receipt of its produce, possession will be deemed to be in the minor, only when it is shown, that after the gift, he was in receipt and enjoyment of such produce also. [p. 444, col. 1.]

In order that a gift in favour of a minor should be valid, it is not necessary that possession to complete

his title must be given to his guardian alone; it is sufficient if there is a trustee who can act on his behalf. [p. 445, col. 1.]

Fakir Nynar Muhamed Rowther v. *Kandasawmi Kulathu Vandan*, 14 Ind. Cas. 993; 35 M. 120 at p. 126. referred to.

Where the donor himself is in possession of the property gifted, there must be some act of his, which must show that he intended to hold the property on behalf of the minor; where there is no such act the presumption is that he never intended to make any gift. [p. 445, col. 2.]

It would be inequitable to allow the visible means of a man to be narrowed down by a transaction not evidenced by a contract. [p. 446, col. 1.]

Husain Khan Bahadur v. *Nateri Srinivasacharlu*, 6 M. H. C. R. 356 at p. 358, followed.

Second Appeal against the decree of the District Court, Cuddapah, in Appeal Suit No. 28 of 1911, preferred against that of the District Munsif of Cuddapah, in Original Suit No. 468 of 1909.

Mr. *S. Gopalaswami Aiyangar*, for the Appellant.

The Hon'ble Mr. *B. N. Sarma*, for the Respondents.

This second appeal coming on for hearing on the 13th and 14th August 1914 and having stood over for consideration till the 16th September 1914, the Court delivered the following

JUDGMENT.

AYLING, J.—I have had the advantage of perusing the judgment of my learned brother. As regards the applicability of section 43 of the Transfer of Property Act, in case the gift should be held invalid, I entirely agree with him.

The validity of the gift under Muhammadan Law is a more difficult question regarding which, even if I saw reason to disagree with him, I should do so with extreme diffidence. I see no reason to differ, and agree to the finding for which he proposes to call.

TYABJI, J.—The plaintiff sues to enforce a mortgage, Exhibit A, executed by the 1st defendant on 2nd December 1907. The property mortgaged did not belong to the 1st defendant but solely to his father, the 2nd defendant.

The 2nd defendant died before the suit came on for hearing.

On the death of the 2nd defendant all his estate devolved on the 1st defendant under Muhammadan Law, the defendants being Muhammadans.

The plaintiff contends that under section 43 of the Transfer of Property Act, the mortgage purported to be made by the 1st defendant will operate on the 1st defendant's interest in the property mortgaged. The reply is:—

(1) that the property did not belong to the 2nd defendant at his death, and that consequently it has not devolved on the 1st defendant;

(2) that even if it has devolved on the 1st defendant, section 43 does not apply. These were not the contentions on which the suit was instituted, and do not appear on the pleadings.

The facts leading up to these contentions are as follows:—

According to the case of all the parties the 2nd defendant was, prior to 2nd December 1907, the owner of the property in dispute. On that day the mortgage, Exhibit A, was executed by the 1st defendant describing himself as "son . . . . . of Fakruddin (the 2nd defendant), Muhammadan by caste, living by cultivation and resident of Vempalli village." The operative part is to the following effect:—

"On account of my necessities I have borrowed from you . . . . in all Rs. 300. I shall pay on demand the said sum of Rs. 300 with interest thereon." Then the lands in question are described and the document proceeds:—"These lands bearing this assessment are mortgaged by me. I shall not alienate the said fields in favour of others by way of gift, sale, etc., till the above said amount and interest is paid. This is the deed of mortgage executed and given with my consent." The deed is signed by the 1st defendant and his signature is attested. No one else executes the document. It is duly registered.

When the plaintiff instituted the suit, the 2nd defendant was living and section 43 of the Transfer of Property Act was not available to him even on his own allegations. The allegations contained in the plaint were that the 1st defendant was "the manager of the family," that the mortgage was executed by him for family purposes, and that he acted both for himself and as agent for the other defendants, *i. e.*, for his father, the 2nd defendant, and for his son and daughter, the 3rd and 4th defendants.

The 1st defendant's written statement is as follows:—"The suit debt is true. It is what I contracted."

The 2nd defendant's written statement contains categorical denials of the 1st defendant being manager or agent. It also refers to a gift by the 2nd defendant to the 3rd defendant, under which the property is stated to have been delivered into the possession of the 3rd defendant. "Since then," the written statement continues, "the 3rd defendant himself is enjoying the said property." It is on this gift that the contentions of the defendants above referred to depend. For, if the gift was valid and effective, the property became the 3rd defendant's prior to the death of the 2nd defendant, and did not devolve on the 1st defendant as the 2nd defendant's heir, nor was it affected by any of the acts of the 1st defendant under section 43 of the Transfer of Property Act.

Before the suit came on for hearing the 2nd defendant died, and section 43 of the Transfer of Property Act became available to the plaintiff. His contention, that apart from that section the property was subject to the mortgage because the 1st defendant acted as manager and as agent of the 2nd defendant (though it was the primary case of the plaintiff and the subject of an issue), was not considered by the Courts below. Both Courts held the gift to be invalid, and that section 43 of the Transfer of Property Act applied.

It was argued before us in the first place that even if the gift was invalid, section 43 of the Transfer of Property Act would not avail the plaintiff. The argument was that to hold so would be to hold that the 1st defendant could validly transfer his "chance of succeeding to an estate as an heir-apparent," and reliance was placed upon *Ramasami Naik* v. *Ramasami Chetti* (1) for the contention that section 43 should not be so construed as to nullify section 6 (*a*) of the Transfer of Property Act, by validating a transfer initially void under section 6 (*a*). This argument, however, neglects the distinction between purporting to transfer "the chance of an heir apparent," and "erroneously representing that he (the transferor) is authorised to transfer certain immoveable property." It is the latter course that was followed in the present case. It was represented to the transferee that the transferor was in *præsenti* entitled to and thus authorised to transfer the property. In *Ramasami Naik's* case (1) what the transferors "purported to transfer, were mere possibilities of succession with the prohibition in section 6 (*a*) of the Transfer of Property Act".

The other cases cited on this point for the appellant have also no application. In *Nurul Hossein* v. *Sheosahai Lal* (2), there was no erroneous representation : both parties knew what the facts were. In *Rashmoni Dasi* v. *Surja Kanta Roy Chowdhry* (3), the parties had contracted to sell subject to the sanction of the Court, which could not be obtained. In *Pandiri Bangaram* v. *Karumoory Subbaraju* (4), the objection taken and upheld was that though there was an erroneous representation, the transferee was not misled by it and that unless the transferee is so misled, section 43 does not apply.

None of these objections apply in the present case. On the contrary the illustration to section 43 seems exactly in point, except that the transfer is here by way of mortgage and in the illustration it is a sale. Here, as in the illustration, the son represented that he was authorised to transfer property which in fact was not his property but his father's: and if, therefore, the son subsequently "as heir obtained the property" of his father, the transferee "may require the son to deliver it to him"—in this case to have it declared subject to the mortgage. Whether the son (the 1st defendant) "as heir obtained the property", depends upon whether prior to the 2nd defendant's death he had made a gift of the property to the 3rd defendant.

The validity of the gift under Exhibit I must, therefore, be next considered. The District Munsif held against the validity of the gift apparently on the grounds, (1) that the execution of Exhibit I was not legally proved as, though "it was spoken to by its writer," no attestor was called to prove its execution. The only ground of appeal with reference to this manifest disregard by the District Munsif of the provisions of section 72 of the Indian

(1) 30 M. 255 at p. 262; 2 M. L. T. 167; 17 M. L. J. 201.

(2) 20 C. L. 19 I. A. 221.
(3) 32 C. 832; 9 C. W. N. 1019; 2 C. L. J. 6.
(4) 8 Ind. Cas. 388; 34 M. 159; 8 M. L. T. 285.

Evidence Act was that he "erred in thinking that the writer of a deed is not an attestor and proof thereof by him is no proof." No reference to this is to be found in the judgment of the District Judge or in the grounds of appeal to this Court; and it was not questioned before us that the execution of Exhibit I was satisfactorily proved.

The District Munsif further held (2) that assuming Exhibit I to be proved, it was not valid because there was neither acceptance nor delivery of possession of the gift; as to possession he refers to and apparently accepts the plaintiff's evidence that the 1st defendant has been and is in cultivation and possession of the properties, and that the 1st or 2nd defendant has been paying the assessment.

He also casually says: (3) "It is clear from the very wording of Exhibit I, that the gift was simply intended to defeat the plaintiff's claim."

In appeal to the District Judge it was argued that formal transfer of possession was unnecessary, as the donor and donee were living together. The District Judge considered this contention to be supported by the authority of *Humera Bibi* v. *Najm-un-nissa Bibi* (5). He was of opinion, however, that though transfer of possession may be unnecessary, acceptance of the gift was necessary; and he held that there was no acceptance, and so the gift was ineffectual. The result is sufficiently startling. It would appear that according to the decision of the District Court, though the donee (or the person representing him) may take possession of the subject of gift, yet this is not sufficient to imply an acceptance of the gift by or on behalf of the donee. The District Judge arrived at this conclusion apparently without realizing the inconsistency to which it leads, because he misapprehended the principle that underlies the decision in *Humera Bibi* v. *Najm-un-nissa Bibi* (5). In that case everything had been done to transfer possession, except that the donor had not left the premises (forming part of the subject of gift) on which she was living jointly with the donee. It was there held that the donor having emphatically manifested her unequivocal intention to transfer possession, and having done everything else to transfer possession, the fact that she did not vacate the house forming part of the subject of the gift but continued to live in it, was sufficiently explained and it did not vitiate the transfer of possession which was otherwise complete and effectual.

In the view that the District Judge took, he asked for a finding on the issue "whether 2nd defendant was or was not *de facto* guardian of the 3rd defendant at the time of the execution of the deed of gift, Exhibit I." The object of this issue appears from the judgment of the District Judge delivered when he accepted the finding returned by the District Munsif. On reading the District Munsif's finding, however, it is difficult to understand what exact significance the issue had for the District Munsif, and in what way he conceived the matters contained in his judgment to be relevant to the rights and liabilities of the parties. Their Lordships of the Privy Council had occasion in *Mata Din* v. *Ahmad Ali* (6) to encounter the notion that by the use of expressions taken from English Law especially, it may be added, if they include some Latin words such as the expression "*de facto* guardian"—parties can be clothed with legal powers which they do not otherwise possess.

In the present case too it seems that under some similar notion the lower Courts have not considered the case on the broad principles of the law, but have strayed into questions which do not materially aid the final decision. Had the general principles been applied in a plain common sense manner, the case would have admitted of a much more satisfactory and intelligible method of decision.

Under Muhammadan Law (1) a transfer by way of gift must be completed by the donor. He cannot be forced to complete a gift which he has not completed. Transfer of ownership includes a transfer of the

(5) 28 A. 147 at p. 152; 2 A. L. J. 778; A.W.N. (1905) 222.

(6) 13 Ind. Cas. 976; 34 A. 213 at p. 222; 16 C.W.N. 338; 11 M. L. T. 145; (1912) M. W. N. 183; 9 A. L. J. 215; 15 C. L J. 270; 14 Bom. L. R. 192; 15 O. C. 49; 23 M. L. J. 6; 39 I. A. 49.

right of possession, and of enjoying the benefits arising from the property. When, therefore, transfer of ownership is purported to be made, it is not complete unless transfer of possession is also made. (2) It follows that if the donor has not given possession of what is alleged to be the subject of the gift, the alleged donee cannot, on the strength of the declaration of gift, claim to be the owner of the property and, as owner, obtain possession of it through the Court or otherwise without the consent of the donor or his successor-in-title. The donee cannot say: "I have had the ownership transferred to me, give me possession." The answer to this claim would be: "The complete ownership is not in you. One part of ownership is the right to possess. That right has not been transferred to you. It is the donor alone that can transfer that right to you and thus complete your ownership." In short, unless the donor transfers possession, the transfer of ownership itself is not complete. (3) If, however, the subject of the gift is already in the possession of the donee at the time of the declaration of gift, its possession cannot be transferred to him any more. All that is then needed for transferring the ownership, is that the donor should transfer to the donee the residuum of the rights making up the complex notion of ownership. This he can do by declaring that thenceforth the subject of the gift shall be possessed by the donee as his own property. (4) Where the donee is a minor who, though capable of owning property, is not able to be in possession of it, his place is taken by the person who in accordance with law is in charge and possession of the minor's property. (5) If a person, therefore, declares his intention to make a gift to a minor, the donor cannot be forced to carry out his intention. He may do so of his own accord, but the declaration of the intention to make a gift does not of itself give the minor donee a right to insist that the declaration shall be given effect to. (6) No doubt in this case also if the subject of the gift is already in the possession of that person whom the law entrusts with the care of the property belonging to the minor, the gift can require no further completion by a transfer of possession, indeed it would admit of no such transfer. The change would be in the mind with which possession would be held, and not in the person who has actual physical possession of or control over the subject of gift.

There is no difficulty in understanding these propositions. The facts of any particular case may, it is true, sometimes make them somewhat difficult of application, but not on that account abstruse or dissociated from what is referred to in the Indian Evidence Act as the "common course of natural events and human conduct." Where, for instance, the person in actual care of the property of a minor donee is other than he who in accordance with law is under the obligation (and who is clothed, therefore, also with the corresponding right) of being in possession of the minor's property—in other words where the person actually in possession of the minor's property is not the legal guardian of the minor's property—in such a case if the property is transferred to the possession of the legal guardian, it may be objected that the facts were such as to show that the property intended to be given to the minor would not ordinarily be placed in the possession of the legal guardian: the person actually in possession of such property being another. If, on the other hand, possession is in such a case transferred to the latter (*i.e.*, to the *de facto* guardian) it may be objected that the transferee is not legally entitled to hold possession of the property on behalf of the minor, and that the possession of the transferee is not in law the possession of the minor.

It must, however, be always remembered that the question of possession is primarily one of fact and it must refer to "possession of that character of which the thing is capable." *Lord Advocate* v. *Young* (7). There may, it is true, occasionally be some difficulty in determining whether or not possession of the property was held by or on behalf of the donee after the declaration of gift. But the difficulty can seldom be lessened by attention being primarily directed not to the salient facts of the case, not to the question who or on whose behalf acts of ownership

(7) (1887) 12 A. C. 544 at p. 556.

were exercised over the property after the gift and who was deriving the substantial benefit from it, but to other speculative aspects supposed to have some juristic connection with these questions of fact. The difficulty may be enhanced by trying to determine the question, with reference to the existence of relations which are still more obscure.

In the present case it is admitted that the 1st, 2nd and 3rd defendants lived together in the same house. The subject of the gift consisted not of the house in the common occupation of the donor and donee, [as in *Humera Bibi's* case (5)] but of a field and in the words of Domat, "one possesses lands by cultivating them, reaping the fruits, going and coming through them, and disposing thereof at pleasure." Attention should, therefore, have been directed in this case to the person for whose benefit these acts were performed. As the alleged donee was a minor, he could not perform them himself. The question of the *de facto* guardianship, *i. e.*, the question as to which inmate of the house was in the actual care of the minor, could not materially affect a gift of this kind; for it is not as though a gift of moveable property capable of being in direct and personal control had been transferred to a person other than the guardian of the minor, either by error as to the person to whom the transfer should according to law be made or because such transfer would immediately and more effectively provide for the subject of gift being utilised for the benefit of the minor; nor has this question arisen in the endeavour to discover the destination of the actual produce of the land. In the arguments before us the finding that the 2nd defendant was not the *de facto* guardian of the minor was recognised to be irrelevant, and not relied upon by either party.

The real question in this case, whether after the gift the donee was given the benefit of the subject of the gift or whether its produce continued to be taken and dealt with by the donor and applied to his own benefit just as he had done before making the gift, has been lost sight of. The second appeal had, therefore, to be argued without having had the case considered by the lower Courts in its real and substantial form, but through an endeavour to find a mode of decision irrespective of a finding on that essential question.

In this endeavour the case has been presented before us in two aspects.

First, it was argued that the intention of the donor was to defraud creditors and it could not, therefore, be lawfully effected. The objection that the gift was in fraud of creditors (though it was casually alluded to by the District Munsif as stated above), was not referred to in the plaint. The gift is specifically set up in the written statement of the 2nd defendant, yet the contention was not made the subject of an issue. The words of Peel, C. J., in *Doe Dem Ramtonoo Mookerjee* v. *Bibee Jeenut* (8) seem, therefore, to be directly applicable. He says: "This deed then being of a prior date, the subsequent purchaser must impeach it for fraud; all those grounds on which a deed is generally impeached are, however, wanting in this case. There is no evidence before us that the donor was in debt at the time of making this gift, nor is there any evidence to show that he executed it in contemplation of insolvency, or with a view to defraud creditors."

On the other hand, on behalf of the appellant and in support of the gift it was argued that the gift being from a grandfather to his minor grandson, no transfer of possession was necessary and that, therefore, proof of Exhibit I was sufficient to establish the gift.

In connection with this last contention, it must first be considered whether the rule is available to the 3rd defendant and if so, to determine the effect of the rule by a consideration of its scope.

It is urged that the 3rd defendant cannot rely upon the rule, because a gift to a minor must be transferred to his father if the father "is alive and present" (Baillie's Digest, first Edition, Vol. I, page 530) and in the case under consideration no such transfer is alleged but that on the contrary the written statement of the 2nd defendant alleges (paragraph 4) that the possession was delivered to the 3rd defendant himself.

(8) (1843) Fultan 152 at p. 154; 1 Ind. Dec. (o. s.) 736.

That allegation taken literally is meaningless: a boy seven years old cannot take possession of a field. It is explained, however, that possession was taken on behalf of the minor by the grandfather, or in other words that transfer of possession was unnecessary. This explanation is inadequate to bring the gift within the scope of the rule. That rule is concerned with one special aspect of the general rule, that transfer of possession is necessary for completing a gift—that special aspect having reference to the fact that the guardian of the property of a minor is the donor, and the minor the donee. The present case is not such.

The question is always whether the requirement of the law, that the donor shall do everything to transfer all the rights making up ownership (including transfer of possession), has been complied with either by placing the subject of gift in the immediate personal control of the donee or by some act which operates to bring about the same result. The rules of law relating to possession appear abstruse and complex, owing to the failure to direct the inquiry to the ultimate use to which the subject of gift has been put and to determine whether or not it was the donee who has derived benefit from the property after the gift. The law is not made up of unmeaning technicalities. It is not abstruse and removed, from the common course of events and human conduct. The 3rd defendant has failed to come within one particular rule (that gifts to minors shall be transferred to their guardians). His failure arises from the fact that that rule is not applicable to the circumstances of this case. But a gift to a minor which in all essentials has been completed, cannot fail merely because the person who has taken charge of the subject of gift on behalf of the minor is not his father. This would be contrary to all principle and authority. The donee can authorise a third person to take possession of the gift on his behalf. Conversely the donor can give possession to a 3rd person on behalf of any donee. If any authority were needed for these propositions, it may be found in the 11th Chapter of the book on *Hiba* in the Fatawa Alamgiri. A person accepting possession in such circumstances would, in the majority of cases, occupy a position not distinguishable from that of a trustee on behalf of the donee.

These provisions cannot be applied less favourably to a minor than to one of full age; and it has been held by a Bench which included Abdur Rahim, J., that where a lady purported to make a gift to her minor paternal grandchild and "stated in the deed of gift that she would remain in possession of the property as guardian of the minor, and on his behalf," it was necessary to have a finding as to whether the grandmother was at the time of the gift in possession, on the assumption that if she was, her possession might be transformed by her own acts into possession on behalf of the donee though as the father of the donee was alive, (he was the 2nd defendant) the paternal grandmother could not by any act on her part make herself the guardian of her grandchild [*Fakir Nynar Muhamed Rowther* v. *Kandasawmi Kulathu Vandan* (9)]. The decision in that case was ultimately against the validity of the gift as the finding was that the donor was not herself in possession.

Had the donor been found to have been in possession, the validity of the gift would still have depended on the further question whether after the declaration of gift, the donor had transformed her possession on her own behalf into possession on behalf of the minor as his guardian by applying the benefits of the subject of gift to the donee, or whether she had continued to apply them to her own use. For, if she had continued to apply the gift to her own use, the gift would have been liable to attack from two directions.

First, it would be very unreasonable to hold, in the absence of some explanation, that the transaction is real or that there is any intention to make a gift, when it is found that as a matter of fact the person who purports to hold himself forth as the donor, and as having ceased by his voluntary act to have any interest in the property, has continued without interruption to use the property exactly in the same way as before the gift, and has not permitted the donee even at the moment of the gift to have any more benefit from the subject of gift than before. The ostensible object of the gift is that the donee should take all the benefit and the donor should cease to take any. There being on the one side the words of the donor, and on the other his acts,

(9) 14 Ind. Cas. 993; 35 M. 120 at p. 126.

there would seldom be any difficulty in deciding which represents his true intentions. And the legal result of the fact that there is no intention to make a gift, coupled with the fact that the donee has not derived any benefit from the subject of the gift, is that the donor is entitled to continue, as he has been continuing, in possession and enjoyment: and that the previous declaration of gift is nugatory, because it has not been followed by a transfer of ownership which implies a transfer of possession. This result is strictly in accordance with the theory of the law of gift, as appears from *Rahiman Bi* v. *Mahomed Fatima Bibi*(10), where the question was whether the rule, that gifts to minors from the guardians of their property are complete by the declaration of gift (provided that the subject of the gift is under the control of the guardian at the time of such declaration) was in itself a sufficient answer to the objection that the gift had never been completed. The donor there was the father of the donee, and had purported to reserve to himself what in effect was a life-interest. The facts of that case were, therefore, very different from those with which we have to deal here. The considerations referred to in that case, however, in so far as they affect the decision of the questions (1) whether the donor did in fact intend to transfer the ownership from himself to the donee and (2) whether he effectuated such transfer, are of general application.

Secondly, even if the Muhammadan Law were otherwise, it would, to adopt the words of Holloway, J., be very inequitable to allow the visible means of a man to be narrowed down by a transaction not evidenced by contracts [*Husain Khan Bahadur* v. *Nateri Srinivasa Charlu* (11)]. Holloway, J., was dealing with the converse case. But the principle to which he referred is applicable.

It is obvious that the rule should not be so applied that in the changed circumstances of modern life, it should be manipulated to such inequitable purposes. The object of the rule is to prevent a minor from being rendered incompetent to receive a gift from his guardian. It is not the intention of the rule to enable a minor to insist on a gift being completed in his favour, which was not in fact completed by the donor and which was perhaps never intended to be completed. Still less is it the object of the rule to enable the guardian of a minor to continue in possession and enjoyment of property, and yet as against third parties to set up a gift in favour of the minor. In such circumstances the third parties may reasonably claim that the property must be dealt with on the basis that it continued to belong to the alleged donor, who exercised all the rights of ownership over it after purporting voluntarily to part with his rights over it.

It is necessary for these reasons to have a finding on the question whether at or after the date of Exhibit I and as the result of the gift referred to in it, the produce or the income or other benefit derived from the alleged subject of the gift was applied to the use of the donee, so as to show that a transfer of ownership had been made, or whether it was continued to be applied in the same way as it was before the alleged gift.

The finding should be submitted within six weeks and seven days are allowed for objections.

In compliance with the above order, the District Judge of Cuddapah submitted the following

FINDING.— * * * * * * I, therefore, find on the issue on which finding is called for, that the produce of the land or the income or other benefit derived from the alleged subject of the gift was not applied to the use of the donee, so as to show that a transfer of ownership has been made, and that it was on the contrary continued to be applied in the same way as it was before the alleged gift.

This second appeal coming on for final hearing after the return of the finding of the District Judge of Cuddapah on the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.— We accept the finding and dismiss the second appeal with costs.

Appeal dismissed.

(10) 23 Ind. Cas. 651; 15 M. L. T. 345.
(11) 6 M. H. C. R. 356 at p. 358.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 15 OF 1913-19 OF BALLIA DISTRICT.

May 4, 1915.

Present:—Mr. Holms, S. M., and Mr. Campbell, J. M.

SHEONANDAN SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

LACHMAN RAI—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), *s.* 79—*Grove-holder—Grove brought under cultivation—Grove-holder, whether becomes a tenant* ipso facto—*Wrongful dispossession.*

If a grove ceases to be the grove land and the grove-holder brings it under cultivation, he is not entitled to remain in possession as a tenant at all until he comes to some arrangement with the land-holder as to the payment of rent.

If, therefore, the ex grove-holder is dispossessed by the land-holder, he cannot maintain a suit under section 79 of the Agra Tenancy Act, as he is not a tenant.

Harbhajan v. *Bihari Bakhsh Singh*, Selected Decision No. 8 of 1903, applied.

Second appeal from an order of the Commissioner, Benares Division, dated the 25th June 1914, in a case of possession and compensation, reversing that of the Assistant Collector, Ballia District.

JUDGMENT.

HOLMS, S. M.—(*April 22nd*, 1915).—The Commissioner has written a careful judgment in the case, but there is one point in which I think he is wrong on a question of law. There seems to me no doubt whatever that the land in question was until recently groveland and not agricultural land, and that after the grove was cut the respondent was not entitled to remain in possession as an occupancy tenant, nor was he entitled to remain in possession as a tenant at all, until he came to some arrangement with the land-holders and they allowed him to remain in possession as a tenant. The subsequent compromise of the present case by some of the defendants has nothing to do with the matter. In *Harbhajan* v. *Bihari Bakhsh Singh* (1) it was held that a person occupying land without the consent of the landlord was not entitled to recover possession under the corresponding section of the Oudh Rent Act, if ejected by the landlord. The circumstances were not dissimilar. In that case the plaintiff formerly held the land as the *khud-kasht* of his *zemindari*, but he ceased to be a *zemindar* and continued to hold the land without coming to any agreement with the land-holder. This is very much the same as in the present case. So long as the trees existed he had the rights of a grove-holder, but when the trees were cut down, he had no right to remain in possession without the consent of the land-holders. Following that ruling then, a suit under section 79 cannot lie in the present case. I would set aside the order of the Commissioner and restore the order of the Assistant Collector, respondent paying costs throughout so far as the share of the present appellants is concerned.

(1) Selected Decision No. 8 of 1903.

CAMPBELL, J. M.—I agree.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 588 OF 1914.

May 8, 1915.

Present:—Mr. Justice Piggott.

SALLE—PLAINTIFF—APPELLANT

versus

MOHAN LAL—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), *s.* 66—*Benami purchase—Purchase by one of the decree-holders—Suit by at her decree-holder against purchaser, maintainability of.*

In execution of a simple money-decree held by two persons jointly, a certain *zemindari* property of the judgment-debtor was put up to sale and was with the permission of the Court purchased by one of the decree-holders in 1902. The purchaser was put in formal possession of the property in 1903. In 1913, the other decree-holder brought a suit against the purchaser and claimed possession of a share in the property, alleging that in accordance with an oral agreement the purchase was for the benefit of both the decree-holders:

Held, that the suit was barred by the provisions of section 66 of the Code of Civil Procedure. [p. 448, col. 2.]

Achhaibar Dube v. *Tapasi Dube*, 29 A. 557; A.W.N. (1907) 166, distinguished.

Second appeal from the decision of the District Judge, Jhansi, dated the 14th February 1914.

Mr. *Girdhar Lal*, for the Appellant.

Mr. *D. C. Banerji*, for the Respondent.

JUDGMENT.—The plaintiff in this case, Salle, and the defendant, Mohan Lal, were joint holders of a simple money-decree for Rs. 70-12-0 against one Khet Singh. A *zemindari* share belonging to Khet Singh was attached in execution of the decree and put up for sale. It appears that at one stage both the decree-holders had obtained permission of the Court to bid; but this permission lapsed

in consequence of the postponement of the sale. Later on Mohan Lal alone applied for permission to bid and, having received it, he became the certified purchaser of the share in question, at an auction-sale held on the 21st of July 1902, for a sum of Rs. 60. He seems to have certified to the executing Court the receipt of Rs. 60 in part satisfaction of the decree. Formal possession was delivered to Mohan Lal on the 28th of July 1903. In the present suit, filed on the 23rd of July 1913, Salle claimed possession of the share in question in accordance with an oral agreement set up by him, to the effect that Mohan Lal's purchase was to be for the benefit of both the decree-holders. He admitted that Mohan Lal had from the first refused to give him possession over any share in the property in suit. The Court of first instance dismissed the suit on various grounds. Primarily it held that the suit was barred by the provisions of section 66 of the Code of Civil Procedure; further that, supposing the suit was maintainable in any form, it was barred by limitation and, finally, that no oral agreement of the nature alleged in the plaint was proved. The plaintiff appealed to the District Judge and his appeal has been dismissed. The form of the judgment passed by the learned District Judge is assailed in the memorandum of appeal to this Court. As a matter of fact the lower Appellate Court has set out clearly enough the points for determination, but has disposed of the appeal upon findings sufficient to warrant the dismissal of the suit, although they do not cover all the points before it for determination. The learned District Judge says, in effect, that the suit as brought does offend against the provisions of section 66 of the Code of Civil Procedure and should be dismissed on that ground. He suggests, however, that if the plaint had been differently worded, and if the plaintiff had contented himself with asserting that the purchase made by Mohan Lal had been effected with the joint funds of Mohan Lal and the plaintiff and for the benefit of both, he might perhaps be permitted to maintain a suit for a declaration on the principles laid down by a Judge of this Court in *Achhaibar Dube* v. *Tapasi Dube* (1); but the learned District Judge remarks that the period of limitation for a declaratory suit, such as was contemplated by the learned Judge who decided that case, is six years, so that even from this point of view the present suit must fail. It is contended before me in second appeal that the suit was one for the recovery of possession, governed by the twelve years' period of limitation, and that such a suit is maintainable on the facts set forth in the plaint. I am of opinion that the learned Munsif was right in holding that the suit as brought contravenes the provisions of section 66 of the Code of Civil Procedure and should have been dismissed on this ground alone; from any point of view, the facts of the case are distinguishable from those of *Achhaibar Dube* v. *Tapasi Dube* (1), where the decree was a mortgage-decree and was exactly satisfied by purchase of the mortgaged property. The judgment in that case proceeded on its own facts and cannot, in my opinion, be relied upon as authority in the plaintiff's favour in the present case. Moreover, the learned District Judge is right in saying that, if any form of declaratory suit were maintainable on the facts alleged in the plaint, the period of limitation for such a suit would be six years. What the plaintiff in fact claims in the present case is that the defendant, Mohan Lal, is bound to hand over to him one-half share in the property in suit, unless he can produce evidence after an interval of ten years to satisfy the Court that the plaintiff, Salle, as a joint decree-holder, did receive one-half share in the sum of Rs. 60 bid by Mohan Lal as auction-purchaser of the property in suit. I am satisfied that the suit is not maintainable and I dismiss this appeal with costs.

Appeal dismissed.

(1) 29 A. 557; A. W. N. (1907) 166.

MADRAS HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL No. 1538 OF 1911.

April 15, 1913.

Present:—Sir Charles Arnold White, KT., Chief Justice, Mr. Justice Miller and Mr. Justice Sankaran Nair.

THE RECEIVER OF THE NIDADAVOLE AND MEDUR ESTATES—PLAINTIFF—APPELLANT

versus

K. SURAPARAZU AND OTHERS—DEFENDANTS—RESPONDENTS.

Madras Estates Land Act (I of 1908), s. 192—Plaint, valid presentation of—Limitation Act (IX of 908), s. 4—Officer authorized to receive plaints absent from head-quarters—Court, whether closed—Madras Civil Rules of Practice, r. 14, applicability of.

A plaint under the Madras Estates Land Act (I of 1908) presented to the Head Clerk of a Collector is not validly presented, if he is not appointed to receive plaints.

A Court is not closed within the meaning of section 4 of the Limitation Act, if the officer authorized to receive plaints is absent from head-quarters and is in camp.

Rule 14 of the Madras Civil Rules of Practice does not apply to proceedings before a Revenue Court.

Appeal against the decree of the Acting District Judge of Kistna, in Appeal No. 457 of 1910, preferred against that of the Acting Head Assistant Collector of Narasapur, in Summary Suit No. 4 of 1909.

FACTS of the case will appear from the following Order of Reference made by Sankaran Nair and Tyabji, JJ.:—

Under section 192 of the Estates Land Act, the provisions of the Civil Procedure Code are made applicable to suits and appeals filed under the Act. Section 26, Civil Procedure Code, enacts that all suits shall be instituted by the presentation of a plaint, and under Order IV, rule 1, the plaint is to be presented to the Court or such officer as it appoints in this behalf. In the case before us, the plaintiff took his plaint to the office of the Head Assistant Collector to whom it had to be presented. That officer was absent from head-quarters and in camp, and the plaintiff accordingly requested the chief ministerial officer of the Court to receive his plaint, but that officer refused to do so, as he was not authorized to receive such plaints; it was presented to the Head Assistant Collector on his return from camp. The suit is barred, if it is held to have been presented only after the return of the Head Assistant Collector. It is not barred, if presentation to the Head Clerk was a valid presentation of the plaint according to law. The question is one of general importance, and we think it desirable that there should be a final decision. We accordingly refer to the Full Bench the question whether, on the facts stated above, the plaintiff's suit is barred by limitation.

Mr. *P. Nagabhushanam*, for the Appellant.

Mr. *V. Ramadoss*, for the Respondents.

OPINION OF THE FULL BENCH.

We think the words "all suits, appeals and other proceedings under this Act," in section 192 of the Madras Estates Land Act, 1908, may be construed as including the institution of a suit by the presentation of a plaint. The result is that the provisions of the Code of Civil Procedure apply to the presentation of a plaint in a suit under the Estates Land Act. Under section 121 of the Code of Civil Procedure, the rules in the first Schedule have effect as if enacted in the body of the Act. Order IV, rule 1, provides that every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf. It is, therefore, open to the Collector to appoint an officer to whom plaints may be presented, but this, we understand, has not been done.

It is clear that rule 14 of the Civil Rules of Practice does not apply to proceedings before a Revenue Court, and we cannot accept the contention that, when the plaintiff sought to present his plaint in this case, the Court was closed within the meaning of section 4 of the Limitation Act.

We must accordingly answer the question in the affirmative.

Reference answered.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2554 OF 1913.

April 16, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

RAMIAH BAGAVATHAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SOMASI AMBALAM AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), ss. 62, 63—Specific Relief

RAMIAH BAGAVATHAR v. AMBALAM SOMASI.

Act (I of 1877), s. 26 (e)—Contract with a variation of terms after its breach—Suit for specific performance of such contract, maintainability of—Consideration—Fresh consideration—Rule of English Law, applicability of.

Where on a suit for the breach of a contract to sell lands, a subsequent contract to sell lands other than those at first agreed upon was executed for the original consideration:

Held, that section 26 (e) of the Specific Relief Act applied and the plaintiff was entitled only to specific performance of the contract with the subsequent variation. [p. 451, col. 1.]

The rule of English Law that a fresh consideration is necessary for a new contract after breach is not imported into Indian Law. [p. 456, col. 2.]

Cumber v. *Vane*, 1 Str. 426; 1 Sm. L. C. 338; 93 E. R. 613, *Foakes* v. *Beer*, 9 A. C. 605; 54 L. J. Q. B. 130; 51 L. T. 833; 33 W. R. 233, followed.

Sections 62 and 63 of the Indian Contract Act have entirely altered the English Law in this respect and the original contract subsists notwithstanding the variation. [p. 451, col. 2].

Manohur Koyal v. *Thakur Das Naskar*, 15 C. 319; *Davis* v. *Cundasami Mudali*, 19 M. 398; 6 M. L. J. 220, *Manjuri Bibi* v. *Akkel Mahmud*, 19 Ind. Cas. 793; 17 C. L. J. 316; 17 C. W. N. 889, followed.

Second appeal against the judgment and decree of the District Court of Madura, in Appeal Suit No. 54 of 1912, preferred against those of the Court of the Principal District Munsif of Madura, in Original Suit No. 359 of 1910.

Mr. *M. D. Devadoss*, for the Appellants.

Mr. *T. V. Muthukrishna Aiyar*, for the Respondent.

JUDGMENT.

SESHAGIRI AIYAR, J.—My learned brother has stated the facts. It is only necessary to refer to the exact finding arrived at by the District Judge. He finds that the settlement come to at the time of withdrawing the first suit was to substitute a different piece of land for the one which was originally agreed to be conveyed. The consideration was to be the same, and there was to be no change in the parties to the contract.

Mr. Devadoss contends that section 62 of the Contract Act does not apply to such a case. On the finding as stated by me, there has been no breach of the contract, but only a variation with the consent of the parties in one of the essential terms. The suit, which complained of default in the performance, ended in this adjustment. There is no finding that the contract was really broken. If Mr. Devadoss' premises are correct, namely, that there was a breach of the first contract, I would have agreed with him that section 62 will not help the defendant. The case of *Manohur Koyal* v. *Thakur Das Naskar* (1) will then be directly in point. Mr. Muthukrishna Aiyar has not convinced me that this decision is wrong. Section 62 contemplates that the original contract subsists and that the parties have agreed to re-place it by a new contract. The language suggests that the contract is to be put an end to with the consent of both the parties when the substitution, rescission or alteration takes place. Section 63, on the other hand, deals with cases where there has been a breach of the contract. No doubt, as pointed out by Mr. Justice Subramanania Aiyar in the case of *Davis* v. *Cundasami Mudali* (2), this section refers to unilateral acts, whereas under section 62 the concurrence of both the parties is required. That is not the only distinction between the two sections. It is pointed out that both the sections find place under the heading "Contracts which need not be performed." I do not think this can afford any assistance in the construction of the sections. The English authorities which recognise the distinction between promises made before breach and those after breach, must have been present to the minds of the framers of the Contract Act. As at present advised, I am not prepared to dissent from the view taken in the case of *Manohur Koyal* v. *Thakur Das Naskar* (1). But it is not necessary to discuss this subject any further.

I think the judgment of the District Judge can be supported on another ground. To the claim for specific performance made by the plaintiff, defendants' reply is that there has been a subsequent agreement to vary one of the terms of the contract by substituting another piece of land for the one already agreed upon. This defence is covered by section 26 (e) of the Specific Relief Act. That clause does not permit of a plea which sets up the abandonment of the first contract. It can be availed of only in cases of variation and, as I said before, the pleadings and the finding of the District Judge show that this is a contract of that

(1) 15 C. 319.
(2) 19 M. 398; 6 M. L. J. 220.

description. I am unable to agree with the contention of the learned Counsel for the appellant that section 26 (*e*) will not apply, if one of the parties to the contract has been complained against for default. There is no warrant for such a contention. It is open to argument that even if there has been a breach, section 26 (*e*) of the Specific Relief Act would apply, although section 62 of the Contract Act may not.

The decree of the District Judge is right and this second appeal is dismissed with costs.

KUMARASWAMI SASTRI, J.—The plaintiffs, who are the appellants, sue for specific performance of a contract by the defendants to sell the land described in the plaint and for damages. The plea of the defendants was that by an agreement between the parties certain other land was substituted for the land they originally agreed to sell, and both the lower Courts found that the plea was proved and dismissed the plaintiffs' suit, on the ground that the plaintiffs were not entitled to a conveyance of the land claimed.

It is argued for the appellants that, inasmuch as the variation set up was after the breach of the contract, the plaintiffs are entitled to sue on the original contract without any reference to the variation agreed to by them, and reliance has been placed on *Manohur Koyal* v. *Thakur Das Naskar* (1). There can be little doubt from the evidence that, after the plaintiffs filed a suit to recover the advance paid and damages alleging breach of contract by defendants, there was a mediation, as a result of which it was agreed between the plaintiffs and the defendants that land bearing Survey No. 153 (*b*) was to be sold instead of the land originally agreed upon. This appeal was argued on both sides on the footing that the variation was after the breach of contract.

I am of opinion that the present case falls within section 26, clause (*e*), of the Specific Relief Act and that the plaintiffs are not entitled to enforce the contract sued upon without the variation set up by the defendants. The section is clear and enacts that where a plaintiff seeks to nforce specific performance of a contract n writing to which the defendant sets up a variation, the plaintiff cannot obtain the performance sought except with the variation so set up where the parties have, subsequently to the execution of the contract, contracted to vary it. I see nothing in the section or illustrations to limit its operation to variations prior to the breach of the contract. It is, no doubt, true that under the English Common Law, there should be some independent benefit, actual or contingent, which is the consideration for varying a contract not under seal and that after breach, the only plea that would be valid defence would be accord and satisfaction where a party seeks to set up a variation of the terms of the contract. With all deference to the learned Judges who decided *Manohur Koyal* v. *Thakur Das Naskar* (1), I am unable to see any grounds for introducing the same rule in construing either section 26, clause (*e*), of the Specific Relief Act or sections 62 and 63 of the Contract Act, which are general in their terms. The observation of the learned Editors of Smith's Leading Cases on *Cumber* v. *Wane* (3) and the view of Lord Blackburn on *Foakes* v. *Beer* (4) show that the rules of English Law as to consideration for variation are not founded on any sound principle. The Legislature has not adopted the principles laid down in *Foakes* v. *Beer* (4), when it enacted section 63 of the Code and so far as the Madras High Court is concerned, it has been held that no consideration is necessary for a contract to extend the time for performance of a contract: *Davis* v. *Cundasami Mudali* (2). There seems to me to be no reason why after breach the parties should not agree to vary the terms or why a plaintiff who consents to such variation should not be held bound by the terms of his agreement. As a matter of practice, it is very common in this country for mediators to interfere after quarrels have arisen between the parties and effect a compromise between them, and I see nothing inequitable in holding the parties to the variation agreed to, irrespective of whether the variation was before or after breach. I do not think that Courts should engraft on the plain meaning of the provisions

(3) 1 Str. 426; 1 Sm. L. C. 338; 93 E. R. 613.

(4) 9 A. C. 602; 54 L. J. Q. B. 130; 51 L. T. 833; 33 W. R 233.

of Madras enactments limitations founded on technical rules of English law and pleading, especially in cases where such limitations are not suited to the conditions prevailing in this country. The observations of Sir Frederick Pollock (in his Genius of the Common Law, page 92) as to the undesirability of the blind following of English precedents, which have been referred to with approval by Justice Mookerjee in *Manjuri Bibi* v. *Akkel Mahmud* (5) may well be borne in mind in considering this question.

I am of opinion that the decrees of the Courts below are right and dismiss the second appeal with costs.

Appeal dismissed.

(5) 19 Ind. Cas. 793; 17 C. L. J. 316; 17 C. W. N. 889.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 610 OF 1914.

May 17, 1915.

Present:—Justice Sir George Knox, KT.

KHELAWAN KOERI—DEFENDANT—APPELLANT

versus

Sheikh ABDUL RAHIM—PLAINTIFF—RESPONDENT.

Pre-emption decree—Vendee applying to withdraw money, whether estopped from appealing—Appeal.

In a pre-emption suit decree was passed in favour of the plaintiff. The plaintiff deposited the money to be paid to the vendee in Court. The vendee applied to withdraw the money so deposited but did not, as a matter of fact, withdraw it:

Held, that by making the application to withdraw, the vendee did not lose his right to appeal. [p. 452, col. 2.]

Second appeal from a decision of the Additional District Judge of Gorakhpur, dated 28th January 1914.

Mr. *Iswar Saran* (with him Mr. *Parmeshwor Dayal*), for the Appellant.

Mr. *M. L. Agarwala*, for the Respondent.

JUDGMENT.—In the Court of first instance the plaintiff, who is here respondent, instituted a suit for pre-emption, stating that he was entitled to pre-empt both under the Muhammadan Law and the village custom. The Court of first instance held that the plaintiff was entitled to pre-empt and gave him a decree accordingly. The date on which he granted the decree was the 20th of August 1913. From that decree the defendant filed an appeal on the 3rd of November 1913. That appeal was within time as the vacation intervened. Upon the Court proceeding to hear the appeal, a preliminary objection was taken on the part of the plaintiff, to the effect that the defendant had accepted the decree and could no longer appeal from it. The acceptance was said to be on this wise, namely, that on the 5th of September 1913 which was within the month of the period granted to the plaintiff to deposit the pre-emption money, the defendant applied to withdraw the money which had been deposited. Along with the application to withdraw the money, he filed an application stating that he was willing to accept this money and asking that it be given to his Pleader, Munshi Wajid Ali. Upon this application the Court passed an order that the money should be paid; but before it was actually paid the defendant had filed a second application stating that he had changed his mind, would not now accept the money and had in fact on the 3rd of November filed this appeal. The lower Appellate Court held that the defendant could not be allowed to blow hot and cold and that by his first application he had accepted the decree, and dismissed the appeal. The defendant now comes to this Court and says that by what he did he had not lost his right to appeal.

No authority has been cited to me either one way or the other, except the case of *Anant Das* v. *Ashburner and Company* (1) and that of *Moonshee Ameer Ali* v. *Maharanee Inderjeet Singh* (2). Neither of the cases cited appears to be in point. The facts which govern them are quite distinct from those which govern this appeal. There was no agreement in the present case on the part of the defendant by which he is precluded from filing an appeal. This being so and the appeal having been disposed of by the lower Appellate Court on a preliminary point which is now reversed, I remand the case to the lower Appellate Court with directions to re-admit the appeal under its

(1) 1 A. 267.

(2) 14 M. I. A. 203; 9 B. L. R. 460; 2 Suth. P. C. J. 479; 2 Sar. P. C. J. 731; 20 E. R. 763.

original number in the register and proceed to determine it in accordance with law. Costs will abide the event.

Case remanded.

CALCUTTA HIGH COURT.

CIVIL RULE No. 832 OF 1914.

May 3, 1915.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Chapman.

SIB KISHORE GHOSH—PLAINTIFF—PETITIONER

versus

MANIK CHANDRA NATH—DEFENDANT—OPPOSITE PARTY.

Legal Practitioners Act (XVIII of 1879), s. 28, scope of—Agreement with client for fees—Amount of fees and manner of payment—Reasonable remuneration, implied promise of—Suit maintainable.

Where a party employs a Pleader without any agreement as to the amount of fees or the manner of payment thereof, the Pleader is entitled to recover on an implied promise of reasonable remuneration, and his suit to recover a reasonable sum as his remuneration is not touched by the principle embodied in section 28 of the Legal Practitioners Act. [p. 454, col. 1.]

Kamini Moni Debi v. *Khettra Mohan Ganguli*, 13 Ind. Cas. 43; 15 C. L. J. 660; 17 C. W. N. 45 on review, 11 Ind. Cas. 382; 15 C. W. N. 68; 15 C. L. J. 690; *Keshav Govind Joshi* v. *Jamsetji Curselji*, 12 B. 557; *Sarat Chandra Roy* v. *Chandi Charan Mitra*, 7 C. W. N. 300 and *Mohendra Lal* v. *Akhil Chandra Pakrashi*, 20 Ind. Cas. 47; 20 C. L. J. 424, referred to.

In the absence of an agreement a Pleader is entitled to a *quantum meruit*, which ought to be determined with reference to all the circumstances of the case. [p. 454, col. 2.]

Civil Rule against the decision of the Munsif, Iswarganj, exercising the powers of a Small Cause Court Judge.

Babu *Birendra Kumar De*, for the Petitioner.

Babu *Kali Kinkar Chakrabarty*, for the Opposite Party.

JUDGMENT.—This Rule was issued under section 25 of the Provincial Small Cause Courts Act, 1887, on an application by the plaintiff in the suit, who is a Pleader by profession. His case is that he was engaged to resist the claim in a mortgage suit instituted against the defendant. He successfuly defended the suit, which was dismissed with costs on the 3rd February 1911. He alleges that the defendant paid him Rs. 5 only on account of fees and has refused to make any further payments. He consequently instituted this suit on the 29th January 1914 for recovery of such sum as the Court may adjudge reasonable, and values the relief at Rs. 45. He states incidentally in the plaint that Rs. 50 would be a fair measure of remuneration, as that was the sum decreed in favour of the defendant as against his opponent in the mortgage suit. The defendant pleaded that the suit was not maintainable and, further, that the plaintiff had been paid whatever was lawfully payable to him. The Small Cause Court Judge did not investigate the case on the merits, but dismissed the suit on the authority of the decision of *Kamini Moni Debi* v. *Khettra Mohan Ganguli* (1). We are now invited to set aside the decree of dismissal, on the ground that the case mentioned is distinguishable and section 28 of the Legal Practioners Act, rightly construed, does not bar the claim.

Section 28 of the Legal Practitioners Act is in these terms: "No agreement entered into by any Pleader...with any person retaining or employing him, respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges or disbursements in respect of business done or to be done by such Pleader...shall be valid, unless it is made in writing signed by such person, and is, within fifteen days from the day on which it is executed, filed in the District Court or in some Court in which some portion of the business in respect of which it has been executed has been or is to be done." It is plain that the agreement thus invalidated is an agreement respecting the amount and manner of payment of fees, charges and disbursements. In the case before us, there is no allegation that there was any agreement touching either the amount or the manner of payment of the fees. According to the plaintiff, the defendant asked him to act as his Pleader; nothing

(1) 13 Ind. Cas. 43; 15 C. L. J. 660; 17 C. W. N. 45 on review, 11 Ind. Cas. 382; 15 C. W. N. 681; 15 C. L. J. 690.

was said as to the amount of fees or as to the time when the fees should be paid. The very fact that the defendant asked the plaintiff to conduct his case necessarily implied that he would reasonably remunerate the plaintiff. The relation between the parties is contractual and the case is not governed by section 70 of the Indian Contract Act, which finds a place in the fifth Chapter devoted to certain relations resembling those created by contract. That section, besides, defines the obligation of a person who has enjoyed the benefit of a non-gratuitous act. Here the defendant is bound to remunerate the plaintiff, who acted at his request, even though the act might not have been beneficial to the defendant; for instance, the defendant would have been bound to remunerate the plaintiff, even though the latter had been unsuccessful in his defence. It is plain that if *A* requests *B* to do a piece of work for him, and *B* does it, not intending to act gratuitously, he is bound to pay *B*, even if he is not benefited thereby. The request implies a promise to pay reasonable remuneration. In this view, no question consequently arises as to the effect of section 65 of the Indian Contract Act, which treats of the obligation of a person to make restitution or compensation for advantage received by him under an agreement that is discovered to be or becomes void. But it is worthy of note that if there had been an agreement as to the amount or manner of payment of fees, which was void because made in contravention of section 28 of the Legal Practitioners Act, section 65 of the Indian Contract Act would have been of no avail, inasmuch as the agreement was void *ab initio* and on the face of it, and could not be aptly described as an agreement which has been *discovered* to be or has *become* void. To sum up the position: as the defendant employed the plaintiff without any agreement as to the amount of fees or the manner of payment thereof, the plaintiff is entitled to recover on an implied promise of reasonable remuneration, and the case is not touched by the principle embodied in section 28 of the Legal Practitioners Act. This view is not opposed to the decision of *Kamine Moni Debi* v. *Khettra Mohan Ganguli* (1). There the Pleader claimed fees due under an agreement for professional services rendered; it was ruled that the agreement was void, as the requirements of section 28 had not been fulfilled. In the case before us, there was no agreement between the parties either as to the *amount* or as to the *manner of payment* of fees. We need not, consequently, consider the question whether, if there had been such an agreement, which was void because contrary to the express provisions of the Statute, the Pleader could yet have claimed reasonable compensation. Upon that question, there has been a conflict of judicial opinion, as is clear from the decisions in *Raghunath Saran Singh* v. *Sri Ram* (2); *Razi-ud-Din* v. *Karim Bakhsh* (3); *Rama* v. *Kunji* (4); *Krishnasami* v. *Kesava* (5); *Anantayya* v. *Padmayya* (6), *Sundaraja Ayyangar* v. *Pattanathusami Tevar* (7), *Subba Pillai* v. *Ramasami Ayyar* (8), *Hazari Lal* v. *Tilok Chand* (9). The observations in some of these cases, for instance, those in *Subba Pillai* v. *Ramasami Ayyar* (8), may, as has been argued with considerable force by the opposite party, practically render nugatory the salutary provisions of section 28. Where there is an agreement, void under section 28, the question may well require consideration, whether the Court should assist a person who has entered into a contract rendered void by positive law. No such question, however, arises where, as here, there is no agreement of the kind contemplated by section 28. In the words of Sargent, C. J., in *Keshav Govind Joshi* v. *Jamsetji Cursetji* (10), the Pleader, in the absence of an agreement, is entitled to a *quantum meruit*, which ought to be determined with reference to all the circumstances of the case. To the same effect are the observations in *Sarat Chandra Roy* v. *Chandi Charan Mitra* (11) and *Mohendra Lal* v. *Akhil Chandra Pakrashi* (12). We hold accordingly that the present case is not within the scope of section 28 and that the suit is consequently maintainable.

(2) 28 A. 764; A. W. N. (1906) 235; 3 A. L. J. 579 1 M. L. T. 242.
(3) 12 A. 169; A. W. N. (1890) 36.
(4) 9 M. 375.
(5) 14 M. 63.
(6) 16 M. 278; 2 M. L. J 247.
(7) 17 M. 306.
(8) 27 M. 512; 14 M. L. J. 274.
(9) 136 P. R. 1893.
(10) 12 B. 557.
(11) 7 C. W. N. 300.
(12) 20 Ind. Cas. 47; 20 C. L. J. 434.

The result is that the Rule is made absolute, the decree of the Court below set aside, and the case remanded for trial on the merits. The petitioner is entitled to his costs in this Court. We assess the hearing fee at one gold *mohur*.

Rule made absolute

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1113 OF 1912.

March 29, 1915.

Present:—Mr. Justice Oldfield and Mr. Justice Napier.

PANGALURI VENKATACHELAPATI RAO AND OTHERS—PLAINTIFFS—APPELLANTS

versus

PANGALURI JAYARAMAYYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint undivided Hindu family—Act of trespass committed by one member—Benefit to other members—Presumption.

Under Hindu Law it must not be presumed that one member of a joint undivided Hindu family prescribes also for the benefit of his other co-parceners. [p. 455, col. 2.]

Narayana v. *Krishna*, 8 M. 214; *Parbati Dasi* v. *Baikuntha Nath Das*, 22 Ind. Cas. 51; 15 M. L. J. 66; 12 A. L. J. 79; 19 C. L. J. 129; 18 C. W. N. 428; 16 Bom. L. R. 101; 26 M. L. J. 248; (1914) M. W. N. 42, distinguished.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Guntur, in Appeal Suit No. 18 of 1910, preferred against that of the District Munsif, Bapatla, in Original Suit No. 841 of 1907.

Mr. *K. Narain Row*, for the Appellants.

Mr. *V. Ramadoss*, for the Respondents.

This second appeal coming on for hearing on the 21st and 22nd July 1914, the Court delivered the following

JUDGMENT.—It is argued with reference to isssue 5 that the findings of the lower Courts are based on 1st defendant's prescription against plaintiff and the other members of the family, and that no effective prescription was established. It is alleged in this connection that the lower Courts gave insufficient weight to the facts that the *patta* was throughout in the name of the father of the family and that 1st defendant was the senior and, therefore, presumably the managing member. Reference has also been made to *Narayana* v. *Krishna* (1) and *Parbati Dasi* v. *Baikuntha Nath Das* (2), as showing that no presumption arises in favour of 1st defendant's ownership in the circumstances of this case. But those decisions are not in point, since they do not deal with acquisition, such as that now in question, which admittedly originated in trespass; and we have been shown no authority for the view that one member of a Hindu joint family must be presumed to have prescribed for the benefit of his co-parceners in such circumstances. In fact both Courts also dealt with this part of the case on this broader ground, the learned Subordinate Judge adopting the District Munsif's conclusions *in toto*, that the 1st defendant and his brothers including plaintiff had no title to the property and accordingly that there could be no question of prescription as between them. All were trespassers alike and the title, on which the 1st defendant is entitled to rely as against plaintiffs, is based only on his possession, which is admitted. This conclusion is sufficient to justify the determination of the issue in defendant's favour, and it has not been displaced. The appeal, therefore, fails in so far as it relates to the finding on issue 5.

Issue 4 was "whether the defendants Nos. 1 to 3 are in possession of items 17, 18, 19 and 20 of schedule A and of items 6, 11 and 13 of schedule B."

The lower Appellate Court did not find on the question of possession of these items. It found only that they are the self-acquisition of the 1st defendant. We remand the case for a fresh finding on the evidence on record on issue 4 as to the possession of the items referred to in it.

The finding should be submitted within six weeks from this date and seven days will be allowed for filing objections.

In obedience to the order contained in the above judgment, the Temporary Subordinate Judge of Guntur submitted the following

FINDING.—I have been directed to submit my finding on issue 4, which runs as follows:—

(1) 8 M. 214.

(2) 22 Ind. Cas. 51; 15 M. L. J. 66; 12 A. L. J. 79; 19 C. L. J. 129; 18 C. W. N. 428; 16 Bom. L. R. 101; 26 M. L. J. 248 (1914) M. W. N. 42.

"Whether the defendants Nos. 1 to 3 are in possession of items 17, 18, 19, 20 of schedule A and of items 6, 11, and 13 of schedule B."

2. Item 20 in the issue is a mistake admittedly for item 21.

3. I have dealt with these items in paragragh 12 of my judgment. It is conceded now for the plaintiffs that the survey numbers given for these items in the plaint schedules A and B are incorrect and that the correct numbers are those which appear in the 1st defendant's *patta*, Exhibit IX (*c*). The schedules did not give the boundaries or the names of the lands, but, when the 1st defendant was examined as the plaintiff's 1st witness, he was questioned as to whether he was not in possession of the lands which went by certain names, and he admitted he was in possession of them. The District Munsif noted the items in question against the names put to the 1st defendant in his deposition. Evidently, what the plaintiffs intended to claim were the lands included in the 1st defendant's *patta*, Exhibit IX (*c*), though in respect of the lands in question the survey numbers were incorrectly noted in the schedules A and B. The plaintiffs have applied to me now for the amendment of the plaint by the insertion of the correct survey numbers in the schedules A and B, but the matter is one, which has to be determined by their Lordships. The question, however, is not of much importance, now that their Lordships have practically found that all the lands of *swarna* were the self-acquisition of the 1st defendant.

4. I find that the lands bearing the survey numbers given to the items in question in schedules A and B, as they now stand, are not in the possession of the defendants Nos. 1 to 3.

This second appeal coming on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—The lower Appellate Court's finding on the issue remanded is that the lands referred to in the plaint of items 17, 18, 19 and 20 of schedule A and 6, 11 and 13 of schedule B are not in 1st to 3rd defendants' possession. Its correctness is not disputed. Plaintiffs say only that the survey numbers in the plaint are wrong and that they require time to apply to this Court for an amendment. We see no reason for giving time for that purpose. The second appeal fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 26 OF 1914.

April 16, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

PATINJARA MANAKAL PARAMESWARAN NAMBUDRI—DECREE-HOLDER—PETITIONER—APPELLANT

versus

M. K. SUBRAMANIA PATTAR—JUDGMENT-DEBTOR—COUNTER-PETITIONER—RESPONDENT.

Jurisdiction—Foreign Court—Submission to its jurisdiction—Objection taken in Court of first instance but not persisted on in Appellate Court—Inference—Question, whether can be re-opened afterwards.

The fact that an objection to the jurisdiction of a foreign Court was taken in the Court of first instance in the foreign territory but was not persisted on in appeal, is a clear proof of a submission to jurisdiction of the foreign Court and, therefore, the question cannot be re-opened again in execution of that decree in the British Courts. [p. 457, col. 1.]

Boissiere and Co. v. *Brockner and Co.*, 6 T. L. R. 85, followed.

Appeal against the appellate order of the District Court of South Malabar, in Appeal Suit No. 392 of 1913, preferred against that of the Subordinate Judge of Calicut, in Execution Petition No. 760 of 1912 (Original Suit No. 61 of 1083, Tiruihur District Court, Appeal Suit No. 24 of 1084, Chief Court, Cochin).

Mr. *T. R. Ramachandra Aiyar*, for the Appellant.

Mr. *T. K. Govinda Aiyar*, for the Respondent.

JUDGMENT.—We think that the appeal must be allowed. The counter-petitioner, no doubt, objected to the jurisdiction in the Court of first instance in Cochin State. But, when a decree had been passed against him, he invoked the aid of the Appellate Court there without any such reservation,

This, it seems to us, was a submission to the Cochin Courts which debars him from relying on any defect in their jurisdiction now, vide *Boissiere and Co.* v. *Brockner and Co.* (1). We, therefore, without reference to the other contentions relied on by the petitioner-appellant, set aside the lower Appellate Court's order. The Subordinate Judge will restore the execution petition to his file and proceed with the disposal of it according to law.

Costs here and in the lower Appellate Court will be costs in the cause.

Appeal allowed; Order set aside.

(1) 6 T L. R. 85.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 843 OF 1913.

April 8, 1915.

Present:—Mr. Justice Napier.

MEENAKSHI AMMAL—RESPONDENT No. 1 —PETITIONER

versus

MR. R. G. ORR AND OTHERS—PETITIONERS—RESPONDENTS.

Madras Estates Land Act (I of 1908), s. 186—Collector's certificate—Objections of petitioner, not illegal—Court not bound to call for evidence.

A Collector's certificate, granted under section 186 of the Madras Estates Land Act is not conclusive. [p. 457, col. 2.]

An order of a District Court under section 186 of the Madras Estates Land Act, based not merely upon the certificate of the Collector but also upon other materials raised on behalf of the *ryot*, is not illegal. [p. 457, col. 2.]

Quære.—Whether a District Court is bound to call for evidence when none is offered by the *ryot* himself before acting upon the Collector's certificate? [p. 458, col. 1.]

Goghun Mollah v. *Rameshur Narain Mahta*, 18 C. 271, referred to.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the judgment and order of the District Court of Ramnad, in Original Petition No. 144 of 1911.

Mr. *K. Jagannadha Aiyar*, for the Petitioner.

Messrs. *Srinivasa Aiyangar* and *S. Gopalaswami Aiyangar*, for the Respondents.

JUDGMENT.—The order in this case is one passed by the District Judge of Ramnad under section 186 of the Madras Estates Land Act. The preliminary order which is appealed against was passed on the 20th August 1911, and the judgment assessing the compensation, on the 30th June 1913. The present petition was filed on the 5th November 1913. The Court authorised acquisition of the land for the purpose sought, namely, a threshing floor. The petitioner now complains that the Court erred in basing its decision solely on the certificate of the Collector and in refusing to allow him to adduce evidence. He, however, took no steps to get that order set aside, but allowed the proceedings to continue; and it was not until he had failed in getting compensation as high as he wanted that he objected to the preliminary order. On this ground alone I would dismiss the petition.

On the examination of the record I find that the allegation that the District Judge bases his decision on the certificate alone, is not correct. The learned Vakil admitted that he had the petition before him and it is clear from the language of the order that he had other materials also before him. He does not say in his order that he is satisfied on the certificate of the Collector alone. He deals with the objections taken by the petitioner and decides that in the circumstances the threshing floor is required at the place where the land-holder seeks to have it made. That ground, therefore, disappears.

The allegation that the petitioner was not permitted to call witnesses is contained in an affidavit made by a relative of the petitioner, who speaks to what occurred at the hearing. The proceedings were in English and there is nothing to show that the petitioner was in a position to speak accurately to the facts. The proper person to have made the affidavit is obviously the Vakil who appeared, and no affidavit from him is forthcoming. The respondents have filed a counter-affidavit in which they allege, what is not contradicted, that the petitioner applied for no process to the Court for witnesses. In these circumstances I cannot accept the affidavit as being conclusive. On this ground also I would dismiss the petition.

The only other question that has been strenuously argued on behalf of the petitioner is the claim that the Court must

take evidence of itself. This view has the authority of the majority of the Full Bench who considered this question in the case *Goghun Mollah* v. *Rameshur Narain Mahta* (1) on identical words in the Bengal Act. I do not, however, think it necessary to express any opinion. The point is one of great difficulty and in my view it will be very difficult to construe this section in any way that will give full value to both clauses of sub-section (1). The matter must be decided by a Bench of this Court. The petition is dismissed with costs.

Petition dismissed.

(1) 18 C. 271.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 1966 OF 1913.

March 18, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

SADAYA KONAN AND ANOTHER—PETITIONERS

versus

ANNAMALAI UDAYAN—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. IX, r. 13—Ex parte decree against some of the defendants—Appeal by others—High Court, power of, to entertain application to set aside ex parte decree—Jurisdiction.

A High Court has jurisdiction to entertain an application by some of the defendants to set aside an *ex parte* decree passed by the original Court when a second appeal by the other defendants is pending before it. [p. 458, col. 2.]

Sankara Bhatta v. *Subraya Bhatta*, 30 M. 535; 17 M. L. J. 436; *Chenna Reddi* v. *Pedda Obi Reddi*, 2 Ind. Cas. 802; 6 M. L. T. 135 (F. B.); 19 M. L. J. 388; 32 M. 416, followed.

Kumud Nath Roy Chowdhry v. *Jatindra Nath Chowdhry*, 9 Ind. Cas. 189; 15 C. W. N. 399; 38 C 394; 13 C. L. J. 221, *Indu Meah* v. *Darbakhsh Bhuiyan*, 10 Ind. Cas. 275; 15 C. W. N. 798; 14 C. L. J. 42; *Uedlot Khasia* v. *Ka Ran Khasiani*, 13 Ind. Cas. 377; 15 C L. J. 241, distinguished.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order to set aside the *ex parte* decree passed against the petitioners herein in Original Suit No. 725 of 1911, on the file of the Court of the District Munsif of Kallakurichi, and to direct that the said suit be tried *de novo* as against the petitioners.

Mr. *K. R. Rangasami Aiyangar*, for the Petitioners.

Mr. *G. S. Venkatarama Aiyar*, for Mr. *G. S. Ramachandra Aiyar*, for the Respondent.

ORDER.—This was a suit in ejectment against three defendants. A decree was passed against all of them. These defendants are brothers and are members of an undivided Hindu family. Against the decree of the District Munsif, 1st defendant alone appealed. Defendants Nos. 2 and 3 were not parties to the appeal. The appeal was dismissed. The 1st defendant has preferred a second appeal. Defendants Nos. 2 and 3 applied to this Court to be made party respondents and that application was granted. They have also presented an application to this Court to set aside the decree passed against them by the District Munsif, on the ground that they were not properly served and that the order declaring them *ex parte* is wrong. Mr. G. S. Venkatarama Aiyar raised a preliminary objection that this Court has no jurisdiction to entertain the application. The language of Order IX, rule 13, is clear and if the matter were *res integra*, we would have felt considerable hesitation in holding that this Court had jurisdiction. But in matters affecting procedure, it is desirable that there should be no conflict of decision. It was held in *Sankara Bhatta* v. *Subraya Bhatta* (1), under similar circumstances, that the High Court had jurisdiction to entertain an application. When the question, whether after the preferring of an appeal, the first Court had jurisdiction to hear an application for review, was considered by the Full Bench in *Chenna Reddi* v. *Pedda Obi Reddi*(2), the learned Judges were of opinion that the decision in *Sankara Bhatta* v. *Subaraya Bhatta* (1) was good law. It may also be pointed out that under section 107, clause (2), of the Code of Civil Procedure the Appellate Court has all the powers which the Court of first instance could have exercised. Therefore, it cannot be argued that the High Court has absolutely no jurisdiction. Moreover, it is not desirable that the same matter should be pending in two Courts at the same time. In the present case, the first defendant has appealed on a ground common to himself and the other defend-

(1) 30 M. 535; 17 M. L. J. 436.

(2) 2 Ind. Cas. 802; 32 M. 416; 6 M.L.T. 135 (F.B.); 19 M. L. J. 388.

dants and if he succeeds, the decree will have to be set aside in its entirety. Therefore, no use will be served by the Court of first instance entertaining this application.

The Calcutta decisions to which our attention has been drawn do not affect the question. It was held in those cases that the lower Court was not deprived of jurisdiction by the presentation of the appeal to the Appellate Court. To hold otherwise would be to contravene the express language of Order IX, rule 13. We think the decisions *Kumud Nath Roy Chowdhry* v. *Jatindra Nath Chowdhry* (3), *Indu Meah* v. *Darbakhsh Bhuiyan* (4) and *Hedlot Khasia* v. *Ka Ran Khasiani* (5), are not authorities for the position that the superior Court has no jurisdiction. Both on the grounds of convenience and on the principle of seeing that decisions affecting procedure are not constantly departed from, we hold that this Court had jurisdiction.

On the merits, we accept the affidavit filed by the respondent in the case. This shows that the three defendants were residing together at the time that the summons was served on the 1st defendant, who has been fighting the case in all its stages. The return of the *amin* says that the 1st defendant accepted service on behalf of defendants Nos. 2 and 3 and stated that these defendants had gone to Kallakurichi. The probabilities are all in favour of the defendants Nos. 2 and 3 having been aware of the service of the summons on the 1st defendant, of the progress of the suit and of the decree that was obtained against them in the Court of first instance. We do not believe this allegation that they had knowledge of the decree against them only after the filing of the second appeal.

We dismiss the application with costs.

Petition dismissed.

(3) 9 Ind. Cas. 189; 38 C. 394; 15 C. W. N. 399; 13 C. L. J. 221.

(4) 10 Ind. Cas. 275; 14 C. L. J. 42; 15 C. W. N. 798.

(5) 13 Ind. Cas. 377; 15 C. L. J. 241.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREES Nos. 2196 and 3049 TO 3052 OF 1912.

March 29, 1915.

Present:—Mr. Justice Sharf-ud-Din and Mr. Justice Richardson.

ANANT PRASAD SINGH—PLAINTIFF—APPELLANT

versus

H. MANNERS AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 22, proviso, scope of—Raiyati *interest, merging of, into landlord's by sale—Arrears of rent, sale for—Landlord, purchase by—Under*-raiyat's *right, how long remains.*

Though the *raiyati* right merges into that of the superior landlord by the sale of the holding for arrears of rent and its purchase by the landlord, the right of an under-*raiyat* does not cease but remains alive till he is evicted by law, according to the proviso of section 22 of the Bengal Tenancy Act. [p. 460, col. 2.]

Appeal against the decrees of the District Judge of Darbhanga, dated the 28th June 1912, reversing those of the Munsif, Additional Court at Samastipur, dated the 18th of December 1911.

Babus *Umakali Mukherjee* and *Sharoshi Charan Mittra*, for the Appellant.

Babu *Samatul Chandra Dutt*, for the Respondents.

JUDGMENT.

APPEAL No. 2196 OF 1912.

SHARF-UD-DIN, J.—In this appeal the plaintiff is the appellant. He instituted the present suit for declaration of title to, and recovery of possession over, a piece of land against the defendants on the ground that they are trespassers.

In order to understand the grounds urged in support of the present appeal, it is necessary to advert to some facts that happened before the institution of the present suit, and these facts are:

In 1883 the defendants 1st party were the lessees of a share in *Mouza* Satmalpore and while they were lessees, they obtained possession of the land in suit under *kurtowlee* leases executed by the tenants of the *mouza*. By this arrangement the 1st party defendants acquired the right of under-*raiyats*.

In 1906 the landlord brought rent suits against the defendants 2nd party who are the tenants and obtained *ex partee* decrees and in execution of those decrees put up the holdings of those tenants to sale and himself

purchased them and thereafter took delivery of possession. There was a criminal proceeding under section 145 of the Code of Criminal Procedure between the landlord and the defendants 1st party and in this proceeding the latter were found to be in possession, and hence the present suit.

The holdings purchased by the landlord were occupancy holdings and the landlord claims the lands of the holding as a proprietor thereof, on the ground that the entire interests of the landlord and the *raiyat* having united in him, he became a proprietor under section 22 of the Bengal Tenancy Act and that in consequence of the sale of the holding in execution of rent decrees, the *raiyati* interest of those tenants ceased to exist and with it the under-*raiyati* interest of the defendants 1st party and they are, therefore, trespassers and liable to be ejected.

The case set up by the defendants 1st party is described in paragraphs 8 and 9 of their written statements and they are these:

Para. 8—"That these defendants have been in lawful possession over the land in suit for the past 20 years as tenants, and, therefore, the plaintiff is not entiled to eject them."

Para. 9—"That the plaintiff has no legal claim to mesne profits but only to rent, which these defendants have ever been ready to pay and have duly tendered."

The Munsif gave a decree to the plaintiff, whereupon the defendants 1st party appealed to the District Judge. The appeal was allowed and the suit was dismissed. The lower Appellate Court held that the status of the defendants 1st party was that of occupancy *raiyats*. The lower Appellate Court further held that the *ex parte* rent decrees were obtained *mala fide*.

The grounds urged on behalf of the appellant are: (1) that there being no allegation on the part of the defendants 1st party and no proof on their behalf that the rent decrees were obtained *mala fide*, the lower Appellate Court erred in holding that those decrees were *mala fide*; (2) that defendants 1st party, having entered into possession of the land as under-*raiyats* and having continued in possession of the land either in the same capacity or as trespassers, could not acquire any right of occupancy.

It appears that the original tenants allowed the defendants 1st party to remain in possession of the land even after the expiry of the period mentioned in the *kurtowlee* leases.

I am of opinion that on the above facts no decision is necessary as to whether the lower Appellate Court should or should not have held that the *ex parte* rent decrees were obtained *mala fide*.

The decision of the present appeal rests on a finding as to the status of the defendants 1st party. On the admitted facts I find that although the defendants 1st party may not have acquired a title to the land as high as that of an occupancy *raiyat*, yet there can be no doubt that these defendants were holding the land as under-*raiyats* for the whole period from the execution of the *kurtowlee* leases down to the time when these holdings were sold and purchased by the plaintiff landlord in execution of his decrees for rent. The next question is what is their status after the sale of the holdings. I am of opinion that although the *raiyati* interest became merged into the superior interest of the landlord by operation of law, the defendants 1st party's status continued as that of an under-*raiyat* till evicted according to law.

When the appellant relies on the provisions of section 22 of the Bengal Tenancy Act, he must rely on the whole provision of that section. There is a proviso in that section, namely, that nothing in that sub-section shall prejudicially affect the rights of any third person.

There was a preliminary objection that the present appeal is defective inasmuch as Mr. Wilson, one of the members of the 1st party defendants, is not represented. The objection does not require any decision as I am of opinion that the appeal should be dismissed.

The appeal is dismissed with costs.

RICHARDSON, J.—I agree.

This judgment governs the other Appeals Nos. 3049 to 3052 of 1912.

Appeals dismissed.

MEHER ALI *v.* KALAI KHALASHI.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2929 OF 1913.

March 23, 1915.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Richardson.

MEHER ALI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

KALAI KHALASHI—PLAINTIFF—RESPONDENT.

Ejectment—Raiyat *at fixed rate of rent and occupancy* raiyat, *privileges of, distinguished*—"Kayemi", *meaning of*—'Sthayee karsha kabulyat," *meaning of*—*Under*-raiyat's *interest, whether heritable*—*Agricultural year, suit instituted before expiry of*—*Decree*—*Execution.*

A *raiyat* at a fixed rate of rent is competent to create a permanent heritable interest in favour of his grantee, although the latter is an under-*raiyat*. [p. 461, col 2.]

Hari Mohan v. *Atal Krishna Bose*, 23 Ind. Cas. 925, followed.

The use of the term *'kayemi'* in a *kabulyat* imports not fixity of rent, but only permanence of occupation of the land. [p. 462, col. 1.]

Gayratulla v. *Girish Chandra Bhaumik*, 12 C. W. N. 175; *Fazel Sheikh* v. *Keramuddi Sheikh*, 6 C. W. N. 916 and *Huromohan Mookerjee* v. *Ranee Lalun Monee Dassee*, 1 W. R. 5, referred to.

Where the plaintiff is an occupancy *raiyat*, he is not competent to create in favour of his grantee a permanent heritable under-*raiyati* interest. [p. 462, col. 1.]

The description of a *kabulyat* as *"sthayee karsha kabulyat"* does not necessarily imply that the grantee was intended to have a permanent heritable interest. [p. 462, col. 1.]

Where the grantee is an under-*raiyat* of an occupancy *raiyat*, his interest is not heritable. [p. 462, col. 1.]

Arip Mandal v. *Ram Ratan Mandal*, 31 C. 757; 8 C. W. N. 479 and *Jamini Sundar Dasi* v. *Rajendra Nath Chukrabutty*, 11 C. W. N. 519, referred to.

Where the suit was instituted before the expiry of the agricultural year current at the time when the original under-*raiyat* died:

Held, that the proper form of the decree would be one for ejectment against his representatives, the defendants, to be executed only on the expiry of that particular agricultural year. [p. 462, col. 2.]

Appeal against the decree of the District Judge, Faridpur, dated the 7th of June 1913, affirming that of the Munsif, Additional Court, Midnapur, dated the 29th of May 1912.

Babu *Surendra Chandra Sen*, for the Appellants.

Babu *Rupendra Kumar Mitra*, for the Respondent.

JUDGMENT.—This is an appeal by the defendants in an action in ejectment. The ancestor of the defendants executed a *kabulyat* in favour of the plaintiff on the 1st June 1889 in respect of the disputed land, which covers an area of six *cottas*. The original tenant died in 1910. On the 4th April 1911, the plaintiff commenced this action to eject the defendants who are his descendants, on the ground that as the household interest was not heritable, they had no right to remain in occupation of the land. The Courts below have decreed the suit. In support of the present appeal, it has been urged that the plaintiff was a *raiyat* at a fixed rate of rent and was competent to create, as he did, a permanent heritable interest in favour of his grantee, although the latter was an under-*raiyat*. It has not been disputed by the respondent, and in view of the decision in *Hari Mohan* v. *Atal Krishna Bose* (1), (Rule No. 1260 of 1913 decided on the 17th June 1913), it cannot be disputed, that this result would follow if the plaintiff is a *raiyat* at a fixed rate, but it has been argued that he is not a *raiyat* of that description.

In the *kabulyat* executed by the ancestor of the defendants in favour of the plaintiff the interest of the latter is described as a *kayemi karsha jote*. The contention of the appellant is that the use of the term *kayemi* indicates that the plaintiff was a *raiyat* at a fixed rent. This position has been controverted by the respondent, and reliance has been placed on the decision in *Fazel Sheikh* v. *Keramuddi Sheikh* (2), to show that the term *'kayemi* does not necessarily indicate fixity of rent. Reference has also been made to paragraph 15 of the report of the Rent Law Commission, dated the 15th July 1880, published in the *Calcutta Gazette* of the 21st July 1880. The opinion was expressed by the Commissioners, as the result of their inquiries, that in Backergunj even the interest of a *howladar* is not held at a fixed rent, and this, indeed, was the view adopted by the Court in the case of *Huromohan Mookerjee* v. *Ranee Lalun Monee Dassee* (3). If the interest of a *howladar* does not imply fixity of rent, it is obvious that a subordinate tenant, whose interest is that of a *kayemi kurshadar*, does not hold at a fixed rent. We are of opinion that the use of the term

(1) 23 Ind. Cas. 925.
(2) 6 C. W. N. 916.
(3) 1 W R 5.

'*kayem*' imports not fixity of rent, but only permanence of occupation of the land, and this view is in accordance with that adopted in *Gayratulla* v. *Girish Chandra Bhaumik* (4) and *Fazel Sheikh* v. *Keramuddi Sheikh* (2). The position, then, is that the plaintiff was an occupancy *raiyat* and was not competent to create in favour of the ancestor of the defendants a permanent heritable under-*raiyati* interest.

It has been finally argued on behalf of the appellant that as the *kabulyat* is described as *sthayee karsha kabulyat*, the intention of the grantor, whatever restrictions there might have been on his own right, was to create a permanent and heritable interest in the grantee, and that, notwithstanding the provisions of section 85 of the Bengal Tenancy Act, it is not open to him to question the validity of the grant made by him. In our opinion, there is no force in this contention, for the descriptin of the *kabulyat* as "*sthayee karsha*" *kabulyat* does not necessarily imply that the grantee was intended to have a permanent heritable interest. We must take that expression along with the description of the interest of the grantor himself, who was only an occupancy *raiyat*, and not a *raiyat* at a fixed rent; he could not consequently be assumed to have created in the grantee a permanent heritable interest in contravention of the express provisions of the law. In this view, no question of estoppel arises.

If, then, the grantee was an under-*raiyat*, as he must be held to have been, it cannot be disputed that his interest was not heritable. This view is supported by the cases of *Arip Mandal* v. *Ram Ratan Mandal* (5) and *Jamini Sundar Dassi* v. *Rajendra Nath Chuckrabutty* (6). With reference, however, to the decision of the Full Bench in *Arip Mandal* v. *Ram Ratan Mandal* (5), it has been argued that as the present suit was instituted before the expiry of the agricultural year in which the tenant died, the suit was premature and was bound to fail. We are not prepared to accept this contention as well-founded. Assuming that the suit was instituted before the expiry of the agricultural year current at the time when the original under-*raiyat* died, the proper form of the decree would be one for ejectment against his representatives, the defendants, to be executed only on the expiry of that particular agricultural year. It is not disputed that the agricultural year mentioned has expired long ago and that the defendants have nevertheless continued in occupation of the land. The decree for ejectment made by the Court below must consequently be affirmed and this appeal dismissed with costs.

Appeal dismissed.

(4) 12 C. W. N. 175.
(5) 31 C. 757; 8 C. W. N. 479.
(6) 11 C. W. N. 519.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 261 OF 1914.

April 19, 1915.

Present:—Mr. Justice Sadasiva Aiyar, Mr. Justice Bakewell and Mr. Justice Napier.

Sowcar BAPU SAHIB YOUSUFF SAHIB AND CO.—DEFENDANTS—APPELLANTS

versus

ISAC ISMAIL AND CO.—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 85, 88—Mutual, open and current account explained—Defendant residing outside original jurisdiction—Accounts submitted within jurisdiction—Jurisdiction of High Court—Factor, definition of.

Where under an agreement between the plaintiff and the defendant the defendant submitted to the plaintiff his account in the plaintiff's shop in Madras, the High Court in its original side does not cease to have jurisdiction over the suit merely because the defendant resides in a place outside such jurisdiction. [p. 463, col. 1.]

Different sums were advanced by the plaintiff to the defendant at different times. They were treated under an agreement as a consolidated debt commencing from the date of the agreement and a promissory note was executed by the defendant the same day about the consolidated items. A suit on the basis of the dealings was held to fall under Article 85, Schedule I, Limitation Act, 1908, and not under Article 88. [p. 464 cals. 1 & 2].

A factor is an agent entrusted with the possession of goods for sale. [p. 463 col. 2.]

Stevens v. *Biller*, 25 Ch. D. 31; 53 L. J. Ch. 249; 50 L. T. 36; 32 W. R. 419, followed.

Therefore where in the contract and dealings between the parties something outside the mere entrusting of the goods for sale is found (*e. g.*, advances from time to time by the plaintiff to the defendant and credit for the goods sold on defendant's behalf), these elements are quite sufficient to bring the case under Article 85 for the balance due on a mutual, open and current account, and Article 88 has no application. [p. 464, col. 2.]

Stevens v. *Biller*, 25 Ch. D. 31; 53 L. J. Ch. 249; 50 L. T. 36; 32 W. R 419, followed.

BAPU SAHIB YOUSUFF & CO. *v.* ISAC ISMAIL & CO.

Appeal, under clause 15 of the Letters Patent, against the judgment of the Hon'ble the Chief Justice, in Original Side Appeal No. 82 of 1912, reported as 24 Ind. Cas. 128, preferred against the judgment of the Hon'ble Mr. Justice Wallis, in the ordinary original civil jurisdiction of the High Court, in Civil Suit No. 262 of 1910.

FACTS of the case will be found in 24 Ind. Cas. 128.

Mr. *G. Krishnaswami Aiyar*, for the Appellants.

Mr. *A. Duraiswamy Aiyar*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The defendant is the appellant. The first question argued in this appeal is whether the entire cause of action arose within the local limits of the original side jurisdiction of this Court. It was contended that as the defendant lives in Kodambakam outside such limits and as the plaint in paragraph 4 states "that statements of accounts were sent by the plaintiff" (to the defendant) it is clear from the plaint itself that such statements were sent on to Kodambakam outside the limits of Madras and that hence part of the cause of action arose outside such limits. I am, however, not prepared to differ from the concurrent conclusion of the three learned Judges of this Court who have already dealt with this case, that conclusion being that the statements of accounts were intended by the parties to be submitted by the plaintiffs to the defendant in the plaintiffs' shop premises in Madras and that they were so submitted. The objection as to jurisdiction, therefore, fails.

The next contention of the appellant's learned Vakil is that the Rs. 10,000 made up of four sums paid by the plaintiffs to the defendant on different dates in July 1907 constituted an independent transaction of loan between the parties and that the claim for the recovery of these four sums was barred by limitation. The arguments under this contention were based partly on the fact that a promissory note payable on demand for the total of these four sums making up the Rs. 10,000 was obtained from the defendant by the plaintiffs on the 23rd July 1907, and partly on the fact that this sum of Rs. 10,000 was not entered as one of the items in the statements of accounts submitted from time to time by the plaintiff to the defendant. So far as the argument is based upon the execution of a separate promissory note, I do not think there is anything in it because on the very date on which the promissory note was executed, an agreement was signed by the defendant on the counterfoil of the sheet on which the promissory note was executed, and that agreement clearly stated that these four sums making up Rs. 10,000 were to be the sums advanced to the defendant in respect of, and for his carrying on, the dealings which were to be commenced from that date between the parties. Whether the right given under the promissory note to the plaintiffs to recover the Rs. 10,000 *on demand* is treated as qualified by the agreement in the counterfoil, (namely, that the Rs. 10,000 was to be the amount of advance to be taken into account in the dealings that commenced between the parties) or whether the contract under the promissory note is treated as a collateral security for the due performance by the defendant of the agreement entered into between the parties according to the counterfoil paper, is, in my opinion not material, because the suit, reading the plaint as a whole, seems to me to be based upon the dealings between the parties, and upon the basis that the items making up the Rs. 10,000 should be treated as items constituting the dealings between the parties. If the promissory note is to be treated as a collateral security, the fact that the claim to enforce that security is barred by limitation, cannot affect the plaintiffs' right to enforce the obligation of the defendant in respect of the substantial claim arising out of the accounts of the dealings between the parties, such accounts being mutual, open and current accounts according to the evidence. While it must be admitted that the plaint is badly drafted in paragraphs 4 and 6, I think that reading it as a whole, the plaintiffs' claim was intended to be based on the dealings, treating the advance of the four items making up the ten thousand rupees as the commencement of the dealings. On this view of the facts, no question of limitation arises in respect of this sum of Rs. 10,000.

Finally, it was argued that the accounts ought to have been taken as if the dealings under the agreement in the counterfoil of Exhibit A had ceased on the 3rd March 1908 and not in May 1909. The question whether the accounts ought to be taken till March 1908 or May 1909 was not dealt with in the judgment given by the learned Judge who tried the case in the original side, nor was it dealt with in the preliminary decree which followed that judgment. This Letters Patent Appeal is against the decree* of the learned Chief Justice passed in appeal on the preliminary decree. It was only in the subsequent proceedings that resulted in the final decree that the sum due on the accounts was ascertained, on the basis that it was to be taken till May 1909 and was awarded on that basis against the appellant.

The question, therefore, as to the date to which the accounts ought to be taken between the parties cannot be raised in this appeal against the preliminary judgment and decree.

In the result I would dismiss the appeal with costs.

BAKEWELL, J.—I agree with the conclusions of the learned Chief Justice in his judgment for the reasons mentioned therein and I have nothing further to add.

I concur in the order proposed by my learned brother.

NAPIER, J.—I agree. I will only add a few words on the points that were argued before us. The *first* point taken on the question of limitation was that the suit was one which was governed by Article 88 and that Article 85 had no bearing. Now Article 88 does not in terms apply, because that is a suit against a factor; but it was suggested that the relation between the plaintiff and the defendant in this case was one in which the plaintiff was a factor and that, therefore, it did not come within Article 85. Now it is true that the plaintiff was a factor in respect of some portion of the dealings between the parties. But it is not correct to suggest, as was suggested by the learned Vakil for the appellant, that it was as a factor that he made the advances which are included in the accounts. The position of a factor is stated in the judgment of Cotton, L. J., in *Stevens* v. *Biller* (1), as "an agent entrusted with the possession of goods for the purpose of sale." When, therefore, we find that in the contract and the dealings between the parties there was something outside the mere entrusting of goods for sale and the sale by the agent, there are other elements on which the suit can be brought and those elements are quite sufficient to bring the case within Article 85. There were the advances from time to time and there were credits for the goods sold on the defendant's behalf. I see no reason, therefore, why a suit should not be brought under Article 85 for the balance due on a mutual, open and current account.

The *next* point taken was that this total amount of Rs. 10,000 was not in fact treated by the parties as being an item in the account. With respect to that I entirely agree with my learned brother and I adopt the reasons given by the learned Chief Justice, which are to be found on pages 4 and 5 of his judgment. In my view the dissentient Judge, Mr. Justice Oldfield, overlooked the close connection between the circumstances under which the advances were made and treated this sum of Rs. 10,000 as an independent transaction. The facts of the case, in my view, do not support that contention, and I, therefore agree that this appeal should be dismissed with costs.

Appeal dismissed.

(1) 25 Ch. D. 31; 53 L. J. Ch. 249; 50 L. T. 36; 32 W. R. 419.

*See 24 Ind. Cas. 128.—*Ed.*

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 3899 OF 1912.

May 3, 1915.

Present:—Mr. Justice Fletcher and Mr. Justice Roe.

SURENDRA NARAYAN MITRA —PLAINTIFF—APPELLANT

versus

DEJINDRA PROSAD MITRA AND OTHERS —DEFENDANTS—RESPONDENTS.

Mesne profits or damages, suit for—Civil Procedure Code (Act V of 1908), s. 11, O. XX, r. 12, scope of—

SURENDRA NARAYAN MITRA *v.* DIJENDRA PROSAD MITRA.

Title derived from a party, nature of—No issue raised or tried—No bar—Co-defendants.

Section 11 of the Civil Procedure Code, 1908, contemplates a case where a party derives title from a party to the previous litigation subsequent to the previous litigation. [p. 465, col. 2.]

There is nothing in section 11 of the Code of Civil Procedure to suggest that where the plaintiff has derived no title subsequent to the previous suit, the subsequent suit should involve the consequence of being dismissed. [p. 465, col. 2.]

Where no issue was raised or tried in the former suit between the parties to the new suit:

Held, that the claim was not barred by section 11 of the Code of Civil Procedure. [p. 465, col. 2.]

Order XX, rule 12, does not contemplate anything except the relation between the plaintiff and the defendant in a previous suit. There is nothing in Order XX, rule 12, to suggest that it applies between co-defendants. [p. 465, col. 2.]

Appeal against a decree of the District Judge, Jessore, dated the 21st of September 1912, affirming that of the Subordinate Judge, first Court, Jessore, dated the 30th of May 1911.

Babus *Sarat Chandra Roy Chowdhury* and *Dhirendra Krishna Roy*, for the Appellant.

Babus *Bepin Behary Ghose II*, *Jnanendra Nath Sircar* and *Amarendra Nath Bose*, for the Respondents.

JUDGMENT.—This is an appeal from a decision of the learned District Judge of Jessore affirming the decision of the Subordinate Judge of the first Court there. The plaintiff brought the suit to recover mesne profits or damages in respect of certain lands of which he had been kept out of possession by the defendants Nos. 1 to 56. The plaintiff in the year 1896 obtained a lease of about 600 *bighas* of land at an annual rent of Rs. 196 odd from the defendants Nos. 57 to 60. When the plaintiff attempted to take possession, he was resisted by the defendants Nos. 1 to 56. Then happened what has caused the difficulty in the present suit. In the year 1900, the defendants Nos. 57 to 60 instituted a suit to recover possession through the plaintiff of the lands together with mesne profits. The present plaintiff was the *pro forma* defendant to that suit. But it is quite clear that that suit ought to have been dismissed, because either the defendants Nos. 57 to 60 had a right to possess the lands in which case the decree ought to have been in their favour, or that there had been a right of possession in favour of the present plaintiff in which case the suit ought to have been dismissed. What happened was that the suit was decreed on the 11th July 1902, actual possession being delivered on the 23rd July 1909. In the course of the execution proceedings in that suit, mesne profits were assessed for three years down to the 11th July 1905, and now the plaintiff brings the present suit to recover mesne profits after that date. The learned Judges of the Courts below have dismissed the suit on the ground that it is barred by the rule of *res judicata*. It is quite clear that section 11, Code of Civil Procedure, contemplates a case where a party derives title from a party to the previous litigation subsequent to the previous litigation. There is nothing in section 11 to suggest that where the plaintiff has derived no title subsequent to the previous suit, the subsequent suit should involve the usual consequence of being dismissed. That is what has caused the difficulty in the present case because obviously the plaintiff in this suit does not claim through the defendants Nos. 57 to 60 subsequent to the date of the former suit.

Then the *next* point is that, at any rate, the present plaintiff was a formal party to the former suit and that a case of *res judicata* has arisen between the present plaintiff and the defendants Nos. 1 to 56 by reason thereof. But no issue was raised or tried between the present plaintiff and the defendants Nos. 1 to 56 in the former suit. It is quite clear, therefore, that the present claim is not barred by section 11, Code of Civil Procedure.

The *other* point is that the plaintiff's suit is barred by section 211 of the old Code of Civil Procedure, which corresponds with Order XX, rule 12, of the new Code. But Order XX, rule 12, does not contemplate anything except the relation between the plaintiff and the defendant in that suit. There is nothing in Order XX, rule 12, to suggest that it applies between co-defendants. That being so, there is nothing to prevent the plaintiff in the present suit from recovering damages in respect of the period subsequent to the assessment of damages in the former suit. The present appeal must, therefore, be allowed with

costs both here and in the Courts below and the case remitted to the Court of first instance for the purpose of deciding the other issues raised in the case and, if necessary, for assessing and determining the amount of damages payable to the plaintiff.

Appeal allowed

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1355 OF 1913.

April 30, 1915.

Present:—Mr. Justice Fletcher.

JADAB CHANDRA SARDAR AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

GOVINDA CHANDRA MANDAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 49, 87—Occupancy right, non-transferability of, unless by custom—Notice, necessity of—Re-entry, landlord's right of—Transfer by raiyat *without consent of landlord.*

Where in the absence of any custom of transfer an occupancy *raiyat* transfers the property to the under-*raiyats*. the landlord has a right to re-enter upon the property

A notice under section 49 of the Bengal Tenancy Act, to which under-*raiyats* are entitled, is indeed required before ejectment, but that does not apply to a superior landlord who is claiming to re-enter because the occupancy *raiyat* has forfeited his holding by having transferred it without the consent of the landlord.

Section 49 applies where the occupancy *raiyat* still remains in the position of the landlord, not where the occupancy *raiyat* has forfeited his interest by having transferred his interest without the consent of the landlord.

A notice served under section 87 of the Bengal Tenancy Act is not required for the landlord to re-enter in a case like this.

Appeal against the decree of the District Judge, 24-Pergannahs, dated the 23rd January 1913, affirming that of the Munsif, 2nd Court, Basirhat, dated the 29th of February 1912.

Dr. *Dwarka Nath Mitter* and Babu *Baikuntha Nath Mitter*, for the Appellants.

Babus *Sarat Chandra Roy Chowdhury* and *Satya Charan Sinha*, for the Respondents.

JUDGMENT.—This is an appeal by the defendants Nos. 1 and 2 from a decision of the learned District Judge of 24-Pergannahs dated the 23rd January 1913, affirming the decision of the Munsif of the second Court of Basirhat. The suit was brought by the plaintiffs for ejectment. The defendants Nos. 1 and 2 were under-*raiyats* under the defendant No. 4. Then the defendant No. 4 transferred his occupancy right to the first three defendants. After that transfer, the landlord settled the land with the present plaintiffs. The plaintiffs then sued to recover possession of the land. The under-*raiyats* raised many defences, but it has been found by the learned Judge of the lower Appellate Court that the interest that the defendant No. 4 had was that of an occupancy *raiyat* and that there is no custom of transfer. Therefore, when the fourth defendant transferred the property to the other three defendants, the landlord had a right to re-tenter upon the property. But it is said that the defendants Nos. 1 and 2, who were originally under-*raiyats*, are entitled to a notice under section 49 of the Bengal Tenancy Act. Under section 49 an under-*raiyat* is not liable to be ejected by his landlord, except when holding otherwise than under a written lease, at the end of the agricultural year next following the year in which a notice to quit is served upon him by his landlord. That does not apply to a superior landlord who is claiming to re-enter because the occupancy *raiyat* has forfeited his holding by having transferred it without the consent of the landlord. Section 49 applies where the occupancy *raiyat* still remains in the position of the landlord, not where the occupancy *raiyat* has forfeited his interest by having transferred his interest without the consent of the landlord.

Then another point has been made that, in this case, the landlord could only re-enter after a notice served under section 87 of the Bengal Tenancy Act. The decisions of this Court are clear and conclusive that that is not so. Those decisions have been acted upon and recognised and this point about section 87 clearly has got no substance in it. I agree with the conclusion arrived at by the learned Judge of the lower Appellate Court. The present appeal, therefore, fails and mus be dismissed with costs.

Appeal dismissed.

KALI CHURN *v.* MOHANANDA DATTA.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1567 OF 1912.

March 5, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Richardson.

KALI CHURN CHOWDHURY AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MOHANANDA DATTA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Partition—Co-tenancy—Subordinate interest, acquisition of, by one co-tenant, effect of—Partition, meaning of.

Where *A* and *B* are in joint possession as joint owners, each is ordinarily entitled to claim partition against the other, and it is no valid answer to a claim for partition by *A* that *B* has acquired a subordinate interest over the whole property. [p. 467, col. 2.]

Bhagwat Sahai v. *Bipin Behary Mitter*, 7 Ind. Cas. 549; 37 C. 918 at p. 927 (P. C.); 12 C. L. J. 240; 14 C. W. N. 962; 8 M. L. T. 228; 7 A. L. J. 1137; 12 Bom. L. R. 997; 20 M. L. J. 907; (1910) M. W. N. 691; 39 I. A. 198, followed.

Property held in co-tenancy may be partitioned by suit and the only essential is that the property sought to be partitioned is held in co-tenancy. [p. 468, col. 1.]

Partition is the process by which property held by two or more persons in co-tenancy is converted into estates in severalty and thereby divided among them, with the result that the land which before partition was held and enjoyed jointly, is after partition held and enjoyed by the different parties according to the allotments made by Court. [p 468, col. 1.]

Appeal against the decree of the Subordinate Judge of Mymensingh, dated the 15th of March 1912, affirming that of the Munsif, Second Court, Kishoregunj, dated the 4th of August 1911.

Babus *Kritanta Kumar Bose* and *Bepin Chandra Bose*, for the Appellants.

Babu *Birendra Kumar Dey*, for the Respondents.

JUDGMENT.—This is an appeal by the second and third defendants in a suit for partition of joint property. The land in dispute is comprised in an estate held by the fourth and fifth defendants as proprietors. On the 27th February 1894, the proprietors granted a lease to the third defendant, apparently for the benefit of himself and his brothers, the first two defendants. On the 31st August 1904 the fourth defendant gave a lease to the first three defendants in respect of his half share. This lease, it has been alleged, was granted for building purposes. On the 21st February 1905, the fifth defendant granted a *putni* to the first three defendants in respect of the half share held by him as proprietor. On the 6th December 1909, the fourth defendant granted a similar *putni* to the plaintiffs in respect of his half share. The *putni* leases, it has not been disputed, were superior to the leases previously granted by the proprietors. On the 2nd June 1910 the plaintiffs commenced the present suit for partition as against the first three defendants. They also joined the proprietors as fourth and fifth defendants, but no relief was claimed against the latter. The contending defendants have resisted the claim for partition on the ground that the suit is not maintainable. Their argument is that as they are lessees of the entire property under the lease of the 22nd February 1894, the plaintiffs, as *putnidars* of a half share, are not entitled to claim partition. In our opinion, there is no force in this contention.

It has not been disputed that as the plaintiffs and the first three defendants are *putnidars*, each in respect of one-half share, the plaintiffs are, *prima facie*, entitled to claim partition against the defendants. When *A* and *B* are in joint possession as joint owners, each is ordinarily entitled to claim partition against the other, and it is no valid answer to a claim for partition by *A* that *B* has acquired a subordinate interest over the whole property. We are unable to uphold the contention that as the first three defendants, in addition to their *putni* interest, have also a subordinate interest which extends over the entire property, the right of the plaintiffs to claim partition cannot be enforced. Neither authority nor principle has been adduced in support of this proposition. It was ruled by the Judicial Committee in the case of *Bhagwat Sahai* v. *Bipin Behary Mitter* (1), where their Lordships affirmed the decision of the Full Bench in *Hemadri Nath Khan* v. *Ramani Kanta Roy* (2), that the right of partition exists when two parties are in joint possession of land under permanent titles, even though those titles may not be identical or of co-ordinate degree. In the case before us, the plaintiffs and the first three defendants are both holders of

(1) 7 Ind. Cas. 549; 37 C. 918 at p. 927 (P. C.); 12 C. L. J. 240; 14 C. W. N. 962; 8 M. L. T. 228; 7 A. L. J. 1137; 12 Bom. L. R. 997; 20 M. L. J. 907; (1910) M. W. N. 691; 37 I. A. 198.

(2) 24 C. 575; 1 C. W. N. 406.

putni tenures; they are in possession as *putnidars* and their interests are of the same grade. Consequently, as between them the right of partition exists. There is no intelligible principle on which the view can be maintained that the right of the plaintiffs to claim partition has become unenforceable because the defendants have an additional right, namely, right as subordinate tenants. Property held in co-tenancy (subject to exceptions immaterial for our present purpose) may be partitioned by suit and the only essential is that the property sought to be partitioned is held in co-tenancy. This requirement is fulfilled in the case before us. Partition is the process by which property held by two or more persons in co-tenancy is converted into estates in severalty and thereby divided among them, with the result that the land which before partition was held and enjoyed jointly is after partition held and enjoyed by the different parties according to the allotments made by Court. If partition is allowed in the case before us, the result will be that the land will be demarcated. The defendants will, after partition, become tenants under the plaintiffs in one specified half on the basis of their leases of 1894 and 1904, while in the other separated half they will be tenants under themselves. The position, consequently, will be that, after partition, the plaintiffs will be entitled to treat the defendants as their tenants in respect of a specific parcel of land instead of, as now, tenants in respect of one-half share of joint and undivided land. It is not difficult to imagine that after partition has been so effected, the plaintiffs may have advantages which they do not now enjoy; at the same time, during the continuance of the leases of 1894 and 1904, there will be no interference with the actual enjoyment of the land by the defendants, although they will be in occupation of one demarcated half as their own land and of the other half as tenants under the plaintiffs. We are consequently of opinion that the Courts below have rightly held that the suit is maintainable.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 31 OF 1915.

April 16, 1915.

Present:—Mr. Justice Fletcher and Mr. Justice Teunon.

BENODE BEHARI PATRA—PLAINTIFF—PETITIONER

versus

JANKI KALWAR—DEFENDANT—OPPOSITE PARTY.

Promissory note, suit] on—Amount claimed not found to have been actually advanced—Suit, if to be decreed for amount found.

In a suit for recovery of the sum of Rs. 40 alleged to have been advanced on a hand-note with interest, the Judge found that the sum of Rs. 30, and not Rs. 40, was really advanced by the plaintiff to the defendant, but dismissed the suit on the ground that the plaintiff had failed to prove the advance of Rs. 40 claimed:

Held, that judgment ought to have been entered in favour of the plaintiff for the amount found to have been actually advanced. [p. 469, col. 1.]

In the matter of Small Cause Court Suit No. 1156 of 1914 of the Court of Small Causes at Howrah.

FACTS.—One Benode Behari Patra brought a suit in the Small Cause Court of Howrah basing his claim exclusively on a hand-note, which he alleged the defendant had executed when he took a loan of Rs. 40 from him. The learned Small Cause Court Judge found that the execution of the hand-note was not proved; but he found from the oral evidence adduced by the plaintiff that Rs. 30 were paid by the plaintiff to the defendant. He also found from the evidence adduced before him that there was no stipulation for interest. So he dismissed the plaintiff's suit, on the ground that the plaintiff had brought the suit on an altered contract inasmuch as the hand-note upon which the plaintiff sued contained a stipulation to pay interest at 7 pies per rupee per month.

Against that the plaintiff moved the High Court and obtained a Rule.

Babu *Debi Prosad Dutt*, for the Petitioner.

Babu *Manmotha Nath Ganguli*, for the Opposite Party.

JUDGMENT.

FLETCHER, J.—This is a Rule calling upon the opposite party to show cause why the judgment and decree complained of should not be set aside. The plaintiff sued the defendant in the Small Cause Court to recover the

sum of Rs. 40 which, it is alleged, had been advanced to him on a hand-note with interest. The learned Judge has found that the story of the hand-note is untrue. He also has found that the story of the defendant that he did not borrow any money is equally untrue. The real fact is, he says, that the plaintiff advanced to the defendant the sum of Rs. 30, and not Rs. 40, without any agreement as to the payment of interest. Speaking for myself, I am inclined to think that the learned Judge was wrong in finding that, because, so far as my experience goes, the people in this country who lend out money do not do so without any interest. People who carry on business of this sort always take good care for the stipulation of interest and, not uncommonly, interest at a very high rate. The learned Judge has found that the plaintiff advanced to the defendant the sum of Rs. 30 and he has adopted this course, namely, he has held that the plaintiff having claimed Rs. 40 with interest and having failed to prove the advance of Rs. 40, is entitled to recover nothing. Obviously this cannot be supported. The learned Judge ought to have entered judgment in favour of the plaintiff for the amount that he has found to have actually been advanced by the plaintiff to the defendant and that amount, according to his judgment, is Rs. 30 without any interest. I think we must enter judgment for the plaintiff for Rs. 30 with interest thereon at six pre cent. per annum from the date when the suit was dismissed by the learned Judge of the Court of Small Causes, that is, the 19th of December last, up to realization. The defendant must pay the costs of this Rule to the plaintiff. We assess the hearing fee at one gold *mohur*. As both parties have been guilty of adducing false evidence before the learned Judge of the Court below, we make no order as to the costs in that Court.

TEUNON, J.—I agree.

Rule made absolute.

ALLAHABAD HIGH COURT.

PRIVY COUNCIL APPLICATION No. 4 OF 1915.

May 1, 1915.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

RAM KARAN—DEFENDANT—APPELLANT

versus

MADHUKAR PRASAD—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 110—Privy Council appeal—Appeal dismissed for default by High Court—Decree affirming decree of Court below.

A decree of the High Court dismissing an appeal for default of prosecution is a decree affirming the decision of the Court below within the meaning of section 110 of the Civil Procedure Code. [p. 469, col. 2.]

Beni Rai v. *Ram Lakhan Rai*, 20 A. 367; A. W. N. (1898) 77, followed.

Application for appeal to the Privy Council.

Dr. *S. C. Banerji*, for the Appellant.

Mr. *A. P. Dube*, for the Respondent.

JUDGMENT.—This is a petition for leave to appeal to His Majesty in Council. The appeal to this Court was valued by the appellant at Rs. 200. It was from an order of the District Judge removing him from his post as trustee of certain trust property. The trust property is said to have an annual income of over Rs. 2,300. It is, therefore, clear that the decree or final order involves, directly or indirectly, some claim or question to or respecting property of the value of Rs. 10,000 and over. But there are two other points for decision. The *first* one is whether the decree against which the applicant seeks to appeal does or does not affirm the decision of the Court below. The appeal to this Court was dismissed for default of prosecution and costs were awarded to the opposite party. A very similar question arose in *Beni Rai* v. *Ram Lakhan Rai* (1).

In that case it was held that the decree of this Court dismissing an appeal for want of prosecution was a decree affirming the decision of the Court below within the meaning of section 596 of the Code of Civil Procedure. The language of the rules in the present Code of Civil Procedure corresponding to section 596 has not been altered. The result of the order dismissing the appeal for default is practically an affirmance of the decision of the Court

(1) 20 A. 367; A. W. N. (1898) 77.

below. In this case, therefore, we have to see, whether the appeal which the applicant wishes to prosecute involves some substantial question of law. Six grounds of appeal are entered in the application. The first ground is the only one which relates to the order of this Court dismissing the appeal for default. That raises no question of law whatsoever. The remaining five all relate to questions which arose between the parties on the merits in the Court below. They do not relate to our order of dismissal for default, from which this application has arisen. Of these five grounds, only ground No. 4 has been indicated to us as involving any question of law. The question involved depends upon the findings of fact arrived at by the Court below and affirmed by our order of dismissal. These facts being against the appellant, we can see no substantial question of law which arises for decision.

In our opinion the applicant is not entitled to the certificate which he seeks. This application is rejected with costs.

Application rejected.

CALCUTTA HIGH COURT.

CIVIL RULE No. 202 OF 1915.

May 21, 1915.

Present:—Mr. Justice Woodroffe and Mr. Justice Mullick.

ROMESH CHANDRA DAS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ANTHONY PENHEIRO AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 20, scope of—Party to suit includes representative of such party—Power to add parties, to be exercised at hearing—Setting aside, application for—Abatement and substitution.

The words "any person who was a party to the suit" in Order XLI, rule 20, of the Code of Civil Procedure will, on a reasonable construction of the same, include the representative of such a party. [p. 470, col. 2.]

The power given to the Court to add parties is a power which is to be exercised at the hearing, for it is necessary that the Court should have before it all the circumstances of the case. [p. 470, col. 2.]

The mere fact that the representative of a deceased person happens to be a party already on the record in his own right, does not dispense with an application for setting aside an abatement and substitution [p. 471, col. 1.]

Rule obtained in Second Civil Appeal No. 3527 of 1913, preferred against the decree of the Additional District Judge of Chittagong passed in Title Appeal No. 812/448 of 1911, dated the 28th June 1913, affirming that of the Additional Munsif, Chittagong, passed in Title Suit No. 427/26 of 1911, dated the 15th August 1911.

Babus *Joges Chandra Roy* and *Probodh Kumar Das*, for the Petitioner.

Babus *Ram Charan Mojumdar*, *Gopal Chandra Das* and *Hemendra Kumar Das*, for the Opposite Party.

JUDGMENT.—This Rule is based on a petition which comprises two forms of relief. The *first* is that Durgesh Nandusi Debi, the administratrix to the estate of Rajani Kanta Das, should be made a respondent. Now, this lady is the widow and representative of the deceased plaintiff, Rajani Kanta Das, but through, it is said, inadvertence, she was not made a party to this appeal. An application, however, has been made to us to make her a respondent under the provisions of Order XLI, rule 20, of the Code of Civil Procedure. I think that the words of that section "any person who was a party to the suit," etc., would, on a reasonable construction of the same, include the representative of such a party. But the difficulty in the way of the applicant is, as has been pointed out by the learned Pleader on behalf of the opposite party, that the power given to the Court to add parties is a power which is to be exercised at the hearing, and doubtless it is necessary that the Court should have before it all the circumstances of the case. Therefore, so far as this part of the Rule is concerned, the petition is premature and must be rejected. This, however, will not stand in the way of the applicant applying to the Court at the hearing by a petition under Order XLI, rule 20. The first part of this application is premature; and the only other matter which remains for us to consider is whether or not we should, as asked, make an entry in the record that the right of appeal survives to Rajani Kanta in respect of the estate of Mohendra Lal Das. Mohendra Lal Das died on the

9th April 1914, and six months from the date of his death expired on the 8th October 1914. So far as this plaintiff is concerned there has been an abatement, and the proper course appears to me is to apply, if the party is so advised, to set aside the order of abatement and to substitute in the place of Mohendra Lal Das Romesh Chandra Das, who is said to be his administrator. Now it is admitted that if a third party and not Romesh had been the administrator, it would have been necessary to make such an application and then to apply for substitution in the place of Mohendra Lal Das as his legal representative. But it has been submitted to us that the petitioner is excused from taking this course by reason of the fact that Romesh who is the administrator of Mohendra happens to be also on the record as plaintiff in his own capacity. This, however, does not appear to me to be a sufficient answer. It may well be, as is pointed out, that where property has been obtained by inheritance by some person who is already on the record, it is not necessary that any further steps should be taken. But the present case appears to me one in which the substitution is necessary. The mere fact that the representative of a deceased person happens to be a party already on the record in his own right, does not dispense with an application for setting aside an abatement and substitution.

This part, therefore, of the application also fails and the Rule must be discharged with costs, the hearing fee being assessed at one gold *mohur*.

Rule discharged.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 93 OF 1912.

February 8, 1915.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Hannay.

PAKALA RAMA RAO AND OTHERS—DEFENDANTS NOS. 4 TO 8—APPELLANTS

versus

APPANA KUMARASWAMI—PLAINTIFF—RESPONDENT.

Contract of partnership—Breach of contract, suit for—Damages—Death of one partner subsequent to suit, effect of.

Where a cause of action exists, the damages must be estimated with regard to the time when the cause of action came into existence. [p. 471, col. 2.]

Where the suit is for damages for breach of contract of partnership, the death of one partner subsequent to the suit does not affect the quantum of damages. [p. 472, col. 1]

Appeal against the decree of the District Court of Nellore, in Original Suit No. 4 of 1903.

FACTS.—Four persons entered into a partnership to carry on a trade for 10 years; three of them broke the contract in the very first year by refusing to go on with the partnership. The suit is by the other partner to recover damages for breach of contract. One of the partners died in the course of the suit. The District Court decreed the suit. The present appeal is against that decree.

Mr. *C. A. Seshagiri Sastri*, for the Appellants.

Messrs. *T. V. Venkatarama Aiyar* and *T. V. Muthukrishna Aiyar*, for the Respondent.

JUDGMENT.—Three points have been argued before us. We agree with the District Judge that there were no partners not joined and that the suit is not bad for non-joinder. We also agree with him that the contract was not rescinded by reason of the failure of the plaintiff to make stipulated payments.

Assuming that the defendant was liable in damages, it has been argued that one of the partners has since died and that as his death would in any case have put an end to the partnership, this fact must be considered in reduction of damages. Mr. Mayne in his Work on Damages lays down broadly that matters arising subsequently to the cause of action are inadmissible in reduction of damages and in *Joyner* v. *Weeks* (1), it was observed by Fry, L. J., that as a general rule where a cause of action exists, the damages must be estimated with regard to the time when the cause of action came into existence. Applying this principle we think that the subsequent death of one of the partners cannot be taken into account and that in the words of Wright, L. J., in the same case at page 33, "the suggested

(1) (1891) 2 Q. B. 31 at p. 33; 60 L. J. Q. B. 510; 65 L. T. 16; 39 W. R. 583; 55 J. P. 725.

kind of ademption or loss appears to us to be too remote, uncertain and accidental to be properly made the ground of decision." The appeal fails and is dismissed with costs. The memorandum of objections is also dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1791, 2062 AND 2063 OF 1911.

April 20, 1915.

Present:—Mr. Justice Fletcher and Mr. Justice Teunon.

IN No. 1791 OF 1911

PROSONNO KUMAR MUKHERJEE AND OTHERS—DEFENDANTS—APPELLANTS

IN No. 2062 OF 1911

BROJA NATH MUKERJEE AND OTHERS—DEFENDANTS—APPELLANTS

IN No. 2063 OF 1911.

BROJENDRA KUMAR MUKERJEE AND OTHERS—DEFENDANTS—APPELLANTS

versus

KULADA PROSAD MUKERJEE AND OTHERS—PLAINTIFFS—RESPONDENTS

(IN ALL CASES.)

Bengal Tenancy Act (VIII of 1885), s. 186A, scope of—Denial of landlord's title, by tenants, effect of—Landlord, if can sue for recovery of possession.

Section 186A of the Bengal Tenancy Act does not apply to a case brought by a landlord in a Civil Court for possession when the tenants thereof have successfully denied the landlord's title in a rent suit.

Khater Mistri v. *Sadruddi Khan*, 34 C. 922; *Sheikh Miadhar* v. *Rajani Kanta Ray*, 5 Ind. Cas. 708; 14 C. W. N. 339 and *Ekabbar Sheikh* v. *Hara Bewah*, 8 Ind. Cas. 660; 15 C. W. N. 335; 13 C. L. J. 1, referred to.

Srimati Mallika Dassi v. *Makham Lal Chowdhury*, 9 C. W. N. 928; 2 C. L. J. 389, distinguished.

Appeal against the decrees of the District Judge, Bankura, dated the 22nd of May 1911, affirming those of the Munsif, second Court, Bankura, dated the 29th of January 1910.

Dr. *Sarat Chandra Bysack*, for Babu *Brajendra Kumar Chakravarty*, for the Appellants.

Babu *Samatul Chandra Dutt*, for Babus *Satis Chandra Mukherjee* and *Khetra Gopal Banerjee*, for the Respondents.

JUDGMENT.—These are appeals by the defendants against the judgments of the learned District Judge of Bankura, dated the 22nd May 1911. The suit was brought by the landlords to recover possession of a certain property held by the defendants, on the ground that the tenants have successfully and without reasonable and probable cause denied the landlords' title in a certain rent suit. The only question is, do the tenants incur forfeiture by their doing so? The argument in this case has been based upon section 186A of the Bengal Tenancy Act. To whatever class of cases section 186A may apply, it does not apply to this case because no damages have been awarded. Therefore, the position of the plaintiffs is exactly the same as if that section did not exist. The decided cases on this point seem to be clear, notwithstanding the doubt that was thrown upon the case of *Srimati Mallika Dassi* v. *Makham Lal Chowdhury* (1). It is not necessary to go through all the cases which have gone the other way. It is sufficient to say that the cases of *Khater Mistri* v. *Sadruddi Khan* (2), *Sheik Miadhar* v. *Rajani Kanta Ray* (3) and *Ekabbar Sheikh* v. *Hara Bewah* (4) are all authorities for the proposition that a suit of this nature does lie. Thecase of *Srimati Mallika Dassi* v. *Makham Lal Chowdhury* (1) does not seem to be borne out by the late authorities. That being so, the only other question that has been raised is whether the present plaintiffs can maintain the suit. That clearly they can on findings of fact made by the learned District Judge in the lower Appellate Court. These findings are conclusive and binding upon us and we must accept them and hold that the plaintiffs in fact represent the whole body of landlords.

The present appeals, therefore, fail and must be dismissed with costs.

Appeals dismissed.

(1) 9 C. W. N. 928; 2 C. L. J. 389.
(2) 34 C. 922.
(3) 5 Ind. Cas. 708; 14 C. W. N. 339.
(4) 8 Ind. Cas. 660; 15 C. W. N. 335; 13 C. L. J. 1.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 4 OF 1915.

May 10, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

BANKEY BIHARI LAL—DEFENDANT—APPELLANT

versus

CHARNI—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 165—Suit for profits against co-sharer lambardar, maintainability of.

A co-sharer by becoming a *lambardar* does not cease to be a co-sharer, and, therefore, a suit brought against him by another co-sharer under section 165 of the Tenancy Act is not bad in law.

Chunno Lal v. *Parbhu Dial*, 6 Ind. Cas. 809; 7 A. L J. 526, referred to.

First appeal from an order of the District Judge, Cawnpore, dated the 10th December 1914.

Mr. *Kailas Nath Katju*, for the Appellant.

Mr. *K. N. Laghate*, for the Respondent.

JUDGMENT.

CHAMIER, J.—This appeal arises out of a suit brought by the respondent against the appellant for his share of the profits of a *mahal* for the years 1318, 1319 and 1320 *Fasli*. The respondent in his plaint described the appellant as a co-sharer and the suit as one brought under section 165 of the Tenancy Act, which provides for a suit by a co-sharer against another co-sharer for a settlement of accounts and for his share of the profits of a *mahal*. The appellant pleaded that he was the *lambardar* of the *mahal* and that the suit should have been brought against him not under section 165, but under section 164 of the Tenancy Act. The Assistant Collector fixed issues on the questions whether the appellant was a *lambardar* of the *mahal* and whether, if he was a *lambardar*, the suit could be maintained under section 165 of the Act. He found that the appellant was a *lambardar* and that the suit could not be maintained against him under section 165 of the Tenancy Act. He gave the respondent an opportunity of amending his plaint by describing the appellant as *lambardar* and the suit as one brought under section 164. The respondent declined to amend his plaint and the suit was dismissed. The respondent appealed. The District Judge reversed the decision of the Assistant Collector and remanded the suit for trial on the merits, on the ground that the appellant had not by becoming a *lambardar* ceased to be a co-sharer, and there was no reason why the respondent should not have framed his suit under section 165. The learned Judge was of opinion that the description of the suit was a minor matter and that the suit should have been tried out. In this appeal it is contended that a suit under section 165 is a suit of a different description from a suit under section 164 and we were referred to the decision of this Court in *Chunno Lal* v. *Parbhu Dial* (1). Where a defendant is a *lambardar*, as in a suit under section 164, he is entitled to deduct his *haq-lambardari* and the village and other expenses; whereas a co-sharer defendant in a suit under section 165 is not entitled to such deductions. The appellant in the present case pleaded and proved that he was a *lambardar* and on that account entitled to deduct *haq-lambardari* and village and other expenses. That was merely a question of account which the Assistant Collector could have disposed of. The respondent was perhaps badly advised in declining to meet the Assistant Collector's wishes by amending his plaint. But as an amendment was not really necessary, it seems to us that the Assistant Collector was wrong in dismissing the suit. He ought to have tried out the suit and given the appellant credit for the *haq-lambardari* and village and other expenses. It is possible that the respondent was afraid that if he amended the plaint, he would be told that the suit had become one of a different character and, therefore, must be dismissed. The result might be that the respondent's claim for profits for one year would be barred by limitation. In my opinion the District Judge was right in remanding this case for trial on the merits and I would dismiss this appeal with costs.

PIGGOTT, J.—I concur.

BY THE COURT.—The order of the Court is that this appeal is dismissed with Costs.

Appeal dismissed.

(1) 6 Ind. Cas. 809; 7 A. L. J. 526.

COURT OF THE BOARD OF REVENUE UNITED PROVINCES.

REVENUE PETITION No. 1 OF 1914-15 OF BIJNOR DISTRICT.

March 15, 1915.

Present:—Mr. Holms, S. M., and Mr. Campbell, J. M.

LEKHRAJ MAL AND OTHERS—APPELLANTS

versus

NATHU—RESPONDENT.

Agra Tenancy Act (II of 1901), *s.* 11—*Non-occupancy tenant*—Theka *of proprietary share taken by him*—*Tenancy, right of, if in suspense*—*Fresh period necessary.*

Where a year to year tenant remained in occupation for a number of years but before the acquisition of occupancy rights, took a *theka* of the proprietary rights:

Held, that to acquire occupancy rights he could not count the period before the *theka*, but that he must complete fresh twelve years after the cessation of the *theka*.

Second appeal from an order of the Commissioner of the Rohilkhand Division, dated the 24th July 1914, reversing that of the Assistant Collector, Bijnor District, in a case of ejectment.

JUDGMENT.

CAMPBELL, J. M. (*March 6th*, 1915.)—The question on issue is clearly stated in the Commissioner's order. and what has to be decided is whether respondent's right of tenancy was in suspense while he held part of the village as *thekadar* and revived when the *theka* ceased, or whether the right of tenancy lapsed and a new period of tenancy began after the cessation of the *theka*.

As I read section 12 of the Tenancy Act, the latter is the correct interpretation of the law, and the period of 12 years for acquisition of occupancy rights did not begin to run until respondent ceased to be a *thekadar* holding under section 11 (*b*).

I can read nothing into section 12 to justify any other interpretation of the law.

If respondent had acquired occupancy rights before he took the *theka*, the circumstances would be different, but in this case he had admittedly not done so.

I would, therefore, set aside the Commissioner's order and restoring the order of the Assistant Collector give appellant his costs in all Courts.

HOLMS, S. M.—I quite agree. There must be continuous holding *as a tenant* for 12 years for the acquisition of a right of occupancy under section 11.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2555 OF 1912.

March 4, 1915.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Sadasiva Aiyar.

SARVESHRI SHETTATHI—DEFENDANT No. 16—APPELLANT

versus

PUTTAMMA SHETTATHI AND OTHERS—PLAINTIFFS—DEFENDANTS NOS. 1 TO 15—RESPONDENTS

Alayasanthana *Law—Joint family—Minority—Partition of family property, when allowed.*

Under *Alayasanthana* Law as in *Marumakatayam* Law no partition of *tarwad* property should be permitted during the minority of some members of the *tarwad*, unless such partition is shown to be beneficial to such minors.

Arayalprath Kunhi Pocker v. *Kanthilath Ahmed*, 29 M. 62, followed.

Second appeal against the decree of the Court of the Subordinate Judge of South Canara, in Appeal Suit No. 437 of 1910, preferred against that of the Court of the District Munsif of Udapi, in Original Suit No. 75 of 1909.

Mr. *B. Sitarama Row*, for the Appellant.

Mr. *K. Sundara Row*, for the Respondents.

JUDGMENT.—It has been held in *Arayalprath Kunhi Pocker* v. *Kanthilath Ahmed* (1), in a case under the *Marumakatayam* Law that where there are minors a partition of the *tarwad* property must be shown to be beneficial to the minors, and we see no reason for applying a different rule to cases such as the present arising under the *Alayasanthana* Law. The lower Appellate Court has found that in this case the partition was not beneficial to the minors and the second appeal must be dismissed with costs.

Appeal dismissed.

(1) 29 M. 62.

MAHABIR *v.* RAMESHWAR BURE SINGH.

COURT OF THE BOARD OF REVENU, UNITED PROVINCES.

REVENUE PETITION No. 103 OF 1914-15 OF RAI BARELI DISTRICT.

April 3, 1915.

Present:—Mr. Holms, S. M,. and Mr. Campbell, J. M.

MAHABIR AND OTHERS—APPELLANTS

versus

Raja RAMESHWAR BURE SINGH —RESPONDENT.

Oudh Rent Act (*XXII of* 1886), *s.* 32 (1)—*Application for appraisement of produce—Notice not issued, effect of—Award by* amin, *legality of.*

Where a Court receiving an application for the appraisement of produce ordered the *kurk amin* to appraise the crops without issuing to the opposite party the notice required by section 32 (1) of the Oudh Rent Act:

Held, that the order of appraisement was illegal and consequently the award by the *amin* was null and void.

Second appeal from an order of the Commissioner of the Lucknow Division, dated the 7th November 1914, reversing that of the Assistant Collector of Rai Bareli District, in a case of *kankoot*.

JUDGMENT.

CAMPBELL, J. M.—(*March* 31*st*, 1915.) —I am unable to agree with the Commissioner in this case. It is admitted that when an application was received from the respondent for '*kankoot*' under section 31, the Court failed to issue the notice required by section 32 (1) to the other party, and ordered the *kurk amin* to appraise the *mohwa* crop. As the order for appraisement was illegal, I think that the award by the *amin* under section 32 (2) should also have been held to be null and void.

The inquiry and decision as to the prevailing custom of "*kankoot*" or "*bastai*" was clearly irregular.

I would quash the whole proceedings *ab initio*, making parties bear their own costs.

HOLMS, S. M.—I agree.

Proceedings quashed.

KRISHNA AIYAR *v.* CHAKRAPANI.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 113 AND 114 OF 1915.

March 15, 1915.

Present:—Mr. Justice Oldfield.

KRISHNA AIYAR—DEFENDANT No. 1 —PETITIONER

versus

IN C. R. P. 113 OF 1915

CHAKRAPANI, MINOR, BY GUARDIAN SANTHANA CHETTIAR - DEFENDANT No. 6—RESPONDENT.

IN C. R. P. No. 114 OF 1915

KRISHNA AIYAR AND ANOTHER— PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (*Act V of* 1908), *O. XXXII, r.* 6 (2), *O. XXXIX, r.* 10—*Joint Hindu family, suit by minor—Managing member acting as next friend—Managing member, right of, to withdraw money—Security, deposit of—Court, duty of.*

A next friend of a minor plaintiff, even if he is the managing member of the joint Hindu family of which both are the members, is not entitled to draw money from Court on behalf of the minor plaintiff without furnishing security. [p. 476, col. 1.]

Harihar Pershad Singh v. *Mathura Lal*, 35 C. 561; 12 C. W. N. 598; 8 C. L. J. 256, distinguished.

Ganesha Row v. *Tulja Ram Row*, 19 Ind. Cas. 515; 17 C. W. N. 765; 11 A. L. J. 589; 18 C. L. J. 1; 15 Bom. L. R. 626; 14 M. L. T. 1; (1913) M. W. N. 575; 25 M. L. J. 150; 40 I. A. 132; 36 M. 295, followed.

A Court cannot, under Order XXXII, rule 6 (2) of the Code of Civil Procedure, order payment of money to a person not appointed guardian *ad litem* by any competent authority without demanding security from him. [p. 476, col. 1.]

Kanakasabai Mudaliar v. *Ponnusami Mudaliar*, 21 Ind. Cas. 848; *Budhi Lal* v. *Morarji*, 31 B. 413; 9 Bom. L. R. 553, followed

Petitions, under sections 115 and 151 of Act V of 1908 and section 15 of the Charter Act, praying the High Court to revise the orders of the Court of the Subordinate Judge of Kumbakonam, in Interlocutory Applications Nos. 977 and 986 of 1914, in Original Suit No. 28 of 1914.

Mr. *T. Rangachariar*, for the Appellants.

Messrs. *K. Srinivasa Aiyangar* and *T. Narasimha Aiyangar*, for the Respondents.

JUDGMENT.—I think that in the circumstances the lower Court was justified with reference to Order XXXIX, rule 10, of the Code of Civil Procedure in paying out the money deposited by the 1st defendant.

The only objection to its procedure, which requires full consideration, is that based on its failure to demand security from the next friends of the minor 2nd plaintiff and 6th defendant.

The 2nd plaintiff's guardian, the 1st plaintiff, resists this objection on the ground that he was entitled to receive the money, because it belonged, not to the 2nd plaintiff, but to the joint family composed of the 2nd plaintiff and himself as managing member. It is no doubt true that the plaintiffs claimed partition in their plaint as between their branch of the family and other members of it; and *Harihar Pershad Singh* v. *Mathura Lal* (1) supports their contention. But on the other hand, a later decision of the Privy Council, *Ganesha Row* v. *Tulja Ram Row* (2), decides that a managing member, who is also a next friend, can do nothing in the former capacity for which the leave of the Court would be required, if he acted in the latter. Following the later authority, I hold that the lower Court, in paying out to the 1st plaintiff on 2nd plaintiff's behalf without security, acted without jurisdiction.

In the 6th defendant's case the question is whether his guardian *ad litem*, to whom payment was made without security, was exempt from the obligation to give it under Order XXXII, rule 6 (2), of the Code of Civil Procedure, on the ground that he was appointed guardian of the 6th defendant's property by the latter's father's Will. Following *Kanakasabai Mudaliar* v. *Ponnusami Mudaliar* (3) and *Budhi Lal* v. *Morarji* (4), I must hold that he has not been appointed guardian by competent authority and that he should, therefore, have been called on for security.

The lower Court's orders must be set aside. The next friends of the 2nd plaintiff and the guardian *ad litem* of the 6th defendant must give security for what they have drawn to the satisfaction of the lower Court within 15 days from the receipt by it of this order and must give such security before drawing any further sums. If security is not given as directed above, the next friend and guardian must pay back the money. They must pay the 1st defendant's costs of these petitions.

Petitions allowed.

(1) 35 C. 561; 12 C. W. N. 598; 8 C. L. J. 256.
(2) 19 Ind. Cas. 515; 36 M. 295; 17 C. W. N. 765; 11 A. L. J. 589; 18 C. L. J. 1; 15 Bom. L. R. 626; 14 M. L. T. 1; (1913) M. W. N. 575; 25 M. L. J. 150; 40 I. A. 132.
(3) 21 Ind. Cas. 848.
(4) 31 B. 413; 9 Bom. L. R. 553.

CALCUTTA HIGH COURT.

CIVIL RULE No. 987 OF 1914.

May 7, 1915.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Roe.

TARA SANKAR GHOSE AND ANOTHER—PLAINTIFFS—PETITIONERS

versus

Sheik NASARUDDI AND OTHERS—DEFENDANTS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. IX, r. 13—Bengal Tenancy Act (VIII of 1885), s. 153A, scope of—Admission—Limitation Act (IX of 1908), Sch. I, Art. 164—Limitation—Dismissal of suits—Material irregularity.

Section 153A of the Bengal Tenancy Act requires that no application to set aside an *ex parte* decree in a suit between a landlord and tenant as such shall be admitted, unless the applicant has, at or before the time when the application is admitted, deposited in the Court to which the application is presented, the amount, if any, which he admits to be due from him to the decree-holder. [p. 477, col. 1.]

The admission of rent contemplated by the Legislature is an admission that rent is due in respect of the holding for which the suit has been instituted. [p. 477, col. 2.]

A person is not bound to make any deposit where he does not admit that any money is due from him to the plaintiff in respect of the holding for which rent is claimed. [p. 477, col. 2.]

Article 164 of the first Schedule to the Limitation Act provides that an application by a defendant for an order to set aside a decree passed *ex parte* may be made within thirty days from the date of the decree or, where summons was not duly served, when the applicant had knowledge of the decree. [p. 477, col. 2.]

Under section 3 of the Indian Limitation Act it is obligatory upon the Court to dismiss a time-barred application, although limitation is not set up as a defence. [p. 478, col. 1.]

Balaram v. *Mangta Das*, 34 C. 941; 6 C. L. J. 237; 11 C. W. N. 959, *Kailash* v. *Bissonath*, 1 C. W. N. 67; *Sundar Singh* v. *Doru Shankar*, 20 A. 78; A. W. N. (1897) 168 and *Ramgopal* v. *Joharmall*, 15 Ind. Cas. 547; 39 C. 473, referred to.

A Court acts with material irregularity in the exercise of its jurisdiction in granting relief, without adjudication of the question of limitation, on an application which, on the face of it, is barred by limitation. [p. 478, col. 1.]

Rule against the order of the Munsif, fourth Court, Dacca.

Babus *Sarat Chandra Roy Chowdhury* and *Bhudeb Chandra Roy*, for the Petitioners.

Babu *Satish Chandra Chowdhury*, for the Opposite Parties.

JUDGMENT.—We are invited in this Rule to set aside an order made under

rule 13 of Order IX of the Code of Civil Procedure. The petitioner sued the opposite party and four other persons for recovery of arrears of rent. The opposite party, who was the first defendant, alone entered appearance and filed a written statement. On the day of trial, however, no one appeared on his behalf. The result was that an *ex parte* decree for rent was made against him on the 15th January 1914. On the 25th January, he made an application to the Court to set aside the *ex parte* decree. That application was granted on the 27th September 1914. The validity of this order is now challenged on two grounds, namely, *first*, that the Court was not competent to entertain the application under rule 13 of Order IX of the Code of 1908, inasmuch as the requirements of section 153A of the Bengal Tenancy Act were not fulfilled; and, *secondly*, that the Court was bound to dismiss the application as barred by limitation under Article 164 of the Schedule to the Indian Limitation Act.

As regards the *first* ground, we are of opinion that it cannot possibly be maintained. Section 153A requires that no application to set aside an *ex parte* decree in a suit between a landlord and tenant as such shall be admitted, unless the applicant has, at or before the time when the application is admitted, deposited in the Court to which the application is presented the amount, if any, which he admits to be due from him to the decree-holder. The petitioner contends that the defendant admitted that rent was due from him to the plaintiff and yet did not make the requisite deposit. To test the validity of this contention, we must examine the plaint and written statement. The plaintiff claimed rent in respect of several parcels of land within definite boundaries, said to cover an area of 5 *pakis* and alleged to have been held by the defendant under him at an annual rent of Rs. 3-10. The defendant pleaded that the land mentioned, in the plaint constituted a portion only of his holding; he appended to the written statement a list of the parcels of land held by him within the boundaries mentioned and asserted that he held all these lands as one holding at an annual rent of Rs. 7-12. He further stated that he had always been ready and willing to pay the rent lawfully payable by him. Under these circumstances, we have to determine whether the defendant may be said to have admitted that rent was due from him to the plaintiff within the meaning of clause (*a*) of section 153A. We are of opinion that the question must be answered in the negative. The defence in substance was that the defendant did not hold the holding alleged by the plaintiff and that he was liable in respect of rent of a different holding. That does not constitute an admission that rent is due from him to the plaintiff; the admission contemplated by the Legislature is an admission that rent is due in respect of the holding for which the suit has been instituted. It is further clear that if the contention of the plaintiff is well-founded, the written statement itself should not have been accepted under section 149 of the Bengal Tenancy Act; it is significant that no such objection was taken by the plaintiff to the reception of the written statement. In our opinion, it is plain that the requirements of section 153A have been fulfilled; the defendant was not bound to make any deposit, because he did not admit that any money was due from him to the plaintiff in respect of the holding for which rent was claimed. The first contention consequently fails.

As regards the *second* ground, it is plain that the application is, on the face of it, barred by limitation. Article 164 of the Schedule to the Limitation Act provides that an application by a defendant for an order to set aside a decree passed *ex parte* may be made within thirty days from the date of the decree or, where summons was not duly served, when the applicant had knowledge of the decree. In this case, the summons was duly served. Consequently, the defendant was bound to make his application within 30 days from the 15th January 1914. This he did not do. It was not competent to the Court to extend the time under section 5 of the Indian Limitation Act, nor was any ground of fraud established so as to bring the case within the scope of section 18. On behalf of the respondent, however, it has been urged that this point was not taken before the Court below and should not now be entertained. It is conceded on behalf of the petitioner that the

point was not brought to the notice of the Court, but under section 3 of the Indian Limitation Act it was obligatory upon the Court to dismiss the application, although limitation was not set up as a defence, [*Balaram* v. *Mangta Das* (1)]. The position, then, is that the Court has entertained an application which, on the face of it, was barred by limitation and has failed to adjudicate upon the question of limitation. Consequently, as ruled by this Court in the case of *Kailash* v. *Bissonath* (2), it is open to this Court to interfere in the exercise of its revisional jurisdiction under section 115 of the Code, although it might not have been open to the Court to interfere if the Court below had considered the question of limitation and decided it erroneously, as ruled in the cases of *Sundar Singh* v. *Doru Shankar* (3) and *Ramgopal* v. *Joharmall* (4). We hold accordingly that the Court below acted with material irregularity in the exercise of its jurisdiction in granting relief without adjudication of the question of limitation, on an application which, on the face of it, was barred by limitation.

The result is that this Rule is made absolute and the order of the Court below discharged. As the ground on which the petitioner succeeds, was not taken in the Court below, each party will pay his own costs throughout these proceedings.

Rule made absolute.

(1) 34 C. 941; 6 C. L. J. 237; 11 C. W. N. 959.
(2) 1 C. W. N. 67.
(3) 20 A. 78; A. W. N. (1897) 168.
(4) 15 Ind. Cas. 547; 39 C. 473.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 6 OF 1913-14 OF BANDA DISTRICT.

March 31, 1915.

Present:—Mr. HOLMS, S. M.

DILAWAR BUX AND ANOTHER—DEFENDANTS —APPELLANTS

versus

DATA DIN AND ANOTHER—PLAINTIFFS —RESPONDENTS.

North-Western Provinces Rent Act (XVIII of 1873)—Compensation—Improvements—Thekadar, *whether a tenant*—Thekadar's *right to make improvements and claim compensation.*

The appellant held certain land as a *thekadar* under a lease of 1859, which provided that he should make *bandhis* and establish hamlets. The *zemindar* brought the present suit for ejectment and the *thekadar*-appellant claimed compensation for improvements made by him before 1880:

Held, that the claim was governed by the provisions of N. W. Provinces Rent Act XVIII of 1873, which allowed compensation for improvements to a tenant, but did not define the term 'tenant' and that it not being clear whether a '*thekadar*' was entitled to get compensation under that section, his claim must be dismissed. [p. 479, col. 1.]

Ablakh Rai v. *Salim Ahmad Khan*, 2 A. 437, *Raj Bahadar* v. *Birmha Singh*, 3 A. 85, *Abdul Aziz* v. *Wali Khan* 1 A. 338, referred to.

Second appeal from an order of the Commissioner, Jhansi Division, dated the 11th May 1914, reversing that of the Assistant Collector, Banda District, in a case of ejectment.

JUDGMENT.

HOLMS, S. M.—(*February 26th*, 1915.)—The appellant holds the land in dispute under a lease of 1859 A. D., in which it is provided that he should make *bandhis* and establish hamlets. The improvements in respect of which compensation was claimed were all made in 1880 or before, and no compensation is claimed for any improvements made afterwards. At this time Act XII of 1881 was not in force under which a *thekadar* has no right to get compensation for improvements. Act XVIII of 1873 was in force which provides for a tenant getting compensasion for improvements but does not define the term 'tenant'. It is not quite clear whether a *thekadar* could get compensation for improvements, under Act XVIII of 1873. In these circumstances I doubt if section 2 (3) of the present Tenancy Act is applicable. The only question which is doubtful is whether a *thekadar* could get compensation under Act

XVIII of 1873—a point as to which neither party quotes any rulings or authorities. They will get a fortnight in which to file written arguments referring me to rulings. In the event of my deciding that such compensation was payable under Act XVIII of 1873, I would then set aside the order of the Commissioner and direct him to hear the appeal solely on the remaining issue which he has not decided, the amount of the compensation to be awarded. It is admitted by the respondent that the present *nikasi* is some Rs. 500 and the present rent Rs. 210 and he alleges, what the appellant denies, that a hundred *bighas* as well was cultivated as *khudkasht*. The profits are then very small in consideration of the large expenditure and the Commissioner in his remarks, that they have had 33 years' benefit of their improvements, does not seem to have adverted to the very small profit they have made.

HOLMS, S. M.—I have perused the written arguments put in, and considered the rulings referred to. In *Ablakh Rai* v. *Salim Ahmad Khan* (1), referred to by appellant, the question of jurisdiction was not raised, while in *Raj Bahadur* v. *Birmha Singh* (2), the question of whether the word "tenant" in the improvement sections included a *thekadar* was not considered.

On the other side the Full Bench ruling, reported as *Abdul Aziz* v. *Wali Khan* (3) is to the point. There was a difference of opinion, but three Judges against two held that for most purposes "*thekadars*" should be held to be tenants under Act XVIII of 1873. I doubt, however, if *thekadars* were entitled under that Act to get compensation for improvements. This being so, I dismiss the appeal with costs.

Appeal dismissed.

(1) 2 A. 437.
(2) 3 A. 85.
(3) 1 A. 338.

ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL NO. 360 OF 1914.

May 27, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

ABDUL RAFI KHAN AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

MAULA BAKHSH—OBJECTOR—RESPONDENT.

Limitation Act IX of 1908), *Sch. I, Art.* 182—*Civil Procedure Code* (*Act V of* 1908), *O. XXI, r.* 12—*Execution—Inventory of property attached not annexed to application—Application, whether in accordance with law.*

Where a decree-holder fails to annex to the application for execution of his decree an inventory of the property to be attached with a reasonably accurate description of the same, as required by Order XXI, rule 12, of the Code of Civil Procedure, the application is not in accordance with law within the meaning of Article 182 of the Limitation Act, 1908, and cannot save limitation when it is dismissed for non-compliance with an order for amendment. [p. 480, cols. 1 & 2.]

Hira Lal v. *Dulari Kuar*, A. W. N. (1892) 3; *Mangal Sen* v. *Baldeo Pershad*, A. W. N. (1892) 70, referred to.

Execution first appeal from the decision of the Subordinate Judge of Azamgarh, dated the 27th June 1914.

Dr. *S. N. Sen*, for the Appellants.

Messrs. *Peare Lal Banerjee* and *Iybal Ahmad*, for the Respondent.

JUDGMENT.—This is an appeal by the representatives of one Ali Bakhsh Khan deceased, who obtained a decree on July 10th, 1906, against an order of the Subordinate Judge of Azamgarh dismissing the appellants' application for execution on the ground that it was barred by limitation. The decree as already stated was passed on July 10th, 1906. The first application for execution was made in September 1909 and was struck off after the decree had been partly satisfied. The second application for execution was made on August 24th, 1910, and was ultimately struck off on March 24th, 1911. For the purposes of this appeal it may be assumed that the application of August 24th, 1910 was an application made in accordance with law to the proper Court for execution of the decree. The third application for execution was made on August 23rd, 1912, and was struck off on September 6th, 1913, the decree-holder having failed to comply with the order of the Court requiring him to make certain

amendments in the application. The fourth application for execution was made on June 4th, 1914, and it is against the order of the Court dismissing the fourth application that this appeal has been brought. The question for decision in the appeal is whether the third application of August 23rd, 1913, was an application made in accordance with law to the proper Court for execution of the decree. When the application was presented, the office reported that there were many mistakes in columns 6, 7 and 8 of the application. It was also noticed that the prayer for relief was irregular. The prayer was that by means of attachment and sale of the property of the judgment-debtor, a list of which would be filed afterwards, the balance of the decree together with costs of the execution proceedings might be recovered. It has been held in many cases that it is not every defect or mistake in an application for execution which obliges the Court to hold that the application is not one made in accordance with law. Speaking generally, the Courts have set themselves to inquire whether an application in question is in substantial compliance with law. For the purposes of this appeal we may disregard the mistakes and defects in columns 6, 7 and 8 of the application. But the failure of the decree-holder to annex to the application an inventory of the property to be attached with a reasonably accurate description of the same as required by Order XXI, rule 12, Civil Procedure Code, stands on a different footing. In *Hira Lal* v. *Dulari Kuar* (1) this Court held that an application for attachment of immoveable property in execution of a decree which did not contain the particulars required by section 237 of the Code of Civil Procedure of 1882, was not an application in accordance with law within the meaning of Article 179, Schedule II, of the Limitation Act of 1877 and in *Mangal Sen* v. *Baldeo Prasad* (2), Mahmood, J., held that an application for execution of a decree by attachment of moveable property of the judgment-debtor unaccompanied by an inventory of the property sought to be attached was not an application in accordance with law within the meaning of Article 179, Schedule II, of the Limitation Act of 1877. The learned Vakil for the appellants has been unable to refer us to any case in which these decisions have been disapproved. But he has referred us to several cases in which defective applications for execution have been amended beyond limitation and the Courts have held that the amendment related back to the date of the application. Such cases have no bearing on the present appeal. Here although the decree-holder was given time to amend his application, he did not amend it, and it is impossible for us some years afterwards to allow him to amend an application which was struck off on account of his failure to comply with the order of the Court requiring him to amend it. We must follow the decisions of this Court reported in the Weekly Notes for 1892, and hold that the application for execution put in on August 23rd, 1913, was not an application in accordance with law within the meaning of Article 182, Schedule I, of the Limitation Act of 1908 which governs the present case. If the application of 1913 is put out of the way, the present application of June 1914 is clearly barred by limitation as held by the Court below. The appeal fails and is dismissed with costs including fees in this Court on the higher scale.

Appeal dismissed.

(1) A. W. N. (1892) 3.
(2) A. W. N. (1892) 70.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 904 OF 1913.

March 12, 1915.

Present:—Mr. Justice Walmsley.

JNANENDRA NATH BHATTACHARJEE —DEFENDANT—APPELLANT

versus

CHANDI CHARAN SAHA AND ANOTHER— PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 23—Excisable articles, sale of—Liquor, license to sell—Transfer—Partnership, terms of—Legality—Findings of fact.

A partnership for the sale of excisable articles is not illegal. [p. 481, col. 1.]

Appeal against the decree of the District Judge, Nadia, dated the 31st of July 1912, reversing that of the Munsif, first Court,

Krishnagar, dated the 14th of September 1911.

Babu *Baranashibasi Mukherjee*, for the Appellant.

Babu *Shiba Prosanna Bhattacharjya*, for the Respondent.

JUDGMENT.—The plaintiff is the licensee of a country liquor shop. His son is the licensee of an imported liquor shop. He brought a suit against the defendant, now appellant, for accounts alleging that the defendant was his servant or *karmachari*. In the alternative he asked that if the defendant was found to be a partner, the partnership should be dissolved and an account in respect of the partnership taken.

The defendant appeared and said that he was a partner, and the learned Munsif found that he was a partner to the extent of 8 annas and he passed a decree accordingly.

Then the plaintiff preferred an appeal to the District Judge and the learned Judge held that the defendant could not be a partner, because the license of a liquor shop is a personal privilege and the licensee cannot take any one as a partner into the business. He also held that as the license for the imported liquor shop stood in the name of plaintiff's son, the plaintiff could proceed with the suit only with regard to the country liquor shop. Having found that the defendant could not be a partner, he proceeded to ascertain what he really was. He came to the conclusion that he was not an ordinary servant but that he was an agent and he ordered that he should render an account.

The defendant has appealed to this Court and it is urged on his behalf that the District Judge is wrong in finding that the defendant cannot lawfully be a partner, and *secondly*, that the finding as to the defendant being an agent is against the admitted facts on the record, and *thirdly*, that the subject of defendant's status was not argued before the lower Court. With regard to the *first* point the learned District Judge quotes two cases, *Rakhal Chandra Shah* v. *Damodar Shaha* (1) and *Behari Lal Shah* v. *Jagodish Chunder Shaha* (2).

The former of these cases came before this Court in its revisional criminal jurisdiction, and I do not think it lays down any principle useful to the present case. In the second case the licensee sold his stock in trade to another person, with the intention that the transferee should carry on the business of selling liquor without obtaining a license. The agreement was held to be void. I do not think it follows from this decision, or from the prohibition contained in the Act against transferring, sub-letting and assigning, that a partnership in any form for the sale of excisable articles is illegal. But whether the learned Judge's view as to the legality of partnership is right or wrong, I think he was clearly wrong in arguing that because defendant could not legally be a partner, he must stand in some other relation to the plaintiff. The Judge should have ascertained whether the defendant was a partner in fact, and if so, what was the legal consequence. This brings me to the second and third points.

With regard to the status of the defendant, it appears from the order sheet that the learned District Judge only heard arguments on the question of law and after that the case did not come up again for hearing.

This was an error and the parties should have been allowed an opportunity of setting before the Court their arguments as to the true relation between the plaintiff and defendant.

The view I take is this that the lower Appellate Court should first of all determine the relation which really existed between the parties. If it is found that they were partners, it will be for the Court to determine whether the terms of the partnership were such as to make it illegal, if they were, then it would follow from the principle laid down in the case of *Behari Lal Shah* v. *Jagodish Chunder Shaha* (2) that the agreement between them was one upon which the plaintiff could not sue.

I, therefore, set aside the decision of the lower Appellate Court and remand the case, for the appeal to be heard again in the light of these remarks.

Costs will abide the result.

Case remanded.

(1) 9 Ind. Cas. 115; 12 Cr. L. J. 11; 15 C. W. N. 160.
(2) 8 C. W. N. 635; 31 C. 798.

SANKUNNI MENON *v.* NALLAPPAH RAMUNNI MENON.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1663 OF 1915.

March 21, 1913.

Present:—Mr. Justice Spencer and Mr. Justice Coutts-Trotter.

SANKUNNI MENON AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

NALLAPPAH RAMUNNI MENON AND OTHERS—DEFENDANTS—RESPONDENTS.

Fraud, plea of—Issues—Allegations, mere, not sufficient.

No man ought to be found guilty of fraud and collusion of a particularly gross kind of fraud unless it is clearly and unambiguously alleged and put in issue against him. [p. 483, col. 1.]

Therefore, in a suit upon an indemnity bond the plea that the damnification suffered by the plaintiff is the result of his negligent and fraudulent conduct in the previous litigation ought to be in issue against him in clear terms; it is not enough that there are allegations in the written statement from which a plea of this kind could be spun out. The plea should be clearly and distinctly raised. [p. 483, cols. 1 & 2.]

Second appeal against the decree of the District Court of South Malabar, in Appeal Suit No. 756 of 1911, preferred against that of the Subordinate Judge of Calicut, in Original Suit No. 16 of 1910.

FACTS.—The plaintiffs sued to recover moneys due under an indemnity bond executed by two of the senior ladies of a Malabar *tarwad*. There having been some dispute as to who was *karnavan* of the *tarwad* and whether the *tarwad* was divided or undivided, plaintiffs who had to pay moneys to the 5th and 10th defendants, that is, to the two ladies, paid moneys to the 5th defendant and her near male relations, on their representation that they were the sole persons entitled to receive the same, and on their executing an indemnity bond agreeing to indemnify the plaintiffs against any loss that they might sustain if the other branch claimed any portion of the moneys that was paid. That event happened and the 10th defendant brought a suit to recover the whole amount and got a decree. The present suit was instituted to recover the said amount and costs under the indemnity bond. Both the lower Courts dismissed the suit, on the ground that the plaintiffs did not properly conduct the suit brought by the 10th defendant and that there was fraud and collusion. Thereupon the plaintiffs preferred this second appeal.

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellants, contended that (1) in a suit based on an indemnity bond it was no defence in law that the plaintiffs did not conduct the previous suit properly; (2) there was no allegation of fraud or collusion in the written statement in the previous suit nor any issue raised.

Mr. *K. P. Govinda Menon*, for the Respondents, contended that (1) evidence was let in as regards fraud and the finding of fraud was a question of fact with which the High Court had no power to interfere in second appeal; (2) in any event the lower Appellate Court should be directed to frame a new issue and try the question.

JUDGMENT.—The appellants in this case brought their action upon a bond of indemnity dated the 10th February 1902 and executed by the 1st defendant, the 2nd defendant, the 3rd defendant, the 6th defendant and the deceased 5th defendant, who also represented the 4th, 7th and 8th defendants. The material facts, when disentangled from the mass of transactions between the parties, are very simple. The defendants Nos. 1 to 8 formed one branch, and the defendants Nos. 9 to 16 the other, of what was originally one common *tarwad*. No one was or is agreed as to how far at the times material to this suit the two branches were separate entities as regards the making of contracts or the holding of property. The 1st defendant was certainly the *karnavan* or manager of the branch to which he belonged, and he claimed to be the *karnavan* of the whole *tarwad* comprising both branches; the uncertainty which existed as to the amount of community between the two branches, of course, equally attached to his claim to be their common *karnavan*. The plaintiffs owed Rs. 1,000 to the whole body of persons comprising the defendants; the same doubt again arising as to whether it was a debt to them as one whole *tarwad*, or as a joint debt to the two branches. They owed it under the terms of a hypothecation bond in which the contracting parties were themselves of the one part and the 5th and 10th defendants of the other, they being the senior women, or *karnavastris*, of their respective branches. In 1902, the appellants paid the Rs. 1,000 to the first defendant as representing the group comprised of defendants Nos. 1 to 8 and took from them the

document on which they now sue, which acknowledges the receipt of the money and proceeds to indemnify them against any loss they might suffer in consequence of any claim made or suit brought against them in respect of the same sum by the 10th defendant. In due course the event happened against which the parties had sought to provide; and the 10th defendant brought an action against the appellants (Original Suit No. 453 of 1904 on the file of the Tirur Munsif's Court) claiming the whole principal sum of Rs. 1,000 and Rs. 700 for interest. For reasons not apparent to this Court, she succeeded; judgment passed against the appellants for Rs. 1,700 and costs; and they were compelled to pay that sum under process of law. Having paid it, they not unnaturally turned to those who had indemnified them against the exact event which had happened; and as they declined to pay, they brought this suit against them. Their action was dismissed in both the Courts below, on the ground that the 10th defendant succeeded in her action against them owing to their negligence and collusion. We may say at once that even if we thought it open to the defendants to invite such a finding, we should set aside the present judgment and order a new trial. Some of the reasons put forward for finding the appellants negligent were puerile, as for instance that they did not join the 1st defendant as a party, and did not appeal, which they were under no possible obligation to do. Moreover both Courts below utterly failed to distinguish between two radically distinct conceptions as negligence and fraud, and seem to treat them almost as convertible terms. But in this case we think we ought to go further. It is a fundamental principle of law that no man ought to be found guilty of fraud and collusion of a particularly gross kind of fraud, unless it is clearly and unambiguously alleged and put in issue against him. In the present suit, the 1st defendant who, one would suppose to be the person chiefly interested, did not allege collusion at all. The defendants Nos. 2, 3, 5 and 6 have the following simple sentence in their written statement: "It was owing to the plaintiff's neglect and collusion that they failed" in the suit in question. Then follow certain statements which appear to be by way of particulars, and which, if they are anything at all, are particulars of negligence; one of them being the remarkable allegation that the appellants failed to avoid payment under the decree of the Court. But of any expansion of the bald statement that the plaintiffs' failure was owing to their collusion, there is not a trace. It was urged before us that to enforce rules of pleading strictly in India would be impracticable and would lead to injustice. While this may be true in some cases, we doubt greatly whether the interests of justice would be furthered by allowing vague and unspecified allegations of fraud to be gone into. But it is unnecessary to discuss this; the matter does not stop there. Issues were framed in this case, and there are not less than 13 of them; not one raises the question of collusion in these proceedings, even vaguely. We think that that is conclusive and that the Courts below ought to have refused to allow the defendants to raise the issue at the hearing. The appeal must be allowed with costs throughout as against defendants Nos. 1, 2, 3 and 6 and against the representatives of deceased 8th defendant (and against the representatives of deceased 5th defendant) and the appellants must have a decree against defendants Nos. 1, 2, 3 and 6 and against the assets of deceased 5th defendant for (1) Rs. 1,700, (2) the costs they were ordered to pay the plaintiff in Original Suit No. 453 of 1904 on the file of the Tirur Munsif's Court, (3) the costs incurred by them in defending that suit and (4) their costs in this suit throughout. Mr. Ananthakrishna Aiyar wisely abstains from pressing for a decree against defendants Nos. 9 to 16; so that the appeal as regards them fails and is dismissed. The only question that arises is with regard to their costs. They have been treated throughout as little more than formal parties, and have not sought to take any part in the argument on the merits; nor indeed could they with decency support a plea of collusion on the part of one of their members. Mr. Ananthakrishna Aiyar suggests that they should not receive more costs than they could have received had his appeal wholly failed. That is probably correct, but such an order gives rise to great trouble on

taxation and we think justice will be done if the appellants are ordered to pay to defendants Nos. 9 to 16 one-eighth of the sum they are adjudged entitled to recover as costs from defendants Nos. 1, 2, 3 and 6.

Appeal allowed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 5 OF 1913-14 OF FARRUKHABAD DISTRICT.

October 5, 1914.

Present:—Mr. Ballie, S. M., and Mr. Tweedy, J. M.

BISMILLAH BEGAM—PLAINTIFF—APPELLANT

versus

BEHARI AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), ss. 158, 177 (c)—Resumption, suit for—Muafidar *pleading proprietary title—Decision—Appeal—Jurisdiction.*

Where in a suit for resumption the defence was that the *muafidar* had acquired proprietary rights by virtue of his and his predecessors-in-interest having been in possession for 50 years and of there having been two successors to the original grantee:

Held, that the question being one of proprietary title, an appeal from the decision of the Revenue Court lays to the District Judge.

Second appeal from an order of the Commissioner, Allahabad Division, dated the 21st October 1913, reversing that of the Assistant Collector of Farrukhabad District, in the a of resumption of rent-free grant.

JUDGMENT.

BAILLIE, S. M.—(*September 30th*, 1914.)—Two questions are involved in this case: *first*, whether the *muafi* in question was resumable at the pleasure of the *zemindar*, *second*, whether the *muafidar* and his predecessor-in-interest had been in possession for fifty years and two successors to the original grantee. It is urged before me that the latter question is one of proprietary title and the ruling of the High Court in *Sunder Singh* v. *Collector of Shahjahanpur* (1) is cited. It is contended, therefore, that the Commissioner had no power to hear the appeal which lay to the District Judge and his decision was, therefore, *ultra vires*. No objection was taken in the Commissioner's Court to this effect. The appellant awaited the Commissioner's decision and when it was against him, asks that the appeal should be re-heard in the District Judge's Court. Unfair as it may seem to be, the objection must, I think, be sustained. The High Court is the supreme authority on a question of jurisdiction and it has been, not only in the case cited, but in other cases held that such appeals lie on the civil side. Personally, I consider that it was not the intention of the Legislature that the appeal should lie so. It was probably overlooked that the wording of section 158 was such as to lead to the appeal being transferred to the District Judge. The reasons for which I think it was not the intention of the Legislature to transfer such appeals are two. *First*, appeals are transferred from the Revenue Courts to the Civil Courts in cases in which it is possible that there may be a conflict of jurisdiction and in which the finding of a Revenue Court on an issue regarding proprietary right could be upset in a Civil Court as they now are in Oudh. This was not such a case. There was no question of pre-existing proprietary rights. The question whether a *muafidar* should, by virtue of a certain length of possession, be deemed to be a proprietor is one which can only arise in a suit for resumption and can, therefore, only be decided in the Revenue Courts. There was for decision only a simple question of fact, whether the *muafi* was of fifty years' standing and had been held by two successors to the original grantee. It was not, in the sense contemplated by section 177, a question of proprietary title.

The *second* reason is that it seems obvious that the Legislature never intended that the Civil Courts should fix rent or revenue.

It is undeniable, however, that the law is now so worded as to support the High Court decision, and in any case the decision of the High Court must be considered final on a question of jurisdiction.

I am, therefore, compelled to allow this appeal, reverse the decision of the Commissioner and direct that the memorandum of appeal be returned by the Commissioner for presentation to the District Judge.

TWEEDY, J. M.—I concur.

Appeal allowed.

(1) 11 Ind. Cas. 514; 33 A. 553; 8 A. L. J. 539.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 1124 OF 1914.
May 27, 1915.
Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.
AUDH BIHARI PANDE—PLAINTIFF—APPELLANT
versus
JADUBANS MISIR AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Wajib-ul-arz, *construction of*—*Rights* inter se—*Preferential claim.*

The *wajib-ul-arz* of 1833 of a village recorded the mere fact that the co-sharers had a right of pre-emption.

The *wajib-ul-araiz* of 1860 and 1869 recorded that a near co-sharer had a right of pre-emption, after him the co-sharer in the same *thok* and after him the co-sharers in other *thoks*:

Held, that the co-sharer in the same *thok* as the vendor had a preferential claim as against the vendee who was a co-sharer in a different *thok*.

Second appeal from the decision of the Additional District Judge of Gorakhpur, dated the 27th of April 1914.

Mr. *Haribans Sahai* and Dr. *S. N. Sen*, for the Appellant.

Messrs. *M. L. Agarwala* and *Lakshmi Narain*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption. The plaintiff is a co-sharer in the same *thok* as the vendor. The defendants-vendees are co-sharers but in a different *thok*. The plaintiff adduced in evidence an extract from the *wajib-ul-arz* of 1833 and from that of 1860 and 1869. The *wajib-ul-arz* of 1833 records the mere fact that the co-sharers have a right of pre-emption. The *wajib-ul-arz* of 1860 records that there is a right of pre-emption and that the near co-sharer has a right, and after him the co-sharer in the *thok*, and after him co-sharers in other *thoks*. The *wajib-ul-arz* of 1869, in our opinion, is identical with the entry in the *wajib-ul-arz* of 1860, though inslightly different language. It is to be pointed out that both sides admit that some custom of pre-emption prevails in the village. The only question is whether it is an incident of the custom that the plaintiff as a co-sharer in the same *thok* as the vendor has a preferential right over the vendee who is a co-sharer in another *thok*. The Courts below have dismissed the plaintiff's suit. It seems to us that the evidence is all the one way and there was no rebutting evidence. The only possible ground upon which it could be said that the plaintiff had no right was because the *wajib-ul-arz* of 1833 did not expressly record a right of co-sharers *inter se*. There is nothing necessarily inconsistent between the entry in the *wajib-ul-arz* of 1833 and that of the entry in the *wajib-ul-araiz* of 1860 and 1869. A Record of a Right of pre-emption amongst co-sharers does not exclude the possibility of there being rights *inter se*. In the present case we have the villagers in a village in which admittedly a custom existed twice recording the details of the right, first in 1860 and subsequently in 1869. In our opinion under the circumstances of this case the Court below was bound to have decreed the plaintiff's claim. With regard to the consideration, the first Court decided that the full amount had been paid and that evidence adduced by the plaintiff to show that the money had been given back was absolutely worthless. The lower Court did not decide this issue and we have accordingly considered the matter ourselves, and we think that the finding of the Court of first instance ought to be upheld. We accordingly allow the appeal, set aside the decrees of both the Courts below and give the plaintiff a decree for pre-emption conditional upon payment of the sum of Rs. 1,499 within three months from this date. If the money is paid within the time, the plaintiff will have his costs in all Courts including in this Court fees on the higher scale. If the money is not paid, the suit will stand dismissed with costs in all Courts, including in this Court fees on the higher scale.

Appeal allowed.

MADRAS HIGH COURT.
APPEAL AGAINST ORDER No. 26 OF 1915.
April 16, 1915.
Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.
RY. SIVAJI RAJA SAHIB AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS
versus
RY. V. AISWARIYANANDAJI SAHIB AND OTHERS—PLAINTIFFS—RESPONDENTS.

Receiver, appointment of—Grounds—Poverty of

insolvency, if grounds—Civil Court, jurisdiction of, to interfere in Magisterial proceedings under s. 145, Criminal Procedure Code—Management or malversation—Discretion of lower Court—Appellate Court, power of, to interfere.

A Civil Court has jurisdiction to come to a different conclusion from that of a Magistrate under section 145, Criminal Procedure Code, but it has no right to sit in judgment over the finding of fact arrived at by the Magistrate, by a review of the evidence produced before the latter. [p. 486, col. 2.]

Poverty or insolvency of the defendant is no ground for the appointment of a Receiver unless there be in addition some danger to the estate. [p. 488, col. 2.]

Anonymous, 10 Ves. 4; 33 E. R. 2; *Howard* v. *Papera*, 1 Madd. 142; 56 E. R. 54, followed.

Where no specific acts of mismanagement or malversation are proved against a defendant in possession, the Courts must be very slow to displace a party rightfully in possession by the appointment of a Receiver. [p. 489, col. 1.]

Where *prima facie* the title to the property in dispute is in him who is in possession of the property, his possession cannot be displaced by the appointment of a Receiver pending a suit before a Court. [p. 489, col. 2.]

Newton v. *Ricketts*, 10 Beav. 525; 16 L. J. Ch. 372*n*; 11 Jur. 662; 50 E. R. 684; 76 R. R. 192, followed.

As a rule, an Appellate Court will not interfere with the discretion of the lower Court ordering the appointment of a Receiver; but where the lower Court has based its order on a wrong view of the facts, it is the duty of the Appellate Court to interfere and set it right. [p. 489, col. 2.]

Shadi v. *Anup Singh*, 12 A. 436; A. W. N. (1890) 95. distinguished.

Appeal against an order of the Court of the Subordinate Judge of Tanjore, in Interlocutory Appeal No. 1918 of 1914, in Original Suit No. 43 of 1913.

The *Advocate-General* and Mr. *G. S. Ramachandra Aiyar*, for the Appellants.

Mr. *T. Rangachariar*, for the Respondents.

JUDGMENT.—The late Maharaja Sivaji of Tanjore died in 1855. The dispute in the present case relates to the properties which were endowed to certain temples by the late Rajah and to certain private properties belonging to the estate of the late Rani. The senior Rani, Kamakshi Boyi, succeeded to what is known as the *Palace Estate* as well as the temple properties. The defendants in this case claimed to be the sons of the adopted son of Rajah Sivaji. The plaintiffs allege that they are sons of the deceased Maharajah "by ladies known as his sword wives." The last of the Ranis, Muthu Sri Teejamba Boyi Saheba, died on the 3rd May 1912. The case for the plaintiffs is that they are entitled to succeed to the management of the *devasthanams* and to enjoy the private properties in preference to the defendants, the validity of whose father's adoption they deny. The plaintiffs applied to the Subordinate Judge for the appointment of a Receiver pending the disposal of the suit. He granted their prayer. The defendants have preferred this appeal.

A large number of charges alleging mismanagement, malversation, waste, etc., were preferred against the defendants. Apparently before the Subordinate Judge only six of these charges were pressed for decision. He found four of them proved, and on the strength of this finding, made the order for the appointment of a Receiver.

Before dealing with the charges *seriatim*, it is necessary to mention that immediately on the death of the last Rani, disputes regarding the possession of the properties arose between the plaintiffs on one hand and the defendants on the other. On the 13th of August 1912 the Sub-Divisional Magistrate held that the possession of the defendants should be "*maintained*", and directed the plaintiffs to establish their claim in a civil suit. This present suit was instituted as a result of that adjudication by the Magistrate. The Subordinate Judge criticises at considerable length the conclusion of the Sub-Divisional Magistrate regarding possession. Although it is open to a Civil Court to come to a different conclusion from the Magistrate on materials placed before it, the Judge has no right to sit in judgment over the findings of fact the Magistrate has arrived at, by a review of the evidence produced in the Magisterial proceedings. The Subordinate Judge is not hearing an appeal from the Sub-Divisional Magistrate. The conclusion of the Magistrate, five months after the death of the late Rani, was that defendants had been in possession of the properties and that they should be maintained in that possession. He found against the plaintiffs' contention that they were peacefully in possession.

The question for consideration, therefore, is, whether the evidence let in justifies the order of the Subordinate Judge directing the appointment of a Receiver. No oral evidence was let in and the Court below acted solely on the affidavits filed by both the parties.

The *first* charge which the Subordinate Judge holds to have been proved is dealt with by him in paragraph 9 of the judgment. The charge relates to the lease of Mariyambalpuram village for 20 years at the rate of Rs. 15 per *pangu*. It was contended that having regard to the rise in the price of paddy and seeing that under Exhibit G the parties were entitled to revert to the *amani* system after the termination of that lease, the rate of rent secured under the new lease is highly detrimental to the interests of the *devasthanams*. Mr. G. S. Ramachandra Aiyar, who has worked out the figures with reference to the deductions to be made under the earlier lease-deed, Exhibit G, has shown that the rate secured under the new lease compares favourably with what was payable under Exhibit G. The Subordinate Judge lays considerable stress on the fact that the sale price of paddy is at the rate of Rs. 2 per *kalam*. He has not paid sufficient attention to the decision of the Revenue Officer in Exhibit VIII, to the effect that the commutation rate in one of the temple villages is Rs. 1-4-0 per *kalam*. The market rate is different from the commutation rate which the tenants have to pay under the Estates Land Act. A certain average is arrived at in the later case in fixing the commutation rate, and it is upon that standard that the rent due from tenants has to be recovered. It is true that the defendants have with unseemly haste entered into leases for a long period of time. It is pointed out that under the previous lease the period was 20 years and that generally the temple properties are leased out for a considerable length of time. It may be an error of judgment to grant long leases where the tendency of prices is to rise higher year after year. But that is no ground for considering that the defendants have wilfully surrendered rights belonging to the *devasthanams*. We must hold that this charge has not been proved against the defendants.

The *next* charge is dealt with by the Subordinate Judge in paragraphs 10 and 11 of his judgment. The previous lease secures 65 *kalams* of paddy per *veli* in respect of the village of Kodikalur. The present lease for 20 years secures Rs. 80 per *veli*. At the commutation rate mentioned in Exhibit VIII this would not be an unfair rent. Here again the fact that the lease covers a long period is a matter for comment against the defendants. As against this, it is stated that the tenants were very refractory, that in *faslis* 1309, 1310 and 1311 the late Rani was able to collect only at the rate of Rs. 7 per *veli*, that as a result of that there were legal proceedings under the Estates Land Act, and that in order there may be peace in the village and the amount may be recovered without litigation, the defendants were obliged to give a long lease at the rate already mentioned. We cannot say that this explanation is unsatisfactory. Where the tenants have been long on the land and have been accustomed to a particular rate of rent, the landlord will not be acting injudiciously in continuing that rate, if the result of his endeavours to impose a higher rate is likely to lead to litigation. We must hold that this charge is not substantiated against the defendants.

The Subordinate Judge held that the charges relating to the Thirupanthurithi village and Bommani Thottam were not proved. We see no reason to differ from him. In the second case especially, the opinion of a leading legal practitioner was obtained before the transaction was entered into, and we cannot say that the defendants acted recklessly in this matter.

The *third* charge which the Subordinate Judge held to have been proved, relates to Nalladi village. There are two complaints. One is that the sale of paddy to Gopalasawmi Chetty was at the rate of Rs. 1-12-6 per *kalam*, whereas the ruling price in the district was Rs. 2-9-0. The second complaint is that the defendants were not justified in allowing a commission of six pies per *kalam* to the tenant purchaser. There is room for doubt whether the purchaser was the tenant who was bound to measure the paddy to the *devasthanam*. But apart from this, on the first question, we are not satisfied that the rate of Rs. 1-12-6 was not a proper rate. Exhibits O3, O4 and O5 show under what circumstances the paddy was sold. The plaintiffs produce two affidavits, Exhibits O and O1, sworn to by two merchants of Kumbakonam; to prove the rate at which paddy was selling at the time. The Subordinate Judge himself is of opinion that these two deponents may be referring to the price of old paddy. He has failed to take note of the fact that the village at which the paddy was stored was

17 miles from Mayavaram and 32 miles from Kumbakonam. The *District Gazette* containing the prices has not been produced by either side, and there is no evidence as to what the price of paddy was in the outlying villages. The affidavits give no particulars and afford no basis for ascertaining the price at Nalladi. We attach no value to the affidavits filed in the case. It is well-known that the cart-hire from a village to the market in towns will be considerable. That factor has not been taken into account by the Subordinate Judge in coming to a conclusion whether the rate of Rs. 1-12-6 was proper or not.

As regards the paying of brokerage or commission, we are wholly unable to agree with the lower Court that it is unjustifiable. Treating Gopalasawmi Chetti to be the tenant, it is clear from Exhibit O5 that he measured the paddy to the *devasthanam* at Nalladai; and that the defendants' agent wanted to sell the paddy. Then Gopalasawmi offered to purchase it from the agent. He settled the price at Rs. 1-12-6 and asked for a commission of six pies per *kalam*. The fact that the purchaser happened to be the tenant is no reason for holding that *qua* purchaser he should not be given the commission. In sales of paddy it is not unusual to grant a commission; we see nothing wrong in Gopalasawmi having bargained for a commission of six pies per *kalam*.

The *last* of the charges relates to Prandhai Thottam. If the charge that was made in respect of this village is established, it would to some extent justify the order passed by the Subordinate Judge. The allegation is that the late Rani spent a sum of Rs. 7,000 for planting a mango *tope* and that the defendants wantonly and recklessly destroyed that garden and sold away the mango trees. The Subordinate Judge is unable to find what particular sum of money was really spent by the Rani in improving the garden; although in more than one place he speaks of the heavy expense incurred by the late Rani. He does not find that the mango trees were cut. He does not find what were the number of mango trees which were planted. On the other hand the evidence shows that there were a large number of *iluppai* trees in this place, which were yielding to the *devasthanam* about Rs. 30 on an average per year. The defendants directed that the trees should be cut; they were sold at public auction and realised a sum of over Rs. 2,800. It seems to us that this act was one of prudent management and not of waste on the part of the defendants. Rupees 2,800 put out at the lowest rate of interest would secure a considerably larger income than what the *illuppi* trees were yielding to the *devasthanam*. It was stated that the defendants failed to take advantage of an offer to pay a premium by a lessee and to lease it out for Rs. 400 a year. We have no materials to judge of the solvency of the proposed lessee. We are unable to say that the defendants acted otherwise than honestly in not accepting that offer.

These are the specific charges that have been considered by the Subordinate Judge. In addition to these, Mr. Rangachariar drew our attention to the fact that the defendants are not in solvent circumstances, and that in the interests of the temple it is not desireable that persons of such poor means should be in charge of the properties. It is common ground that the properties are considerable and that the income from them is nearly a lakh of rupees a year. Mr. Rangachariar also draws our attention to the fact that the two defendants are young and inexperienced and that they are managing the properties through their agents in rotation. This, he suggests, will lead to difficulties in the recovery of the rent from the tenants; the system of management by rotation is well known in this country and the sanction of the Privy Council was given to it in *Ramanathan Chetti* v. *Murugappa Chetti* (1). We see no ground for the appointment of a Receiver because there is management by rotation. As has been pointed out in Beach on Receviers, section 600, as a general rule, the poverty or insolvency of a trustee is not a ground for a Receiver, unless there be in addition thereto some danger or loss of the estate, vide *Anonymous* (2) and *Howard* v. *Papera* (3). Moreover in the present case the defendants are in receipt of pensions from the Government and are legatees under

(1) 29 M. 283 (P. C.); 1 M. L. T. 327; 16 M. L. J. 265; 3 A. L. J. 707; 8 Bom. L. R. 498; 10 C. W. N. 825; 4 C. L. J. 189; 33 J. A. 139.

(2) 12 Ves. 4; 33 E. R. 2.

(3) 1 Madd. 142; 56 E. R. 54.

the Will of the late Rani in respect of the *mukhasa* properties. However, in order to safeguard the interests of the temple we have resolved that pending the disposal of the suit the defendants should furnish security in the sum of Rs. 10,000 to the satisfaction of the Subordinate Judge for the proper management of the property.

Mr. Ranagachariar contended that the general rule that parties in possession should not be lightly displaced by the appointment of a Receiver, does not apply to cases of recent or disputed possession; and he quoted the analogy of section 239 of the Indian Succession Act for this purpose. It is true that where property is *in medio* after the death of the last owner and a dispute exists as to who is entitled to that property, a proper procedure is to appoint a Receiver. That is often done in England and that principle has been accepted in this country. But where a party is in peaceful possession and that possession has been secured to him by an order of the Magistrate, the analogy of section 239 cannot apply. The present case is more analogous to that of a person in whose favour a Probate in common form has been granted and a caveat is entered against his right to administer the estate. The case of *Newton* v. *Ricketts* (4), quoted by the learned Advocate-General, establishes that in such circumstances a Receiver should not ordinarily be appointed. Lord Langdale in delivering the judgment of the Court says: "It is satisfactory to find, that the authorities show, that such a state of things alone affords no right to relief, though it may, if connected with other circumstances; induce the Court to interfere and protect the property." A person who obtains possession after the Will has been proved in common form has only recent possession; and when that possession is disputed by the caveator, if a Receiver should not displace the party originally put in possession, we see no reason why, where a Magistrate has maintained a party in possession and his right is disputed by the opposing party, a Receiver should be appointed.

Mr. Rangachariar strongly pressed upon us the decision of *Shadi* v. *Anup Singh* (5), which lays down that the discretion of the lower Court should not be interfered with. If the facts were undisputed and the Court below had exercised the discretion in a particular way, ordinarily the Appellate Court would be unwilling to interfere with that discretion. But where, as in this case, we find that the Subordinate Judge has come to a wrong conclusion on the facts, we do not think that the decision in *Shadi* v. *Anup Singh* (5) has any application.

There is only one other circumstance to be noticed and that relates to the *prima facie* title of the plaintiffs. The plaintiffs claim to be the legitimate sons of the deceased Rajah. They may be able to establish that in the suit. But it is permissible to point out that the Government in granting the pension to the sons of the adopted son of the late Rani did not recognise the rights of the plaintiffs. On the other hand, the defendants are in receipt of pensions from the Government; and *prima facie* their claim is superior to that of the plaintiffs. Under these circumstances we do not think that the plaintiffs have shown a better *prima facie* title than the defendants.

Although we have come to the conclusion that the order of the Subordinate Judge must be set aside we think it desirable in the interests of the trusts that the defendants should be called upon to furnish (*a*) quarterly accounts of their management to the Subordinate Judge, (*b*) that they should take the permission of the lower Court for any leases over a year, and (*c*) that they should within three months from this date furnish security for Rs. 10,000 to the satisfaction of the Subordinate Judge. We reverse the order of the lower Court and dismiss the petition for the appointment of a Receiver. We make no order as to costs.

As regards the memorandum of objections, it is enough to point out that the alleged attempt to alienate the *mokhasa* properties will not prejudice the plaintiffs, as it would be affected by his *lis pendens*. There are no serious allegations of waste. We agree with the Subordinate Judge's conclusion on this matter. If the security is not given, leave to apply for further orders is given.

Appeal allowed.

(4) 10 Beav. 525; 16 L. J. Ch. 372*n*; 11 Jur. 662; 76 R. R. 192 at p. 195; 50 E. R. 584.

(5) 12 A. 436; A. W. N. (1890) 95.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 9 OF 1914-15 OF AGRA DISTRICT.

April 3, 1915.

Present:—Mr. Holms, S. M., and Mr. Campbell, J. M.

RUP SINGH—APPELLANT

versus

Musammat BEERA—RESPONDENT.

Mortgagor and mortgagee—Occupancy holding, mortgage of—Void mortgage—Mortgagor, if can eject mortgagee without paying mortgage-money—Landlord and tenant, relation of, if exists between.

A mortgagor of an occupancy holding who has put the mortgagee in possession cannot eject him from the holding, on the ground merely that the mortgage is void under the Tenancy Act, without re-paying the mortgagee the money which he has received from him.

Bahoran Upadhya v. *Uttamgir*, 12 Ind. Cas. 112; 8 A. L. J. 931; 33 A. 779; Revenue Reports 1910-12, p. 94, followed.

The relation of landlord and tenant does not exist between the mortgagor and the mortgagee, where rent is not payable by the mortgagor nor is there any contract, express or implied, but for which it would be payable.

Second Appeal No. 2 of 1911-12, followed.

Second appeal from an order of the Commissioner, Agra Division, dated the 11th September 1912, reversing that of the Assistant Collector, Agra District, in a case of ejectment.

JUDGMENT.

HOLMS, S. M.—(*February* 15th, 1915).—The facts are very simple. Can a mortgagor of an occupancy holding, who has put the mortgagee in possession, eject him from the holding on the ground merely that the mortgage is void under the Tenancy Act, without re-paying the mortgagee the money which he has received from him? The High Court in their decision in *Bahoran Upadhya* v. *Uttamgir* (1) have held to the contrary on the principle that he who seeks equity must do equity and that the mortgagor cannot be allowed to retain the mortgage-money in his own hands and at the same time to take back the property. The respondent refers me to a previous ruling, *Ram Sarup* v. *Kishan Lal* (2), which does not deal precisely with this point and which is not referred to in the later ruling.

The appellant further urged that there is nothing to show that the relation of landholder and tenant exist between the parties, as rent is not payable by the appellant nor is there any contract, express or implied, but for which it would be payable, and there is a good deal to be said for this point of view. I have a distinct recollection of a Board's ruling since the present Tenancy Act came into force in which Mr. Tweedy adopted much the same view as the High Court in their later judgment and in which the question of estoppel is also discussed. This will be looked up.

The respondent points to a condition in the mortgage-deed that he should pay rent to the *zemindar* direct, but if the mortgage-deed is void, it is difficult to see how this affects the case.

HOLMS, S. M.—(*April 2nd*, 1915.)—Mr. Tweedy's decision cannot be found and cannot have been published as a Selected Decision, but Mr. L. Porter as member of the Board held in Second Appeal No. 2 of 1911-12 that in a similar case the relation of landholder and tenant did not exist between the parties. Moreover, it seems to me that the occupancy tenant is estopped from ejecting his mortgagee until the mortgage-money has been paid up.

I would set aside the order of the Commissioner and restore that of the Assistant Collector, respondent paying costs in all Courts.

CAMPBELL, J. M.—I agree.

Appeal allowed.

(1) 12 Ind. Cas. 112; 8 A. L. J. 931; 33 A. 779; Revenue Reports 1910-12, p. 94.

(2) 4 A. L. J. 306; 29 A. 327; A. W. N. (1907) 76.

BOMBAY HIGH COURT.

FIRST CIVIL APPEALS NOS. 269 AND 270 OF 1913.

March 17, 1915.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

RASULKHAN HAMADKHAN—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE—DEFENDANT—RESPONDENT.

AND

GULAB CHHITU—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE—DEFENDANT—RESPONDENT.

Bombay Land Revenue Code (Bom. Act V of 1879),

RASULKHAN *v.* SECRETARY OF STATE.

ss. 65,66—Land used as a graveyard and also as a wood store—Possession and user for over 50 year without paying any assessment—Order of eviction, whether legal—Suit to set aside order—Limitation Act (IX 1908), Sch. I, Art. 14.

The land in dispute was used as a graveyard and also for storing wood by the plaintiffs, who had been in undisturbed possession of it ever since 1860 in their own right without paying any assessment. In 1907 the District Deputy Collector ordered the *mamlatdar* "to cause the building and the wood to be removed forthwith from the said land" and the order was confirmed on appeal by the Commissioner in April 1909. On the 22nd February 1910 the plaintiffs sued the Secretary of State for India in Council for the declaration that they were the owners of the land, for a cancellation of the order and for a permanent injunction against the defendant to prevent any obstruction being caused to them in the enjoyment of the property:

Held, (1) that in view of the long undisturbed possession of the plaintiffs the order of eviction was *ultra vires*. [p. 492, col. 1; p. 494, col. 2.]

(2) that the suit was not barred by Article 14 of the Limitation Act. [p. 492, col. 1; p. 494, col 1.]

First appeals from a decision of the Acting District Judge of Broach, in Suits Nos. 7 and 2 of 1910.

Mr. *G. N. Thakor*, for the Appellants.

Mr. *S. S. Patkar*, Government Pleader, for the Respondent.

JUDGMENT.

HEATON, J.—In this matter the following facts are either admitted or established beyond any real controversy.

There is a certain plot of land which is used, and for many years has been used, as a graveyard, but also for storing wood. On the findings of the first Court which to this extent are not challenged in appeal, the occupants or persons who are in charge of the land, whether with reference to its use as a graveyard or as timber store, are the plaintiffs. This occupation had continued for at least fifty years before this suit was brought.

Eventually the Government officers decided that the plaintiffs should be evicted unless they ceased to use the land for the purpose of a wood store. I am describing the case in general, but I think in sufficiently accurate terms. Plaintiffs have brought this suit substantially to protect themselves against the proposed eviction by Government officers unless they cease to use the land as a wood store. The acting District Judge who heard this case substantially found the facts as I have described them, but he came to the conclusion that the order of eviction was perfectly legal and justified under the provisions of the Land Revenue Code. It is here at the outset where I differ from the District Judge. To begin with, as a general principle Government have no power to evict persons in such occupation of land except as provided by the law, and it is not suggested that they have any power to evict these plaintiffs unless that power is to be found in the provisions of the Land Revenue Code. It is not denied that the plaintiffs are lawfully in occupation of this land provided that they put the land to a proper use, that is to say, they are not in occupation as trespassers or persons without any right. It is said, and it may be perfectly true, that they are in occupation as persons entitled to be in charge of the graveyard which exists on the land. But assuming this to be so, and knowing as we do that they have used the land as a wood store, is there any provision in the Land Revenue Code which entitles the Government officers to evict them? I can find none. It is not shown in this case that the land has been assigned for the purpo e of a graveyard as provided in section 38 of the Land Revenue Code. We know merely that the land is and has been a graveyard for a very great many years. How, under what arrangement, or by whose authority, it came to be a graveyard we do not know, and in our ignorance it would be profitless to conjecture.

Then this land, so far as the evidence shows, has neither been assessed nor held for the purpose of agriculture. True, it was assessed, but so far as I can judge on the evidence it was assessed for some purpose not directly connected with agriculture, because when it was assessed it had been for many years and was still a graveyard. No assessment was ever levied from the occupant and it nowhere appears from the Government records that the land was ever regarded as land to be used for the purpose of agriculture. In fact it never has been used for the purpose of agriculture, so far as the evidence informs us. It is not, therefore, land to which sections 65 and 66 of the Land Revenue Code apply. I can find no provision which

entitles the Government to evict these persons, as from their proceedings it seems they propose to do. On the merits, therefore, I feel no doubt whatever that the plaintiffs are entitled to protection against this intended eviction.

The only other points which I need notice are, *first*, that we are not in any way in the case concerned with the question as to whether Government have the power or whether they ought to levy any assessment on this land. *Secondly*, it has been argued that the suit is time-barred. It has been so argued because, it is said, Article 14 of the Schedule to the Limitation Act covers the case. That Article relates to a suit to set aside an act or order of an officer of Government. It is true that the suit is one in terms to set aside the order of an officer of Government, but it is a suit to set aside an order which bears a date less than one year from the time when the suit was filed and, therefore, the suit is not on its face time-barred. What really underlies this argument is, not a question of limitation so much as a very different question. It is argued that there was an earlier order and that limitation runs from the date of that order. That can only be if the order were one which, if not set aside, would lawfully operate as a bar to the plaintiffs' rights. So far as I can see, none of the orders in the case operates as a bar to the plaintiffs' rights. Neither the earliest of them, that of the District Deputy Collector, nor the latest, that of the Commissioner. It is true that the orders are adverse to the interests of the plaintiffs and if practically given effect to, would lead to the eviction of the plaintiffs. No doubt these orders give the plaintiffs a right of action because they are, at any rate to the extent of a threat, an invasion of their rights, but they are not a tangible invasion. They do not of themselves affect the plaintiffs; it would only be the enforcement of the orders which would do this. Therefore, I think there is no bar of limitation in the case.

The order which I would propose is that the decree of the lower Court be set aside, that a declaration be made that the plaintiffs are in lawful occupation of the land in suit and are entitled to remain in such occupation undisturbed and I think the plaintiffs should have their costs in both the Courts.

SHAH, J.—These appeals arise out of two suits brought by the respective plaintiffs against the Secretary of State for India in Council for a declaration that they were the owners of the property in suit and that they had been in possession and enjoyment adversely to the defendant for over sixty years, for the cancellation of a certain order of the Commissioner, Northern Division, and for a permanent injunction against the defendant to prevent any obstruction being caused to them in the enjoyment of the property. The lower Court dismissed the suits on the ground that the claim was time-barred, though it held that the plaintiffs were the occupants of the land in suit. The plaintiffs have appealed to this Court and have urged two points in support of the appeals, *viz.*, (1) that the evidence establishes the fact that they have been in possession of the property in suit in their own right, and (2) that their claim is not time-barred.

With reference to the *first* point, a few facts which are beyond dispute may be stated. The plaintiffs have been in possession of the land at least from the year 1860 and have been using the property partly as a graveyard and partly for the purpose of stacking timber. There is nothing to show as to how the plaintiffs obtained this land, nor is there anything to show that the defendant had originally assigned this land to them before the year 1860. In 1871 when a Survey Settlement was effected, the land was assessed. It is not clear on what footing it was assessed. It was entered in the revenue register as waste land and the amount of assessment was shown in that register. No assessment was ever demanded from the plaintiffs up to the date of the present litigation. In 1898 there was some correspondence with regard to the land in suit as well as other lands and in the letter of the Collector to the Commissioner, dated the 20th of April 1898, the view which the Revenue authorities took of their position with reference to this land is stated. It is not suggested, however, that the plaintiffs had anything to do with this correspondence or that any attempt was made to question the propriety of their possession or of the use which they were

making of the land. In 1907 the order, which is referred to by the lower Court as the order which the plaintiffs must seek to set aside, was made by the District Deputy Collector. That was, however, only a letter addressed by that officer to the *mamlatdar* of Ankleshwar, and there is nothing to show as to when, if at all, it was communicated to the plaintiffs. In that order it was stated as follows:—"If, in this manner, a house be built on the cemetery land, and a wood depôt be opened there or wood be stored there, that cannot be allowed on any account whatever. Therefore you will please cause the building and the wood to be removed forthwith from the said land." An appeal was preferred against this order to the Collector, who declined to interfere. A further appeal was preferred to the Commissioner who made an order in April 1909 declining to interfere with the order of eviction. The notice which was actually served on the plaintiffs has been put in on behalf of the respondent now in this appeal. That notice orders the plaintiffs to remove the wood and clear the ground, directs them to use the land only for the purposes of a *kabarasthan*, and states that on failure of their doing so, steps would be taken against them under section 202 of the Land Revenue Code.

The present suits have been brought on the 22nd of February 1910, *i. e.*, within a year from the Commissioner's order, but more than a year after the order of 1907, Exhibit 49, or the notice of September 1908.

The plaintiffs have adduced evidence to show that at least since the year 1860 they have been using the land in suit in their own right and dealing with it as their own property. They have mortgaged and leased the property from time to time. There are superstructures over the land and it has been used as a timber shop. The evidence also shows that a part of the land is used as a private *kabarasthan* by the plaintiffs. It is not necessary to discuss the oral evidence which establishes these facts. The evidence as to the possession and the use of the property is clear and practically unchallenged. The lower Court also has substantially accepted that evidence as proving these facts. It is clear, therefore, that the plaintiffs have been in possession of this land for over fifty years. There is nothing to show that the defendant had assigned this land to them before that time. Under these circumstances it seems to me that though there is no direct evidence the plaintiffs are the owners of the land, under section 110 of the Indian Evidence Act the burden of proving that they are not the owners would be on the defendant who affirms that they are not the owners.

Coming now to the defendant's evidence it seems to me that beyond the entries in the revenue registers, there is nothing to show that the Government assigned this land to the plaintiffs. It is not shown under what circumstances this land came to be assessed in 1877, but it is significant that in spite of the plaintiffs using the land as their own, no attempt was made even after 1877 up to the year 1907 either to prevent them from using the land otherwise than as a *kabarasthan*, and they were never asked to pay any assessment. I am unable to infer from these Revenue Records that this land was assigned to the plaintiffs by the defendant. There is only one other piece of evidence upon which the learned Government Pleader has relied for the purpose of showing that the plaintiffs are not the owners. That is the statement which was made by one of the plaintiffs on the 18th of September 1903 before the Talati of Ankleshwar. There is no doubt that in this statement the deponent expresses his readiness to pull down the *kacha* hut built on the land if Government have any objection to it. It seems to me, however, that no steps were taken after this statement, as I have already stated, up to the year 1907, and when steps were taken in 1907 or in 1908, the plaintiffs asserted their present claim. It does not appear clearly how the statement came to be made before the Talati, but apparently it was in connection with some Revenue inquiry which ultimately resulted in the order of 1907. The plaintiff who has made this statement says that he made it in ignorance of law. On giving the best consideration to the statement, it seems to me that it would not be right to treat this as an admission of the defendant's right by the plaintiffs. As soon as a definite order was made in 1907, that the plaintiffs should remove the huts which they had built on the land, they asserted their right as owners of the land. Under these circumstances I am unable to treat this statement as in any way advancing the defendant's case. In my opinion,

therefore, the result of the evidence is that the plaintiffs' possession for over fifty years is established and that the defendant has failed to show that the plaintiffs are not the owners.

It is necessary to mention here that the Government have never attempted to levy the assessment from the plaintiffs. So far as the present dispute is concerned, it has arisen in consequence of the Revenue authorities having asserted their right to evict the plaintiffs if they did not remove the huts and if they failed to confine the use of the land to the purposes of a *kabarasthan*. It is not, therefore, necessary to consider whether even if the plaintiffs be the owners of this land, the Government have the right to levy any assessment from them in respect of the land. In fact there are no materials in the case upon which this point could be decided, and it is clear that the Government have not so far called upon the plaintiffs to pay the assessment. In coming to the conclusion, therefore, that in virtue of the plaintiffs having proved their possession of the land in their own right and the defendant having failed to show that they are not the owners, we say nothing as to the right of the Government to assess this land and to levy the assessment from the plaintiffs. The lower Court has dealt with the question of assessment, but it does not seem to me to be either proper or necessary to decide that question in this case. I desire to make it clear that the declaration which may be made in favour of the plaintiffs in this litigation will be without prejudice to the right of the defendant, if any, to levy assessment in respect of this land.

I now come to the question of limitation. The lower Court has held that under Article 14 of the Indian Limitation Act the suits are time-barred because they are brought more than a year after the order (Exhibit 49). It seems to me that the view taken by the lower Court on this point is wrong. In the *first* place, in these suits it does not appear to me to be at all necessary for the plaintiffs to have any order set aside. Their claim is substantially one for confirmation of their possession and for an injunction restraining the defendant from evicting them. The order in question is not of such a character as would by itself have any effect if neither party took any action on it. Besides, strictly speaking, it is merely a communication by the District Deputy Collector to the *mamlatdar*. In pursuance of this order no doubt subsequently a notice was issued, and it was urged on behalf of the respondent that at least from the date of that notice the suit ought to have been brought within a year. I do not think that that notice is any more an order within the meaning of Article 14 than the order which is supposed to have been contained in Exhibit 49. Further, on the merits, having regard to the view which I take of the plaintiffs' possession and of their right to this property, it is clear that the order in question is outside the powers of the Revenue authorities. It was urged by the learned Government Pleader on behalf of the respondent that the order in question was justified by the provisions of sections 65 and 66 of the Land Revenue Code. It was contended that the plaintiffs having used the land for non-agricultural purposes, the Revenue authorities had the power to evict the plaintiffs under section 66 of the Act; but, in my opinion, these provisions of the Land Revenue Code have no application to the present case as the plaintiffs are not occupants of the land within the meaning of the Code, and their rights are not proved to be limited to the agricultural use of the land. It is not possible, therefore, to attribute the order or the notice to any section of the Land Revenue Code under which the Revenue authorities can be said to have the power to evict the present plaintiffs from the land in dispute. If follows, therefore, that the order and the notice are *ultra vires* of the Revenue authorities. On these grounds it seems to me that it is not incumbent on the plaintiffs to have any order passed by the District Deputy Collector or the Collecter or the Revenue Commissioner set aside.

I do not think that any injunction is necessary under the circumstances. It will be sufficient to declare that the plaintiffs are entitled to be confirmed in their possession of the land. I, therefore, concur in the order proposed by my learned colleague.

Decree reversed.

Musammat NATHU *v.* SHADI.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 338 OF 1914.

May 25, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

Musammat NATHU AND OTHERS—DEFENDANTS —APPELLANTS

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SHADI—PLAINTIFF—RESPONDENT.

Pre-emption—Muhammadan Law—Demand—When second demand unnecessary—Sale in lieu of dower-debt—Consideration.

Where at the time when the sale came to the knowledge of the pre-emptor, the vendee as well as the witnesses were present, and the pre-emptor at once claimed his right of pre-emption invoking the witnesses:

Held, that it was not necessary under Muhammadan Law for the pre-emptor to make the second demand.

Nundo Pershad Thakur v. *Gopal Thakur*, 10 C. 1008, referred to.

A right of pre-emption arises under the Muhammadan Law even where property is transferred by a husband to his wife in consideration of dower-debt.

Fida Ali v. *Muzaffar Ali*, 5 A. 65; A. W. N. (1882) 175, followed.

Second appeal from the decision of the District Judge of Saharanpur, dated the 13th January 1914.

Dr. *Sulaiman*, for the Appellants.

Mr. *Durga Charan Banerji*, for the Respondent.

JUDGMENT.—This is a defendant's appeal arising out of a suit for pre-emption. The pre-emptor's claim was based on Muhammadan Law. Both the Courts below have decreed the claim and the defendant-vendee comes here in second appeal. The vendor is the husband of the vendee and the property was sold to the lady in lieu of her dower-debt. The plea taken before us is that the preliminary demands were not properly satisfied and, therefore, the suit ought to have been dismissed. The facts are that at the time when the sale came to the knowledge of the plaintiff-pre-emptor, the vendee was present and witnesses also were present. The plaintiff at once claimed his right of pre-emption invoking the witnesses. It is urged that the two demands ought to have been made separately, one immediately after the other, that practically only one demand was made and that does not satisfy the requirements of Muhammadan Law. The authorities are against the appellant; as Mr. Justice Ameer Ali in his book points out, if at the time of the *talab-i-muwasibat* the pre-emptor had an opportunity of invoking witnesses in the presence of the seller or the purchaser, or on the premises to attest the immediate demand, it would suffice for both the demands and there would be no necessity for the second. The reason of this is obvious. A pre-emptor under the Muhammadan Law directly he hears of the sale has to at once make a demand wherever he may be, whether the purchaser or the seller are or are not present, whether witnesses are or are not present, but it is necessary for him to convey knowledge of his demand to the vendee or the vendor and to call attention to the fact that he did make hisfirst demand and to invoke his witnesses to that effect. Where all the parties are present and the witnesses are present, it is sufficient for him to make his claim and call the attention of the witnesses to the fact that he is doing so and that he insists upon his right. [See the remarks in *Nundo Pershad Thakur* v. *Gopal Thakur* (1).]

The next contention is that no right of pre-emption can arise where property is transferred by a husband to his wife in lieu of the dower-debt. This contention is based upon a passage to be found in Mr. Ameer Ali's book, page 713, Volume I (4th Edition). No other authority has been cited. On the other hand, there is a decision of this Court in *Fida Ali* v. *Muzaffar Ali* (2), which is based upon a much older decision of the Sadr Dewani Adalat of 1864. Mr. Ameer Ali challenges this decision, saying that it appears to proceed on a wrong interpretation of the law but he does not point out the error or consider the question any further. We think that we should follow the ruling of this Court and we, therefore, hold that under the circumstances of the present case the right of pre-emption did arise.

The result is that the appeal fails and is dismissed with costs, including fees on the higher scale.

Appeal dismissed.

(1) 10 C. 1008.

(2) 5 A. 65; A. W. N. (1882) 175.

RAM ADHIN *v.* MAHABIR.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 6 OF 1914-15 OF GONDA DISTRICT.

March 31, 1915.

Present:—Mr. Holms, S. M., and Mr. Campbell, J. M.

RAM ADHIN—DEFENDANT—APPELLANT

versus

MAHABIR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 52—Decree for arrears of rent obtained—Decree not satisfied within fifteen days—Suit for ejectment filed—Decretal amount tendered by judgment-debtor during pendency of suit, effect of.

A co-sharer who is not a recorded co-sharer need not join as a plaintiff in a suit for ejectment.

A landlord obtained a decree for arrears of rent against an occupancy tenant and then brought a suit for his ejectment under section 52, Agra Tenancy Act, on the ground of non-satisfaction of the decree for arrears of rent for more than fifteen days. Before the decree for ejectment was passed and while the ejectment suit was still pending, the judgment-debtor offered the decretal amount to the decree-holder, who refused to take it on the ground that it was not offered to him within fifteen days of the decree:

Held, that if the decree-holder had accepted the money when tendered, no decree for ejectment could have been passed, as at the date of the decree for ejectment there would have been no unsatisfied decree for arrears of rent, that, the landlord had no right to complain of non-satisfaction of the decree owing to his own refusal to accept the tendered money and that, therefore, the decree for ejectment could not be made.

A tenant has a right to pay the decretal amount at any time before the order for ejectment is passed.

Second appeal from an order of the Commissioner, Fyzabad Division, dated the 28th July 1914, confirming that of the Sub-Divisional Officer, Gonda District, in a case of ejectment.

JUDGMENT.

HOLMS, S. M.—(*March 5th*, 1915.)—There is nothing to show that Gajadhar is now a recorded co-sharer in the land and respondents deny that he is. If he is not a recorded co-sharer, there is no need that he should have joined as a plaintiff in the suit.

From the record of the ejectment suit it appears that on the 18th February 1914, defendant appeared with the money and that on the 27th February the plaintiffs refused to take the decree-money which was offered to them. The result is that the tenant against whom a decree for arrears of rent had been obtained, dated the 18th September 1913, was ready with the money to satisfy the decree during the pendency of the ejectment suit. The respondents urge that, under the proviso to section 52 (1), the tenant had no right to avoid ejectment by paying the money during the suit, and that he could only avoid ejectment by paying the money within fifteen days of the decree for arrears. The decree for rent was obtained on the 18th September 1913; and the tenant was certainly at liberty to pay up the arrears in February 1914, and it was not his fault that the landlord refused to receive them and the decree remained unsatisfied. Had the landlord received the arrears, the proviso would certainly have prevented any decree for ejectment being made. It seems to me that if the landlord deliberately refused to accept payment of money tendered, that he has no right to complain that the decree is unsatisfied, and that so far as the tenant is concerned, this formal tender of money in Court must be considered to amount to a satisfaction. Had the case been an Agra case, the matter would have been perfectly clear. No decree for ejectment could possibly have been made in the circumstances.

I would set aside the orders of the lower Courts and dismiss the suit for ejectment, provided the appellant pays the full arrears with interest either in the Deputy Commissioner's Court or in the Sub-Divisional Officer's within a week, in addition to any costs which have been decreed against him in the arrears of rent suit.

In the circumstances parties will bear their own costs throughout.

CAMPBELL, J. M.—I agree.

Appeal allowed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 683 OF 1913.

March 22, 1915.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

VASUDEV RAGHUNATH OKA—

PLAINTIFF—APPELLANT

versus

JANARDAN SADASHIV APTE—

DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 53—Subsequent transferee, definition of—Interest in property, existence of—Fraudulent transfer—Auction-purchaser, whether subsequent transferee.

A person, who steps in by operation of law and not by any act of the owner, is not a subsequent transferee within the meaning of section 53 of the Transfer of Property Act. He is not a person having an interest in the property within the meaning of the section which refers to interest which exists at the time of the transfer objected to. [p. 498, col. 1.]

Where, therefore, *P* sold his interest in a certain land to plaintiff in 1906 and in execution of a money decree passed against *P*, his rights in the property were sold at a Court sale on 22nd January 1909 to the defendant, and on the defendant being placed in possession of the property, the plaintiff sued to recover possession under the sale-deed of 1906:

Held, that the sale-deed was not voidable at the option of the defendant inasmuch as he was not a transferee nor a person having interest in the property within the meaning of section 53 of the Transfer of Property Act. [p. 498, cols. 1 & 2.]

Second appeal from the decision of the Subordinate Judge, first Class, at Ratnagiri, in Appeal No. 242 of 1912, reversing the decree passed by the Sub-Judge, at Chiplun, in Civil Suit No. 497 of 1912.

Mr. *H. C. Coyaji*. with him Messrs. *N. V. Gokhale* and *D. G. Dalvi*, for the Appellant.

Messrs. *G. S. Rao* and *P. B. Shingne*, for the Respondent.

JUDGMENT.

SHAH, J.—The question in this second appeal is whether the sale-deed of the 19th February 1906, under which the plaintiff claims, is voidable under section 53 of the Transfer of Property Act at the instance of the defendant, who is an auction-purchaser of the right, title and interest of the plaintiff's vendors in the *takshim*, with which we are concerned in this suit.

There is no dispute about the fact that the defendant purchased the right, title and interest of the heirs of the original owner, Purshotam Oke, in the *takshim* on the 22nd January 1909 in execution of a a money decree against the said Purshotam and one Gopal Mahadev Gadgil with full notice of the sale-deed in favour of the plaintiff. There was another similar sale-deed of the same date in favour of one Deodhar. But the claim on that sale-deed between Deodhar and the defendant has been compromised. It is common ground now that the plaintiff must succeed in this suit, if his sale-deed is good and operative. The objection taken by the defendant in the trial Court was that it was not a real transaction, but entered into without consideration and with the fraudulent object of defeating the creditors of the vendors, whose right, title and interest he had purchased. The trial Court found that the transaction was real and that there was consideration for it, and that it was not entered into with the object of defeating or delaying the vendor's creditors. On these findings the plaintiff's claim was decreed by that Court. In appeal, however, the learned first Class Subordinate Judge with appellate powers came to the conclusion that though a part of the consideration was proved it was grossly inadequate, that the sale was effected with the object of defeating or delaying Purshotam's creditors and that the plaintiff was aware of, and participated in, the fraudulent intentions of the vendors and was not a transferee in good faith. Apparently it was not contended that apart from the objection under section 53 of the Transfer of Property Act the transaction was sham and not real. The issues raised in both the Courts covered the controversy between the parties relating to section 53 of the Transfer of Property Act, and did not indicate that the defendant really contended that the transaction was not real but a mere cloak for concealing the true ownership which remained with the vendors. The lower Appellate Court accordingly reversed the decision of the trial Court and dismissed the plaintiff's claim.

In the appeal before us Mr. Coyaji has argued on behalf of the appellant that section 53 of the Transfer of Property Act cannot help the defendant, as he is not a person at whose option the deed is voidable under the section. He concedes that it is quite open to the defendant to raise the plea that the transaction is sham and colourable or that it is voidable under section 53 of the Transfer of Property Act. As regards the former contention, he says that though it

was raised in the written statement, no issue was framed on the point, and that in any event after the finding of the trial Court, it was practically given up. This position has not been seriously contested by Mr. Rao on behalf of the defendant. In my opinion, therefore, it must be assumed for the purposes of this case that whatever infirmity there may be in the transaction in virtue of the provisions of section 53, it was not a sham but a real transaction between the vendors and the plaintiff. The findings recorded by the lower Appellate Court on the issues arising under section 53 do not negative this assumption, and on the pleadings it would not be possible to say that the question was specifically raised or that it was urged before the lower Appellate Court.

The appellant, therefore, relies upon the wording of section 53 of the Transfer of Property Act, and argues that the transaction is not voidable at the instance of the defendant, even though the findings of the lower Appellate Court, that the object of the sale was to defeat the creditors of the original owner and that the plaintiff was not a transferee in good faith, be accepted. It is quite clear that the defendant is not the person to defraud, defeat or delay whose claim this sale-deed could have been executed. The only persons whose claims were intended to be defeated were Purshotam's creditors, as suggested in the lower Courts. It is quite clear that the defendant is not a creditor and that he does not seek to avoid the document for the benefit of any creditors. It was suggested, however, that the defendant would be a subsequent transferee or a person having an interest in the property within the meaning of section 53, paragraph 1. But the defendant is an auction-purchaser at a Court sale, and not a transferee by any act of the original owner. Having regard to the preamble as well as section 5 of the Act, it seems to be clear that a person who steps in by operation of law and not by any act of the owner is not a subsequent transferee within the meaning of section 53. He is clearly not a person having an interest in the property within the meaning of the section, which apparently refers to interest which exists in fact at the time of the transfer objected to. It is clear, therefore, that the deed is not voidable at the option of the defendant.

It remains to notice the argument of Mr. Rao that apart from section 53 when it was proved that the plaintiff was not a transferee in good faith, and that he had participated in the fraudulent intentions of the transferor, no Court ought to help the plaintiff. The argument, in order to be effective, must amount to this that the sale-deed was not real and that the vendors really continued to be the owners. I have already dealt with this aspect of the case, and, in my opinion, there is a real and substantial difference between a sham transaction and a transaction which is voidable under section 53 in consequence of fraud at the instance of the person defrauded. It is difficult to understand how the defendant can succeed unless he is a person defrauded or the transaction is merely sham and colourable. As he is not a person at whose option the deed could be avoided and as the deed is not a sham transaction, I do not see how the mere finding that the plaintiff is not a transferee in good faith can help the defendant.

I would, therefore, reverse the decree of the lower Appellate Court and restore that of the trial Court with costs here and in the lower Appellate Court on the defendant.

HEATON, J.—I agree.

Decree reversed.

COURT OF THE FINANCIAL COMMISSIONER, PUNJAB.

REVENUE REVISION No. 406 OF 1912-13.

November 2, 1914.

Present:—Mr. Diack, F. C.

LAKHI AND OTHERS—DEFENDANTS—PETITIONERS

versus

Malik DOST MOHAMMAD KHAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Punjab Land Revenue Act (XVII of 1887), ss. 115, 116—Wajib-ul-arz *prohibiting partition of* shamilat, *whether operates as a bar—Revenue Officer, duty of, to decide.*

An entry in the *Wajib-ul-arz* prohibiting the partition of *shamilat* lands does not necessarily operate as a bar, it being the duty of the Revenue Officer dealing with the partition to decide whether such a clause should prevail or not. [p. 499, cols. 1 & 2.]

Taja v. *Tara Chand*, 11 P. R. 1896 Rev., referred to.

Where the *Wajib-ul-arz* of a village was drawn up to suit a time when the land was valued only for its pasture, but the land had since been broken up

LAKHI v. DOST MOHAMMAD KHAN.

for cultivation and there had been a considerable reduction in the number of cattle kept by the community:

Held, that as the conditions had changed and a large section of the community contested the *Wajib-ul-arz*, the Revenue Officer was justified in sanctioning partition. [p. 500, col. 1.]

Revision from an order of the Commissioner, Rawalpindi, dated the 23rd May 1913.

Mr. *Fazal Elahi*, for the Respondents.

ORDER.—On an application for the partition of the common land of *Mauza* Adhi Sargal the Settlement Officer, by his order dated 11th December 1912, directed that the partition should be carried out and should be effected in a certain way. An appeal was preferred to the Commissioner on two main grounds: (1) that partition was contrary to the provisions of the *Wajib-ul-arz* of the estate and (2) that the measure of right laid down by the Settlement Officer as governing the method of partition was erroneous. On these points the Commissioner held in his order dated May 23rd, 1913, that (1) as a similar order passed in regard to *Mauza* Mitha Tiwana, directing partition in spite of the provisions of the *Wajib-ul-arz* to the contrary, had not been impugned by the Financial Commissioner on revision, the Settlement Officer's order should stand and (2) the Settlement Officer having referred the parties to a civil suit as to the matter of the measure of right, if any of them contested his finding, there was no reason to interfere. On 2nd September 1913, the opponents of partition filed the present application for revision, contesting the decision of the Commissioner on both points.

As regards the *second* point, there is, *prima facie*, no reason to suppose that the decision of the Settlement Officer is erroneous and it is open to the applicants to contest the matter in a Civil Court and I, therefore, agree with the Commissioner that there is no need to interfere.

As regards the *first* point, the question whether a clause in the *Wajib-ul-arz* prohibiting partition is a bar to partition even when the conditions under which the clause was inserted have changed, does not appear to have been ever definitely decided in this office. The case of Mitha Tiwana quoted by the Commissioner is not directly in point. It is true that partition was there ordered contrary to such a clause, but in the revision case decided by Sir J. Douie on 23rd April 1911, the only point for decision was whether the area which had been reserved from partition in order to form a grazing ground was not too large, the parties being apparently agreed that the remainder of the *shamilat* should be divided, and the decision was that the area reserved was not too large.

In *Taja* v. *Tara Chand* (1), it was held that the question whether such a clause should prevail was one that should be decided by the Revenue Officer dealing with the partition case, and should not be referred to the Civil Court, but on the merits of the question no opinion was pronounced. The further history of the case shows that partition was acquiesced in by all concerned it being a case where unculturable riverain land had been made culturable by a change in the river, and consequently no further appeal or application was preferred to the Financial Commissioner.

It has been ruled in several cases that statements or agreements in the *Wajib-ul-arz* relating to the rent of occupancy tenants are binding only for the term of Settlement. And *Dilsukh Ram* v. *Nathu Singh* (2) is a case where an agreement in the *Wajib-ul-arz* was held to be a binding custom (as to *haqshufa* in respect of a mortgage with conditional sale). But none of these bears directly on a clause prohibiting partition. On the other hand the Mitha Tiwana case is so far a precedent that it shows that by agreement among the land-owners such a clause can be ignored. In the present case the wording of the clause, in the future tense, "*taqsim nahin karenge, ki charai mal maweshi men nuqsan hota hai*," shows that it is of the nature of an agreement rather than a custom. And even a custom may be abrogated by a custom (Rattigan's Customary Law, paragraph 5). The question is whether when, as in this case, there is a difference of opinion among the share-holders as to whether the agreement or custom should be enforced, it should be upheld or not.

It is matter of common knowledge that the inhabitants of the Thal in which this village lies have found the cultivation of gram in its hollows to be a profitable undertaking. There has in consequence been a revolution in its conditions. The whole

(1) 11 P. R. 1896 Rev.
(2) 98 P. R. 1894 (F. B.).

wording of the *Wajib-ul-arz* shows that it was drawn up to suit a time when the Thal was valued only for its pasture and the only agriculture known was occasional cultivation of *moth* and *bajra* in the *kharif* harvest. The particular clause in question, forbidding partition because it would be an obstacle to grazing, shows that it was designed for another period. The Tahsildar's report shows that a very large area (over 5,500 *bighas*) has been broken up for cultivation, that persons other than owners are largely taking advantage of the provision in restraint of partition to obtain cultivating possession of portions of the common land, and that there has been a considerable reduction in the number of cattle kept by the community. If in spite of all these circumstances a large majority in interest of the owners of the estate were of opinion that the condition of the *Wajib-ul-arz* should prevail, it might be maintained. But when it is contested by a large section of the community it can no longer be maintained as an agreement, and if regarded as a custom, it may be held to have become inoperative as contrary to justice and equity, and it is open to the Revenue Officer dealing with a partition to direct under section 116 of the Act that it may be carried out notwithstanding.

The application is rejected.

Application rejected.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 976 OF 1913.

March 5, 1915.

Present:—Mr. Justice Batchelor.

DAHYA KHUSAL—DEFENDANT No. 1—APPELLANT

versus

BAI BHIKHI—PLAINTIFF No. 2—RESPONDENT.

Matadars Act (Bom. Act VI of 1887), s. 9—Death of representative Matadar—"Heir next in succession," how determined.

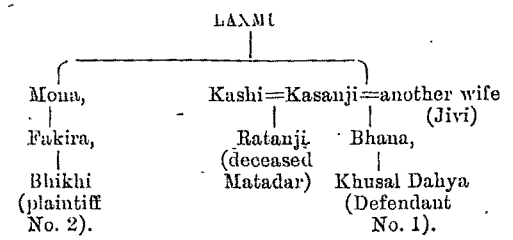
On the death of a representative Matadar, the heir next in succession is ascertained in the first instance by reference to the personal law of the parties. [p. 501, col. 1.]

Second appeal from the decision of the District Judge of Surat, in Appeal No. 87 of 1912, confirming the decree passed by the Subordinate Judge of Olpad, in Civil Suit No. 85 of 1911.

Mr. *G. S. Rao*, for the Appellant.

Mr. *T. R. Desai*, for the Respondent.

JUDGMENT.—This is a case in which the point involved is as to the right of succession to certain Matadari property. The appeal arises in the following state of facts. The genealogy of the parties is as follows:—



The present contest is between Bhikhi, the original 2nd plaintiff, and Dahya the 1st defendant. Ratanji Kasanji, the representative Matadar, died in 1908 or 1909 without issue. Disputes as to the succession to the Matadari property immediately arose, and the Collector of the District and the Commissioner of the Division decided against the claim of the 1st defendant. The Government of Bombay, however, in 1912 took the other view, and reversing the orders of the Collector and Commissioner declared the 1st defendant to be the next heir of the deceased, and accordingly ordered the entry of his name in the Matadari register. Thereupon, Bhikhi and another brought the present suit for a declaration that one of the plaintiffs, and not the 1st defendant, was entitled to succeed to the Matadari property, and both the trial Court and the lower Appellate Court have decided in favour of the plaintiff Bhikhi. My own view is that the appellant Dahya is entitled to succeed.

The question is regulated by sections 9 and 10 of Bombay Act VI of 1887. Section 9 enacts, so far as it is relevant to our present purposes, that on the death of a representative or other Matadar, "the name of the heir next in succession, or, if there are two or more heirs of equal degree, the name of the senior heir, shall, subject to the provisions of section 2 of Bombay Act V of 1886, be registsred in his stead." I apprehend as a matter of grammatical

construction that the words "subject to the provisions of section 2 of Bombay Act V of 1886" govern as well the case of a single heir as the case of two or more heirs of equal degree; but the point is not now material, as neither side contends that the decision of the present appeal is affected by the modification of the rule introduced by the incorporation of section 2 of Bombay Act V of 1886. It is admitted, and, as the genealogy shows, rightly admitted, that if the ordinary Hindu Law is to be enforced, Dahya, and not Bhikhi, is the preferential heir; for Dahya is a *sagotra sapinda* of the deceased Ratnji's, whereas Bhikhi is a *bhinnagotra sapinda*. The lower Courts have decided in favour of Bhikhi on the sole ground that, as they understand the scheme of the Act, it overrides the general law, and provides that, in order to ascertain the heir of a deceased Matadar, the Court is confined to the limits of the Matadar family and can never travel outside those limits. I am obliged to differ from the learned Judges below, because I find nothing in the Act to justify this view, while if that had been the intention of the draftsman, it would have been easy to express it beyond the possibility of misconception. Not only is there no clear provision of that sort, but the section declares that the name of the heir next in succession in such a case as this shall be registered instead of the name of the deceased. Taking these words in their natural meaning they seem to me to denote that the heir is to be ascertained in the first instance by reference to the personal law which governs the parties, for instance, the Hindu Law in the case of Hindus and the Muhammadan Law in the case of Muhammadans. And by section 10 it is enacted that if at any time any person shall, by production of a certificate of heirship, satisfy the Collector that he is entitled to have his name registered in preference to the person whose name the Collector has ordered to be registered, the Collector shall cause the entry in the register to be amended accordingly. Again the section contains no words which indicate that the Court in its inquiry as to who is entitled to be considered the heir shall adopt any other principles than those which a Court would necessarily follow, unless plainly directed otherwise.

It was urged that in *Chinava* v. *Bhimangauda* (1), a case decided with reference to the Watan Act, this Court recognised that one leading object of this Watan legislation is to keep the Watan property intact in the same family. That is perfectly true, but the question still is how far this object is to be pursued, whether within the limitations expressed in the Statute, or beyond those limitations into an unexpressed disregard of the established principles by which heirship is determined. I cannot find in the Act any warrant for this larger extension. And it seems clear that the Act cannot avail to prevent the occasional devolution of the Mata outside the original family, as, for instance, where a deceased Matadar leaves a daughter as his sole heir. It was urged by Mr. Desai that to allow the appellant, Dahya, now to succeed would have the effect of creating a new Matadar family, but the answer to that appears to me to be that the effect will rather be that Dahya will come from outside into the already existing Matadar family. Then Mr. Desai sought to support his case by reference to the addition made to section 2 of the Matadars Act by Bombay Act IV of 1910, which provides that in determining who is the heir to a Matadar for the purposes of the Act the rule of lineal primogeniture shall be presumed to prevail in the Matadar family. But that carries the case no further than this, that where there are lineal descendants of a deceased Matadar the rule of succession will be by primogeniture. Here we are dealing with a case where there are no lineal descendants. On these grounds, as I am unable to discover in the Matadars Act any authority for the view that the Court in ascertaining the heir of a deceased Matadar is disabled from looking outside the Matadar family, I am compelled to give my decision in favour of the appellant, Dahya.

The result is that this appeal is allowed, the decree of the lower Appellate Court is reversed and the plaintiff's suit is dismissed with costs throughout.

Decree reversed.

(1) 21 B. 787.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 783 OF 1913.
April 16, 1915.
Present:—Mr. Justice Chapman and
Mr. Justice Newbould.
KARTIC MANDAL—DEFENDANT No. 1—APPELLANT
versus
BAMA CHARAN MANDAL—PLAINTIFF, AND ANOTHER—DEFENDANT—RESPONDENTS.

Lease—Evidence, documentary and oral, admissibility of—"Putra poutradhi kramay", *meaning of—Lease, perpetual—Tenancy, proof of.*

Where there is a document as evidence of the transaction of a lease, oral evidence in the shape of admission relating to the transaction of the lease is not admissible.

It is not sufficient, to prove the plaintiff's tenancy, to show that he was in possession of other lands covered by the lease.

The expression "*putra poutradhi kramay*" in a document signifies that the lease is a perpetual one.

Appeal against the decree of the Officiating Subordinate Judge, Jessore, dated the 23rd of November 1912, affirming that of the Munsif, Additional Court, at Narail, dated the 24th of November 1911.

Babu *Surendra Nath Sen*, for the Appellant.

Babu *Brojo Lal Chakravarti*, for the Respondents.

JUDGMENT.—The plaintiff's case was that he had obtained a settlement from defendant No. 3, who was a *raiyat* and that upon his going to a portion of the land of which he had obtained the settlement, he was opposed by defendants Nos. 1 and 2. He, therefore, brought this suit for ejectment of defendants Nos. 1 and 2. The plaintiff claimed under a lease, the term of which is described by the expression "*putra poutradhi kramay*." The lease is, therefore, for a term exceeding nine years and having regard to the case of *Jarip Khan* v. *Durfa Bawa* (1), the document was not admissible in evidence and could not have operated to create any title in the plaintiff. The lower Appellate Court, however, decreed the plaintiff's suit.

On behalf of the respondents the difficulty is sought to be got over in three ways. *Firstly*, it is said that the plaintiff was entitled to adduce evidence irrespective of the document to prove his tenancy. This evidence,

(1) 15 Ind. Cas. 476; 17 C.W.N. 59; 16 C. L. J. 144.

it is said, consists, in the present case, of an admission by defendant No. 3 that he had made the lease, that he took an adequate *selami* and also that the plaintiff seemed to have obtained possession of the remainder of the land covered by the lease. If the admission of defendant No. 3 could be used against defendants Nos. 1 and 2, we are of opinion that this is evidence relating to the transaction of the lease and that there being a document as evidence of that transaction, the oral evidence is not admissible. We do not think that it is sufficient, to prove the plaintiff's tenancy, to show that he was in possession of other lands covered by the lease and we note that there does not appear to have been any evidence that the plaintiff was in such a possession.

It is then contended that it would be possible for the plaintiff to prove that there was an oral agreement by defendant No. 3 to create a tenancy. There does not appear to have been any evidence, oral or documentary, other than the evidence of the transaction—the transaction which could only be proved by the document of the lease.

It is then contended that the lease is not a perpetual lease. This contention cannot prevail having regard to the expression "*putra poutradhi kramay.*"

The appeal, is, therefore, allowed, the judgment and decree of the lower Appellate Court is set aside and the plaintiff's suit is dismissed with costs in all Courts.

Appeal allowed.

COURT OF THE FINANCIAL COMMISSIONER, PUNJAB.
REVENUE APPEAL No. 2 OF 1914-15.
March 10, 1915.
Present:—Mr. Diack, F. C.
LAKHMI DAS—APPELLANT
versus
HAYAT AND OTHERS—RESPONDENTS.

Punjab Alienation of Land Act (XIII of 1900), s. 9 (2), (3)—Mortgage by way of conditional sale—Mortgagor denying execution or pleading payment—Deputy Commissioner, whether can decide question of currency of mortgage.

Where a holder of a mortgage by conditional sale applies direct to the Deputy Commissioner under section 9 (2) of the Punjab Land Alienation Act or where a mortgage by way of conditional sale is referred to a Deputy Commissioner by a Civil

Court under section 9 (3) of the Punjab Land Alienation Act and the mortgagor on appearing before the Deputy Commissioner denies execution of the mortgage or pleads payment of the mortgage-debt, the Deputy Commissioner must decline to exercise the power conferred on him by section 9 (2) of the Act. [p. 503, col. 2.]

Appeal from an order of the Commissioner, Rawalpindi, dated the 23rd September 1914.

ORDER.—Final order. In this case the holder of a mortgage-deed of 1893, containing a condition of conditional sale, applied to the Deputy Commissioner, without first taking action under the Regulation of 1806, to exercise his power under section 9 (2) of the Alienation of Land Act, and the Deputy Commissioner, without regarding the plea of the other side that the mortgage by conditional sale had been extinguished by subsequent mortgage-deeds executed in substitution for it, directed the execution of a new mortgage in form (*a*), section 6, of the Act. The learned Commissioner on appeal held that, in disregarding the plea, the Deputy Commissioner in effect decided a question which is within the cognisance of a Civil Court only and he accordingly held that the Deputy Commissiner's order should be set aside. The mortgagee appeals from the order of the Commissioner on the ground that the question of the currency of the mortgage was one for the Deputy Commissioner to decide.

It has already been held in this office, however, though no ruling to that effect has been published, that the view taken by the learned Commissioner is right. The question arose in connection with a ruling of the Chief Court in 1906 that the functions of a Civil Court under Regulation XVII of 1806 are purely ministerial and that the Civil Court has no power to determine, on an application for the issue of a notice of foreclosure, whether the mortgage is or is not valid and subsisting, but has only to issue the notice to the mortgagor or make the reference to the Deputy Commissioner prescribed by section 9 (2) of the Alienation of Land Act. This raised the question, whether on such a reference being made the function of the Deputy Commissioner was also of a ministerial nature only, or whether it was open to him to deal with objections to the validity of the mortgage. If it is not open to him to do so, the result may be that a valid mortgage executed by the Deputy Commissioner under section 9 (4) of the Act may be substituted for one that has been satisfied already or one that has never been valid at all. It was decided, however, by Sir James Douie on certain cases referred from the Rohtak District that the function of the Deputy Commissioner is limited in the above manner, and that the only matters which he may decide are the amount which may be reasonably allowed as due on the mortgage and the period of the new mortgage. If then a case is referred to the Deputy Commissioner by a Civil Court under section 9 (3) of the Act and if the mortgagor on appearing before the Deputy Commissioner denies execution of the mortgage or pleads payment of the mortgage-debt, the Deputy Commissioner must decline to exercise the power conferred on him by section 9 (2). The Civil Court must then, in exercise of its ministerial function under section 8 of the Regulation, issue a notice to the mortgagor informing him that the mortgage will be foreclosed if he does not redeem within one year. By raising a false plea before the Deputy Commissioner, a mortgagor loses the benefit of section 9 (2) of the Act. But if his plea is genuine, then as the notice issued by the Civil Court does not take effect for one year the mortgagor has ample time to bring a civil suit for a declartion that the mortgage is invalid or has been redeemed.

So also when the mortgagee applies direct to the Deputy Commissioner under section 9 (2) of the Act, without first applying to the Civil Court under the Regulation, and the mortgagor denies that the mortgage is in force, the proper course is for the Deputy Commissioner to decline to take action under section 9 (2) and to leave the mortgagee to foreclose under the Regulation or sue in the Civil Court for the money due.

The appeal is rejected.

Appeal rejected.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 4 OF 1915.

March 9, 1915.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

NARBADASHANKAR MUGATRAM VYAS—DEFENDANT—APPELLANT

versus

KEVALDAS RAGHUNATHDAS—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLIII, r. 1, cl. (s)—Order providing for appointment of Receiver, whether appealable.

An order merely directing that a proper person should be appointed a Receiver is not appealable under Order XLIII, rule 1 (*s*).

Upendra Nath Nag Chowdhry v. *Bhupendra Nath Nag Chowdhry*, 9 Ind. Cas. 582; 13 C. L. J. 157, followed.

Appeal from an order passed by the Additional first Class Subordinate Judge, Ahmedabad, in Suit No. 735 of 1914.

Mr. *T.R. Desai*, for the Appellant.

Mr. *G. N. Thakor*, for the Respondent.

JUDGMENT.

HEATON, J.—In this case the plaintiff brought a suit in the Court of the Additional first Class Subordinate Judge at Ahmedabad and moved the Court to appoint a Receiver. The Court heard the parties and made this order:—"I, therefore, hold that a proper person should be appointed a Receiver. The parties will be further heard on the point as to who should be appointed a Receiver." Against this order the defendant in the suit has appealed.

His appeal is met by the preliminary objection that it does not lie. It does not lie certainly, unless it comes under clause (*s*) of Order XLIII of the Civil Procedure Code, which provides for an appeal against an order under rule 1 or rule 4 of Order XL. It is not pretended that this is an order under rule 4 of Order XL, but it is maintained that it is an order under rule 1. It can only be an order under rule 1 if it fall within the terms of clause (*a*) of the rule, that the Court may appoint a Receiver of any property.

It seems to me that the Court has not appointed a Receiver. It has only decided that at some future date it will appoint a Receiver, an order which no doubt it is quite competent to the Court to make under the power conferred on it by section 94 of the Code. But the actual order to appoint a Receiver, it seems to me, will be made only when the Judge actually nominates a person or an official and specifically appoints him to be the Receiver in the case. This conclusion is entirely in accordance with the decision of a Bench of the Calcutta High Court in *Upendra Nath Nag Chowdhry* v. *Bhupendra Nath Nag Chowdhry* (1).

Various arguments have been advanced in this case. Reference, for instance, has been made to the provisions of the old Code. I do not think that they really throw any light on the matter before us, for now the provisions of the law are materially different; nor do I think the decisions under the sections of the old Code help us in this matter.

General considerations have been referred to. They perhaps are not of any special importance here where we have to consider certain definite words, but it does seem to me that general considerations are against multiplying appeals; are against allowing an appeal, first from an order such as this, and then from a latter order actually appointing a Receiver. So it appears to me that the right course to take is to deal simply with the words of the Code. These words are "appoint a Receiver." The Receiver has not been appointed yet and it seems to me, therefore, that no order has yet been made under rule 1 of Order XL, and that the order which has been made is not one of those orders subject to appeal.

This appeal, I think, ought to be dismissed because no appeal lies, and I think the costs in these proceedings should be costs in the matter before the Subordinate Judge.

SHAH, J.—I agree.

Appeal dismissed.

(1) 9 Ind. Cas. 582; 13 C. L. J. 157.

ERA DODDA BASAPPA *v.* RAMA REDDI.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 218 OF 1913.

March 25, 1915.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

ERA DODDA BASAPPA

PLAINTIFF—APPELLANT

versus

RAMA REDDI—DEFENDANT—RESPONDENT.

Probate and Letters of Administration Act (V of 1881), s. 92—Provision in Will that majority of executors should act—Contract by some executors, whether binds estate.

Section 92 of the Probate and Letters of Administration Act has no application, where a Will overrides it and provides that it is only the opinion of the majority of the executors appointed under it that should bind the estate. [p. 509, col. 2.]

Kumban v. *Moorthi*, 7 Ind. Cas. 422; (1910) M. W. 359; 8 M. L. T. 228; 34 M. 406; 20 M. L. J. 951, followed.

A contract, in such a case, entered into by some of the executors only without reference to the others will not, therefore, bind the estate of a deceased testator. [p. 509, col. 1.]

Appeal against the decree of the District Court of Bellary in Original Suit No. 25 of 1912.

FACTS of the case appear from the following judgments of the lower Appellate Court:—

"(1). Plaintiff sued for a declaration that a sale-deed, Exhibit I, was not binding upon him, or in the alternative to be allowed to redeem the property, treating the transaction as a mortgage.

(2). The facts are as follows:—Plaintiff has been found to be a reversioner to the estate of the late Basappa and this finding has not been disputed on appeal. Basappa left a widow, Sugamma, who executed the sale-deed in question in favour of four of the executors appointed by the Will of defendant's father, defendant being then a minor. At the same time three of the executors signed an agreement to reconvey the property to Sugamma whenever she repaid the purchase-money.

(3). The first question is, whether the sale by the widow Sugamma is binding on plaintiff. The evidence shows that her husband, Basappa, died leaving debts, and that Sugamma by way of satisfying a decree of the reconvey of the debt borrowed Rupees 2,500 from defendant's father and executed in his favour a mortgage-deed, Exhibit IV. This was in 1886. In 1891 she executed another mortgage-deed, Exhibit III, for Rs. 3,100 in renewal of Exhibit IV. In 1894, she borrowed Rs. 662 from defendant's father and executed another mortgage-deed, Exhibit II, for Rs. 4,500 for the money borrowed and in renewal of Exhibit III. In 1899, she cleared off the debt to defendant's father by paying to the executors Rs. 800 in cash which she borrowed from elsewhere and by executing in their favour a sale-deed, Exhibit I, for Rs. 4,000 conveying to them a garden land. An endorsement on Exhibit II shows that the debt then amounted to Rs. 6,311, and that the creditors remitted Rs. 1,511.

Now it has not been disputed that the original debt of Rs. 2,500 was incurred in satisfying a decree for the reconvey of money owed by Basappa. What has been urged is that Sugamma had plenty of property to maintain herself and her daughter who were the only surviving members of the family and to pay off this debt, without allowing the interest to accumulate and without selling any of the landed property. The evidence is that her property consisted of the garden land 20 acres in extent, 3 acres of wet land and some dry land. P. W. No. 1 assesses her income as follows:—from the garden land Rs. 600—1,100; from the wet land Rs. 150, 200; from the dry land Rs. 400. P. W. No. 2, one of the executors and purchasers, proves by accounts the income derived from the garden land for five years after the sale. The figures are Rs. 335 (for the first six months after the sale), Rs. 725, Rs. 300, Rs. 655 and Rs. 880 and the charges each year were Rs. 300 for assessment and Rs. 48 for a gardener. The evidence of P. W. No. 3 and D. W. No. 1 would show that the income from the wet land was about Rs. 150 and from the dry land about Rs. 100; it is perfectly fair argument that with this income Sugamma ought to have been able to pay the interest on Rs. 2,500, even if she could not save enough to pay off the principal, but before the sale can be treated as invalid against the reversioners it must be shown that she was guilty off something worse than mismanagement, considering the way in which the income from the garden varied under

the presumably more efficient management of the purchasers. It is fair to suppose that in some years at least she would have had great difficulty in meeting the charges and there is no positive evidence to show that she was guilty of gross extravagance. I do not think it can be held that she unnecessarily burdened the estate. There is some evidence to show that she might have paid off the debt at once by cutting down and selling the cocoanut and mango trees in the garden land, but I do not think she can be blamed for not doing this, considering how unwilling any owner and particularly a Hindu would be to cut down fruit-bearing trees. When once the debt amounted to as much as Rs. 6,000 she had particularly no choice except between a usufructuary mortgage and a sale and she was not bound to choose the mortgage.

Two other arguments have been advanced against the sale. One is that Sugamma acted out of spite against the reversioners, but there is no evidence to prove this and the facts seem to me to show that she was very unwilling to sell the land. The other is that the sale was for a very low price and I shall deal with this later.

The next question is, whether plaintiff is entitled to treat the sale as a mortgage and to claim the right to redeem. His claim is based on an endorsement on Exhibit II which runs as follows:—

"Principal on the mortgage (Exhibit II) is Rs. 4,500, under accounts Rs. 50 are due. In all Rs. 4,550 due. Interest thereon Rs. 1,761. Total Rs. 6,311. The arrangement made this day is as follows:—

		Rs.
The price for which the sale-deed has been executed	...	4,000
Received from Sivanna	...	800
Excused	...	1,511
Total	...	6,311

The interest due from October up to this day is also excused. When we receive from you Rs. 4,000, we shall execute to you a re-conveyance for the land." This endorsement was signed by three of the four executors in whose favour the sale-deed was executed, the fourth being in Madras at the time.

Plaintiff wished to prove this endorsement and to adduce oral evidence to show that the transaction was really a mortgage and not an out-and-out sale. He was not allowed to do either, the Sub-Judge holding that the endorsement was inadmissible as being unregistered, and that section 91 of the Evidence Act precluded the admission of oral evidence. I give below a list of rulings quoted on both sides on those two points.

For appellant:—*Waman Ramchandra* v. *Dhondiba Krishnaji* (1); *Burjorji Cursetji Panthaki* v. *Muncherji Kuverji* (2); *Chunilal Panalal* v. *Bomanji Muncherji* (3); *Virchand Lalchand* v. *Kumaji* (4); *Shridhar Ballal Kelkar* v. *Chintaman Sadashiv Mehandale* (5); *Sreegopal Mullick* v. *Ram Churn Nuskur* (6); *Pertap Chunder Ghose* v. *Mohendra Nath Purkait* (7); *Kali Kishore Dutt Gupta Mozumdar* v. *Bhusan Chunder* (8); *Hurnandun Singh* v. *Jawad Ali* (9); *Satyendra Nath Bose* v. *Anil Chandra Ghosh* (10); *Dwarka Nath Sen* v. *Kisori Lal Gosain* (11); *Panchanan Basu* v. *Chandi Charan Misra* (12); *Venkatagiri Zemindar* v. *Raghava* (13); *Kumara* v. *Srinivasa* (14); *Adakkalam* v. *Theetham* (15); *Kanan* v. *Krishnan* (16); *Rakken* v. *Alagappudayan* (17); *Pathammal* v. *Syed Kalai Ravuthar* (18).

For respondent:—*Balkishen Das* v. *W. F. Legge*(19); *Achutaramaraju* v. *Subbaraju* (20);

(1) 4 B. 126.
(2) 5 B. 143.
(3) 7 B. 310.
(4) 18 B. 48.
(5) 18 B. 396.
(6) 8 C. 856; 12 C. L. R. 152.
(7) 17 C. 291; 16 I. A. 233.
(8) 18 C. 201; 17 I. A. 159.
(9) 27 C. 468.
(10) 5 Ind. Cas. 38; 14 C. W. N. 65.
(11) 6 Ind. Cas. 549; 14 C. W. N. 703; 11 C. L. J. 426.
(12) 6 Ind. Cas. 443; 14 C. W. N. 874; 37 C. 808.
(13) 9 M. 142.
(14) 11 M. 213.
(15) 12 M. 505 at p. 507.
(16) 13 M. 324.
(17) 16 M. 80.
(18) 27 M. 329.
(19) 22 A. 149; 27 I. A. 58; 4 C. W. N. 153; 2 Bom. L. R. 523; 7 Sar. P. C. J. 601.
(20) 25 M. 7; 11 M. L. J. 370.

Mutha Venkatachalapati v. *Pyanda Venkatachelapati* (21); *Uthandi Mudali* v. *Raghavachari* (22); *Abaji Annaji* v. *Laxman* (23).

On the question of the admissibility of the endorsement on Exhibit II, apppellant's argument is that it merely creates a right to another document and so comes under the exception in section 17 (2) (*v*) of the Registration Act, and most of the rulings quoted by him are authorities for holding that such a document need not be registered. It has been admitted that such a document need not be registered, but the question is whether it can convert an out-and-out sale into a mortgage by conditional sale, or if it merely creates a right to another document. It has been held in *Achutaramaraju* v. *Subbaraju* (20) and in *Mutha Venkatachelapati* v. *Pyanda Venkatachelapati* (21) that all the documents, if there be more than one, which go to make a mortgage must be registered, and these rulings seem to me conclusive on the point. If the endorsement is to be taken as proof that the transaction was really a mortgage, though Exhibit I on its face purports to be a sale-deed, it does limit a right in immoveable property, and as such should have been registered. * * * * *

* * * * * * *

* * * It has also been argued that oral evidence should have been admitted for this purpose under section 99 of the Evidence Act on the ground the plaintiff is not the representative of Sugamma, but of her husband, Basappa. It is quite true that he claims as the heir of Basappa but in this particular case, where he seeks to take advantage of an agreement entered into with Sugamma, he must be considered to be her representative. If he is not her representative, he cannot claim under the agreement at all. He is not a third party, unless it is held that Sugamma's acts are not binding upon him.

The next question is whether the endorsement on Exhibit II can be proved for any other purpose. Here I shall deal with two arguments which seem to me to be connected; the *first* being that Sugamma sold the land for a very low price, and the *second* that the sale-deed and endorsement together form one bargain, and that defendant is not at liberty to reject one of them. Plaintiff's witnesses put down the value of the land at Rs. 7,000—8,000 and D. W. No. 4 at Rs. 6,000. D. W. No. 1, who is apparently an interested witness, says the land was not worth more than Rs. 4,000. It is practically admitted that the land is now worth a great deal more than Rs. 4,000, but it is also admitted that there has been a large rise in the value of land in the last few years. On the whole, I do not think that the evidence proves that the price given was so low that the sale would not be binding upon plaintiff, but it does raise a presumption that Sugamma may have accepted this price because the purchasers agreed to re-sell, and it is quite open to plaintiff to prove the endorsement in a suit for specific performance. The question remains whether plaintiff can claim specific performance in the present suit and I think he can. It is true that in the plaint he does not ask for specific performance, but assumes that the endorsement converts the sale-deed into a mortgage. One of the prayers, however, is for recovery of possession, and I do not think he should be forced to bring another suit for specific performance. The suit will have to be remanded for hearing on this question. As appellant did not press for an issue on this point' he will pay respondent's costs in this appeal."

"The suit has been remanded for further hearing and the following additional issues have been framed :—

(1) Can plaintiff compel defendant to perform specifically the contract embodied in Exhibit II ?

(2) Can plaintiff compel defendant to deliver possession of the suit properties on payment of Rs. 4,000 ?

In the suit plaintiff contended that he was not bound by a sale of the suit properties effected by a widow, Sugamma, o that the sale was converted into a mortgage by conditional sale by Exhibit II. The sale-deed was executed in favour of four of the five executors appointed by the Will of defendant's father and three of them have signed Exhibit II, which recites that the

(21) 27 M. 348.
(22) 29 M. 307; 16 M. L. J. 106.
(23) 30 B. 426; 8 Bom. L. R. 553.

sale-deed and cash were taken in discharge of a debt due under a mortgage-bond and contains the following sentence :—"When we receive from you Rs. 4000, we shall execute to you a re-conveyance for the land." This is the contract which plaintiff seeks to enforce against defendant, who was a minor at the time Exhibit II was executed.

(3) The *first* question is, whether the fact that defendant was a minor bars a suit for specific performance. Defendant's Vakil relies on the rulings of *Waghela Rajsanji* v. *Sheikh Masludin* (24) and *Maharana Shri Ranmalsingji* v. *Vadilal Vakhalchand* (25), as deciding that a minor cannot be bound personally by contracts entered into by his guardian. Plaintiff's Vakil contends that executors appointed by a Will have a larger power than an ordinary guardian, and he quotes in support of his argument section 4 of the Probate and Administration Act (V of 1881) and section 28 of the Guardians and Wards Act (VIII of 1890). * * * * * * * * * * * * * * * * * * In *Maharana Shri Ranmalsingji* v. *Vadilal Vakhalchand* (25), it is expressly stated that a guardian appointed by a Will has no higher power in this respect than any other guardian, and that a Will which purported to give such power would probably be *ultra vires*. The Will in the present case, Exhibit A, gives the executors very wide powers in dealing with the testator's property, but with respect to the minor it only authorises them to protect him and to arrange for his education and marriage. There seems to be two classes of cases in which a minor may be held liable, one, when a debt is incurred for necessaries and the other, when a valid charge is made on his estate. There is no question of necessity in the present case, and the contract can only be enforced if it comes under the second class. In most of the cases in which this subject has been dealt with the question, whether a charge upon a minor's estate is valid or not, has been decided by seeing whether it was made for a necessary purpose or for some reason which would inevitably bind the minor when he came of age, but in the leading case *Hunoomanpersaud Pandey* v. *Musammat Babooee Munraj Koonweree* (26) it is laid down that a charge may be for the benefit of the estate. In the present case, then, the contract must satisfy two conditions :—It must bind the minor's estate and it must be for the benefit of that estate. But before discussing this I will deal with an objection which has been raised, on the ground that all the executors did not join in the contract.

(4) There were five executors appointed under the Will and the Will recites that "all matters are to be conducted according to the opinion of the majority of the agents" (or executors). The contract was signed by only three of the executors and of the others, one was in Madras and the other had been convicted of an offence and was in prison. The one who was in prison may be ignored, as he had been convicted of an offence which would probably be considered sufficiently serious to justify his removal. The other was only temporarily absent, but he took no part in the discussion and when he was examined as a witness (D. W. No. 3) in the suit he said that he would not have agreed to the contract to reconvey the land, if he had been consulted. It is a fair inference from the terms of the Will that the words "opinion of the majority" mean that all the executors should take part in forming the opinion, and there are no words empowering a majority of the executors to act apart from the others. I think the contract would be invalid for this reason.

(5) Even supposing that the contract is not invalid for this reason, I do not think it satisfies the two conditions mentioned above; plaintiff's case is that it was an essential condition of the sale and that Sugamma would not have agreed to sell the land, if the executors had not bound themselves to reconvey it to her. The sale was certainly beneficial to defendant's estate, but it does not follow that the executors were entitled to enter into this contract for this reason. The only reason which would justify the contract would be that without it, it would not have been possible to arrange a satisfactory discharge of Sugamma's debt to the estate. Now there is some evidence

(24) 11 B. 551; 14 I. A. 89.
(25) 20 B. 61.

(26) 6 M. I. A. 393; 18 W. R. 81*n*; Sevestre 253*n*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

to show that the contract was one of the reasons which induced Sugamma to execute the sale-deed, but it certainly has not been proved that she insisted on the contract as a condition precedent, or that the executors would not have enforced payment of the debt in any other way. On the contrary they seem to have been quite as anxious to be generous to Sugamma as to be fair to their ward. They remitted Rs. 1,500 of the debt unconditionally, besides binding themselves to reconvey the land. Now a great deal was said about the price given for the land, Rs. 4,000, being much below its real value and this has been used as an argument to prove that the contract to reconvey was a necessary condition of the sale, but the fact that so large an amount was remitted must also be taken into account. If the land which was security for the debt was really worth so much more than Rs. 4,000, a contract to reconvey the land without insisting on the payment of the amount remitted was neither necessary nor for the benefit of defendant's estate. Then there is the question whether the contract binds the estate and the answer to this must, I think, be in the negative.

(6). I have found that the contract was not a necessary condition of the sale, and if it was to bind the estate, Exhibit II should have been registered as it would have affected an interest in immoveable property. I find that plaintiff is not entitled to obtain specific performance and I dismiss the suit with costs."

Mr. *V. Ramesam*, for Mr. *S. Rangaňadha Ayyar*, for the Appellant.

Mr. *A. Venkatarayaliah*, for the Respondent.

JUDGMENT.—We do not think that under the Will which required everything to be done in accordance with the opinion of the majority of the executors, three executors could bind the estate by a contract entered into by them without reference to the others. This is the rule where a majority of trustees have power to act. See *Kumban* v. *Moorthi* (27), and we see no reason why the same principle should not apply to a majority of executors authorised to act under a Will. We do not think section 92 of the Probate and Administration Act has any application as it is overridden by the express provisions of the Will to which it is made subject.

The appeal is dismissed with costs.

Appeal dismissed.

(27) 7 Ind. Cas. 422; 20 M. L. J. 951; (1910) M W. N. 359; 8 M. L. T. 208; 34 M. 406.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 342 OF 1915.

May 18, 1915.

Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Rafique.

HARGU LAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MED SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 201—Recorded co-sharer declared by Civil Court as having no title—Suit for profits by such co-sharer—Pending decision of suit his name expunged from Revenue papers—Presumption of s. 201, applicability of.

A recorded co-sharer in a village was declared by a Civil Court to have no title as such. Pending an application for correction of the Revenue Records in conformity with the Civil Court's declaration he sued for profits as a co-sharer but before this suit was decided the Revenue papers were corrected and his name was expunged:

Held, that under the circumstances, he could not take advantage of the presumption of section 201 of the Agra Tenancy Act. [p. 510, col. 1.]

Second appeal from a decicion of the Additional District Judge, Meerut, dated the 12th December 1913.

Mr. *M. L. Agarwala*, for the Appellants.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs-appellants for their share of profits for the year 1318 and 1319. It appears that during these years the plaintiffs were recorded as co-sharers, but before the institution of this suit a suit had been brought in the Civil Court which decided that the plaintiffs had no title and that they were not

co-sharers although they were recorded as such. In accordance with the decision of the Civil Court an application was made for the correction of the entry in the Revenue papers and for the removal of the names of the plaintiffs from the list of co-sharers. It was during the pendency of this application that the present suit was brought. Both the Courts below have dismissed the suit and in our opinion rightly. The learned Counsel for the appellants relies upon section 201 of the Agra Tenancy Act and contends that as at the date of the suit the plaintiffs were recorded as co-sharers, there was a presumption in their favour under the section that they were co-sharers and were entitled to profits. He also relies on the decision of the Full Bench in *Durga Prashad* v. *Hazari Singh* (1). In our opinion this case is clearly met by the observations made by the learned Chief Justice in his judgment in the Full Bench case referred to above. At page 807 of the report he says: "In very extreme cases where it is clear that there has been some mistake in the record, it would, I think, be open to the Revenue Court to postpone the decision of the case to give the defendant an opportunity of making an application in the Revenue Court to have the entry corrected." In this case as we have said above, an application had already been made for the correction of the entry. A Civil Court had already decided in favour of the defendants and against the plaintiff's title and before the case was decided, the entry of the names of the plaintiffs in the Revenue papers was corrected and their names were expunged. Therefore, it seems to us that this is not a case in which the plaintiffs can claim the presumption of section 201 of the Tenancy Act. Under that section, if effect was given to the presumption, the defendants' remedy would be to bring a suit in the Civil Court. In the present instance a suit had already been brought and a decree obtained negativing the plaintiffs' title. Their names were expunged before the decree in the suit was passed. Therefore, section 201 would be of no avail to the plaintiffs. We might point out that in the case of *Bhawani Singh* v. *Dilawar Khan* (2), it was held that when as between the parties to a Revenue suit, a Civil Court of competent jurisdiction has decided the title to the property adversely to the plaintiff who claims profits, the Revenue Court is not competent to ignore that decision. This ruling also governs the present case. We accordingly dismiss the appeal with costs, including fees on the higher scale.

Appeal dismissed.

(1) 11 Ind. Cas. 116; 33 A. 799; 8 A. L. J. 1025 (F. B.).

(2) 1 Ind. Cas. 886; 31 A. 253 (F. B.); 6 A. L. J. 145.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENCE PETITION NO. 164 OF 1914-15 OF FYZABAD DISTRICT.

March 16, 1915.

Present:—Mr. Holms, S. M.

RAGHUBAR—APPELLANT

versus

THAKUR DIN AND OTHERS—RESPONDENTS.

Oudh Rent Act (XXII of 1886), s. 107A, applicability of—Land held at favourable rate of rent—Grant.

Section 107A of the Oudh Rent Act does not apply to such lands as are held not under a grant, but in which the rate of rent is accidentally favourable to the tenant. [p. 511, col. 1.]

Sel. Dec. No. 5 of 1909 and Sel. Dec. No. 3 of 1911, followed.

Second appeal from an order of the Additional Commissioner, Fyzabad Division, dated the 10th October 1914, confirming that of the Assistant Collector, Fyzabad District, in a case of ejectment.

JUDGMENT.—Two points are urged: one is that there is no evidence to support the finding of the lower Courts that the rent recorded in the *patwari's* papers was not rent agreed to by the landholders. This is outside the grounds of appeal, and there is certainly some evidence to support the finding. The other argument raised is that it is not necessary for the rent to be at a favourable rate by deliberate concession to come within the scope of the Resumption Chapter: in other words, I am asked to overrule Selected Decision No. 5 of 1909 read with the Board's decision in *Chaudhri Shafiq-uz-Zaman* v. *Tasadduk Husain* (1),

(1) 3 Rev. L. J. 112.

which has been followed in other cases by the Board. It is urged that the Selected Decision No. 3 of 1911 is inconsistent with this decision, as it lays down that section 107A applies to all land held rent free and there is no need to produce evidence of any specific grant, and that the same principle should be applied to land held at a favourable rate of rent. There is a possible distinction between the two cases. If we hold that section 107A applies to all land held at a favourable rate of rent and that there is no need to produce evidence of any specific grant, a difficulty arises as to the interpretation of the words "favourable rate of rent." So far as grants are concerned, section 107-I defines these words, but it does not define them when there is no grant of land at a favourable rate of rent, and there are reasons against extending the definition to lands, held not under a grant, but in which the rate of rent may be accidentally favourable to the tenant. I am not prepared at present to differ from the Selected Decision which directly governs the case, and dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CITY CIVIL COURT APPEAL No. 2 OF 1913.

March 24, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

BESINATH KARUMANI—DEFENDANT No. 6—APPELLANT

versus

DEVI DOSS AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 1 TO 5 7, AND 8—RESPONDENTS.

Mortgage—Subrogation—Purchaser of mortgaged property, right of—Partial payment of mortgage-money.

The purchaser of a mortgaged property cannot claim the right to subrogate as against a puisne incumbrancer when he has paid only a portion of the mortgage-debt.

Hanumanthaiyan v. *Meenatchi Naidu*, 12 Ind. Cas. 412; 10 M. L. T. 380; 22 M. L. J. 12; (1912) M. W. N. 158; 35 M. 183; *Srinivasa Swami Aiyangar* v. *Athmarama Iyer*, 2 Ind. Cas. 612; 5 M. L. T. 84; 19 M. L. J. 280; 32 M. 281, followed.

Appeal against the decree of the Court of the City Civil Judge, Madras, in Original Suit No. 18 of 1912.

Mr. *R. Rangasawmy Aiyangar*, for Mr. *T. Ethiraja Mudliar*, for the Appellant.

Mr. *V. Viswanatha Aiyar*, for the Respondents.

JUDGMENT.—The City Civil Judge rightly followed the decisions in *Hanumanthaiyan* v. *Meenatchi Naidu* (1) and *Srinivasa Swami Aiyangar* v. *Athmarama Iyer*(2), in refusing to recognize any right to subrogate in the 6th defendant, whose money went only in partial discharge of the prior mortgage, and in refusing to recognize as valid the alleged oral release by the prior mortgagee of his rights over the property purchased by the 6th defendant. The decision, Appeal No. 295 of 1913, quoted by Mr. S. Rangaswamy Aiyangar for the appellant, does not dissent from the decision in *Hanumanthaiyan* v. *Meenatchi Naidu* (1). It is argued, however, that on the facts found by the District Judge in that case, Appeal No. 295 of 1913, the learned Judges could not have given a decree for the appellant (11th defendant) in that case, unless they held that the first mortgage need not have been fully discharged on the date of the payment by the appellant of the Rs. 920 to enable him to claim priority to the extent of that Rs. 920.

We cannot assume that the learned Judges accepted the facts and dates as mentioned in the District Judge's judgment in that case, as the judgment of the learned Judges does not say so.

We dismiss the appeal with costs of 1st Respondent.

Appeal dismissed.

(1) 12 Ind. Cas. 412; 35 M. 183; 10 M. L. T. 380; 22 M. L. J. 12; (1912) M. W. N. 158.

(2) 2 Ind. Cas. 612; 19 M. L. J. 280; 5 M. L. T. 84; 32 M. 281.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 68 OF 1914-15 OF AZAMGARH DISTRICT.

April 16, 1915.

Present:—Mr. Campbell, J. M.

MAHADEO PRASAD—APPELLANT

versus

BASDEO TIWARI—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Compromise—Stamped paper, whether necessary.

YELLA HANUMAYYA *v.* MULLANGI CHINNA DODDAPPA.

Where the parties to a suit compromise, all that the Court is required to do under Order XXIII, rule 3, of Civil Procedure Code, is to ascertain that the suit has been adjusted by a lawful compromise, and to put the fact on record. It is not necessary that a *sulehnamah* on stamped paper should be filed.

Application for revision from an order of the Commissioner, Gorakhpur Division, dated the 12th November 1914, confirming that of the Assistant Collector, Azamgarh District.

JUDGMENT.—I see no reason to interfere with the Commissioner's order.

All that the Assistant Collector had to do under rule 3, Order XXIII, Civil Procedure Code, was to satisfy himself that the suit had been adjusted by a lawful agreement or compromise and to put the fact on record. It was not necessary for a *sulehnamah* to be filed on stamped paper. He might, and practically did, take the statement of the parties' representatives to the effect that the case was to be withdrawn on defendant contracting to pay rent in future at Rs. 9.

This was ample as a record, and evidently satisfied the Court which might have passed a decree accordingly, but waited for a more formal compromise to be filed.

There was no justification for appellant afterwards resiling. I uphold the Commissioner's order and reject this application with costs.

Application rejected.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 74 OF 1914.

April 26, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

YELLA HANUMAYYA *alias* HANUMANTHAPPA—APPELLANT

versus

MULLANGI CHINNA DODDAPPA—PETITIONER—RESPONDENT.

Civil Procedure Code (Act V of 1908), Sch. II, para 16—Award—Application to set aside award dismissed—Decree—Appeal, maintainability of.

There is no right of appeal against a decree passed upon an award of arbitrators after dismissal of an application to set it aside.

Appeal against an order of the District Court of Bellary, in Original Suit No. 25 of 1911 (Original Petition No. 229 of 1911).

Messrs. *J. C. Adam* and *M. Govindarajulu Naidu*, for the Appellant.

Mr. *V. Viswanadha Sastri*, for the Respondent.

JUDGMENT.—The preliminary objection must be upheld, namely, that under Schedule II, paragraph 16, clause (2), Civil Procedure Code, no appeal lies from the decree framed on a judgment pronounced by the Court according to the award of arbitrators, after the Court had refused an application to set aside that award as invalid.

The appeal must, therefore, be dismissed with costs.

We are asked by the appellant's learned Counsel to set aside the award treating the appeal as a petition in revision under section 115, Civil Procedure Code. His contention is that the District Court had no jurisdiction to refer the matters in dispute to arbitration even by the consent of parties. He relies in support of this contention on the case in *Ghellabhai Atmaram* v. *Nandu Bai* (1);

In the *first* place, we are not clear that the observations relied on from the judgment in *Ghellabhai Atmaram* v. *Nandu Bai*(1), which appear to be *obiter dicta*, have not been couched by that Court in too wide terms. In the *second* place, the contention that the District Court had no jurisdiction to refer the dispute to arbitration was not taken in the lower Court or even in the grounds of the appeal petition sought to be converted into a revision petition. In the *third* place it is a matter of discretion in this Court to interfere in revision under section 115, and as we are not satisfied that substantial justice has not been done between the parties by the order of the District Court. We do not think that it is a fit case for interference in revision.

Appeal dismissed.

(1) 21 B. 335.

CALCUTTA HIGH COURT.

CRIMINAL APPEALS NOS. 587 TO 590 AND 598 OF 1914.
GOVERNMENT APPEAL NO. 4 OF 1914.
RULE NO. 1293 OF 1914.
February 25, 1915.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Richardson.

AMRITALAL HAZRA AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT

AND

SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL—APPELLANT

versus

KHAGENDRA NATH CHOWDHURY AND OTHERS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 225, 537, 239, 256, 257, 342—Charge, defective, effect of—Accused, right of, to know charge against him—Explosive Substances Act (VI of 1908), s. 4 (b), charge under, essentials of—Charge drawn up—Court, duty of, to adhere to statutory language—Misjoinder of charges—Trial, if illegal—"Same transaction", meaning of—Penal Code (Act XLV of 1860), ss. 120A, 120B—Criminal conspiracy, person when guilty of—Indictment nature of, in conspiracy cases—Verdict, objection taken after, effect of—Co-conspirators, separate trial of—Court, power of—Offence under s. 4 (b), Explosive Substances Act—Prosecution, right of, to prosecute for the offence irrespective of ultimate design of conspiracy—Crime, sufficient proof of—Charge of conspiracy—General evidence, particular facts to be proved after—"Unlawfully and maliciously", meaning of—Explosive substances under s. 4 (b), nature of—Prosecution, duty of—Offence, proof of—Accused, whether bound to show his object or design—Possession of explosive substances—Knowledge and assent, if necessary—Failure of conviction for crime committed—Prosecution for conspiracy, if expedient—Guilt, how established—Evidence Act (I of 1872), ss. 10, 143, 154—Evidence under s. 10, when admissible—Cross-examination—Defence, right of, to ask leading questions—Discretion under s. 154—Witnesses, privileges of, in criminal cases—Detective, whether privileged to refuse to answer as to where he was secreted—Statutory provisions, strict compliance with—Written statement in criminal cases, value of.

Where it is alleged on behalf of the accused that the charge under section 4 (*b*) of Act VI of 1908 is materially defective inasmuch as it omits to state, *first*, that the accused were in possession of explosive substances or had them under their control "unlawfully and maliciously", and *secondly*, that it was the intent of the accused to endanger life in British India:

Held, that these defects in the charge do not vitiate the trial and conviction, and that the case would be covered by section 225 and by clause (*a*) of section 537 of the Code of Criminal Procedure. [p. 517, col. 1.]

An accused is entitled to know with certainty and accuracy the exact value of the charge brought against him, otherwise he may be seriously prejudiced in his defence. [p. 517, col. 1.]

It is not essential to specify in the charge the explosive substances which the accused have conspired to have in their possession or under their control, where the illegal act, charged under section 120B, Indian Penal Code, is the unlawful and malicious possession of explosive substances within the meaning of section 4 of the Explosive Substances Act, 1908. [p. 517, col. 2.]

Even though the illegal act which he has agreed to do or caused to be done, has not been done, a person may be guilty of criminal conspiracy. [p. 517, col. 2.]

Although an indictment, which omits to set out the particular false pretence alleged, is held bad where an objection is taken before verdict, the defect is deemed cured by verdict if no such objection is taken and there is a verdict of guilty on such an indictment. [p. 518, col. 2.]

Reg. v. *Goldsmith*, (1873) 2 C. C. 74; 42 L. J. M. C. 94; 28 L. T. 881; 21 W. R. 791; 12 Cox, C. C. 479; *Heymann* v. *Reg.*, (1873) 8 Q. B. 102; 28 L. T. 162; 21 W. R. 357; 12 Cox. C. C. 383, referred to.

The indictment in all cases of conspiracy must, in the first place, charge the conspiracy, but in stating the object of the conspiracy the same degree of certainty is not required as in an indictment for the offence conspired to be committed. [p. 518, col. 2.]

Rex v. *Gill*, (1818) 2 B. & Ald. 204; 20 R. R. 407; 106 E. R. 341; *Reg.* v. *Kenrick*, (1843) 5 Q. B. 49; D. & M. 208; 12 L. J. M. C. 135; 7 Jur. 848; 114 E. R. 1166; *Reg.* v. *Blake*, (1844) 6 Q. B. 126; 13 L. J. M. C. 131; 8 Jur. 145; 66 R. R. 311; 115 E. R. 49; *Sydserff* v. *Reg.*, (1847) 11 Q. B. 245; 12 Jur. 418; 116 E. R. 467; *Reg.* v. *Gompertz*, (1846 9 Q. B. 824; 2 Cox. C. C. 145; 16 L. J. Q. B. 121; 11 Jur. 204; 72 R. R. 458; 115 E. R. 1492; *Reg.* v. *Aspinall*, (1876) 2 Q. B. D. 48 at p. 60; 46 L. J. M. C 145; 36 L. T. 297; 25 W. R. 283; 13 Cox, C. C. 563; *Taylor* v. *Reg.*, (1895) 1 Q. B. 25; 64 L. J. M. C. 11; 15 R. 86; 71 L. T. 571; 43 W. R. 24; 18 Cox, C. C. 45, referred to.

Reg. v. *Parker*, (1842) 3 Q. B. 292; 2 G. & D. 709; 11 L. J. M. C. 102; 114 E. R. 519; *O'Connell* v. *Reg.*, (1844) 11 Cl. & F. 155; 1 Cox, C. C. 413; 5 St. Tr., (N. S.) 1; 9 Jur. 25; 7 Ir. L. R. 261; 8 E. R. 1061; 65 R. R. 59; *Reg.* v. *Mackenzie*, (1892) 2 Q. B. 519; 17 Cox, C. C. 542, 61 L. J. M. C. 181; 5 R. 10; 67 L. T. 201; 41 W. R. 144; 56 J. P. 712, distinguished.

When a charge is drawn up, the Court should adhere to the language of the Statute as far as practicable. [p. 519, col. 2.]

Sections 120A and 120B did not find a place in the Indian Penal Code before the 27th March 1913, when Act VIII of 1913 became law; and, therefore, persons accused under section 120B cannot be convicted, unless the prosecution establishes that the accused were members of a conspiracy after the 27th March 1913. [p. 519, col. 2; p. 520, col. 1.]

Where it is established that there has been a misjoinder of charges, the trial must be deemed illegal, because held contrary to an express provision of the law relating to the mode of trial. [p. 520, col. 1.]

A comprehensive formula of universal application cannot be framed to determine whether two or more acts constitute the same transaction: but circumstances which must bear on the determination of the question in an individual case may be easily indicated; they are, proximity of time, unity or

proximity of place, continuity of action and community of purpose or design. [p. 520, col. 2.]

If *A*, *B* and *C* conspire to make or have in possession or under control an explosive substance within the meaning of the Explosive Substances Act, and if in pursuance of such conspiracy, *A* makes or has in his possession or under his control an explosive substance, they may, if the Court thinks fit, be charged and tried together under section 120B, Indian Penal Code, and section 4 (*b*) of Act VI of 1908. [p. 521, col. 1.]

The Court has the option to place the co-conspirators on their trial separately. [p. 522, col. 1.]

Whenever evidence is attempted to be made admissible under section 10 of the Indian Evidence Act, the defence is entitled to insist on strict compliance with its provisions, namely, upon proof of reasonable ground for belief that the persons named have conspired together. [p. 522, col. 1.]

Where an offence is committed under section 4 (*b*) of the Explosive Substances Act, 1908, in pursuance of a criminal conspiracy, it is open to the Crown to prosecute the accused for such offences, irrespective of the question of the ultimate design of the alleged conspiracy. [p. 522, col. 2.]

In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. [p. 523, col. 2.]

Reg. v. *Hodges*, (1838) 2 Lewin, C C. 227, referred to.

If the commission of a crime is directly in issue in any proceeding, it must be proved beyond reasonable doubt. [p. 525, col. 1.]

Where there is a charge of conspiracy, particular facts are proved to show that one or more of the defendants took part in it after general evidence of the existence of the conspiracy is first given. [p. 525, col. 1.]

Rex. v. *Sydney*, (1683) 9 St. Tr. 817 at p. 841, referred to.

Evidence of similar facts may be received to prove a party's knowledge of the nature of the main fact or transaction, or his intent with respect thereto. [p. 527, col. 1.]

To admit evidence under this head, however, the other acts tendered must be of the same specific kind as that in question, and not of a different character and the acts tendered must also have been proximate in point of time to that in question. [p. 527, col. 1.]

The term "unlawfully and maliciously", in the sense in which it is familiarly used in the criminal law of England, signifies "not for a lawful object and intentionally, without justification or excuse or claim of right." [p. 527, col. 2.]

Reg. v. *Clemens*, (1898) 1 Q. B. 556; 19 Cox C. C. 18; 67 L. J. Q. B. 482; 78 L. T. 204; 46, W. R. 416, *Miles* v. *Hutchings*, (1903) 2 K. B. 714; 20 Cox, C. C. 555; 72 L. J. K. B. 775; 89 L. T. 420; 52 W. R. 284, *Rex* v. *Ward*, (1871) 1 C. C. R. 356 at p. 360; 12 Cox. C. C. 123, *South Wales Miner's Federation* v. *Glamorgan Coal Co.*, (1905) A. C. 239 at p. 255; 74 L. J. K. B. 525; 92 L. T. 710; 53 W. R. 693; 21 T. L. R. 441, referred to.

The explosive substance mentioned in section 4 (*b*) of Act VI of 1908 need not be such as to enable a person by means thereof alone, without the aid of other substances, to cause danger to life or injury o property. [p. 528, col. 2.]

Any part of any apparatus, machine or implement intended to be used or adapted for causing or aiding in causing any explosive substance, is included in the term 'explosive substance' as used in section 4 (*b*). [p. 528, col. 2.]

To place all the available evidence in the case fairly and fully before the tribunal by which alone the guilt or innocence of the accused is to be determined, and not to secure a conviction, is the main duty of the prosecution. [p. 529, col. 2.]

Ram Ranjan Roy v. *Emperor*, 27 Ind. Cas. 554; 42 C. 422; 16 Cr. L. J. 170; 19 C. W. N. 28, referred to.

The offence charged against the accused must be proved by those who made the charge, and the accused stands only to hear the evidence that is given against him and, therefore, he is not bound to show at all, or in any way whatever, what his real object or design in doing any act or acts undoubtedly done by him was. [p. 533, col. 2.]

Rex v *Frost*, (1839) 9 Car. & P. 129; 4 St. Tr. (N. S.) 85; 2 Moody C. C. 140, referred to.

In a charge under section 4 (*b*) of the Explosive Substances Act, 1908, possession to be punishable must also be possession with knowledge and assent. [p. 534, col. 2.]

When the prosecution fails, on the evidence, to secure a conviction for the crime committed, it is inexpedient, even though it may be lawful, to prosecute the accused for a conspiracy the proof whereof really rests on the establishment of that very crime. [p. 534, col. 2.]

Rex. v. *Boulton*, (1871) 12 Cox. C. C. 87 at p. 92 and *Emperor* v. *Lalit Mohan (Noni Gopal)*, 10 Ind. Cas. 582; 38 C. 559; 15 C. W. N. 593; 12 Cr. L. J. 286, referred to.

It is not by proof of his character but by proof of the facts that a man's guilt is to be established. [p. 536, col. 2.]

In the course of cross-examination by the defence for the purpose of eliciting facts in their favour from the prosecution witnesses, though those facts are irrelevant, the defence are entitled, in view of the generality of the provisions of section 143 of the Indian Evidence Act, to ask leading questions. [p. 537, col. 2.]

The Court may in its discretion, under section 154, Indian Evidence Act, permit the prosecution to cross-examine a witness, even though he had been originally called by them with regard to the matters elicited by the defence. [p. 537, col. 2.]

In criminal prosecutions, the witnesses for the Crown are privileged from disclosing the channel through which they have received or communicated information. [p. 538, col. 2.]

Rex v. *Watson*, (1817) 32 St. Tr. 1 at p. 100, referred to.

But the same privilege cannot be claimed by a detective, who cannot refuse on grounds of public policy to answer a question as to where he was secreted. [p. 538, col. 2.]

Webb v. *Catchlove*, (1886) 3 T. L. R. 159, referred to.

In a case where every possible point is likely to be contested, a strict compliance with the statutory provisions is desirable. [p. 539, col. 1.]

When a written statement is accepted by a Court from the accused, it does not take the place of evidence nor of such examination of the accused as is contemplated by the Code of Criminal Procedure. [p. 539, col. 1.]

AMRITALAL HAZRA *v.* EMPEROR.

Criminal Appeals against the convictions, sentences and acquittal in the Raja Bazar Bomb Case, by the Additional Sessions Judge of 24-Perganas, dated the 4th June 1914.

Messrs. *S. K. Sen* and *P. Banerjee*, Babus *Manmatha Nath Mookerjee* and *Birendra Kumar De*, for the Appellant in No. 587.

Messrs. *C. R. Dass* and *S. C. Roy*, Babus *Kshitish Chandra Neogy* and *Prokash Chandra Mazumdar*, for the Appellant in No. 588.

Mr. *S. K. Sen*, Babus *Manmatha Nath Mookerjee*, *Bhudeb Chandra Roy* and *Asiranjan Chatterjee*, for the Appellant in No. 589.

Messrs. *Bagram*, *S. K. Sen* and *H. K. Ghose*, Babus *Sasadhar Roy*, *Kshitish Chandra Neogy* and *Bhudeb Chandra Roy*, for the Appellant in No. 590.

Messrs. *K. B. Dutt* and *N. Sen* and Babu *Probodh Kumar Das*, for the Appellant in No. 598.

Messrs. *Pugh* and *N. Gupta*, Babus *Hemendra Nath Mitra* and *Nerode Chandra Chatterjee*, for the Crown in Nos. 587, 588, 589, 590 and 598.

Messrs. *Pugh* and *N. Gupta*, Babus *Hemendra Nath Mitra* and *Nerode Chandra Chatterjee*, for the Appellant in No. 4.

Messrs. *Bagram* and *S. K. Sen*, Babus *Kshitish Chandra Neogy*, *Birendra Kumar De* and *Hem Chandra Mazumdar*, for the Accused-Opposite Party in No. 4.

Messrs. *Pugh* and *N. Gupta*, Babus *Hemendra Nath Mitra* and *Nerode Chundra Chatterjee*, for the Crown in Cr. R. No. 1293.

Babu *Asiranjan Chatterje*, for the Accused Sarada Charan Guha in Cr. R. No. 1293.

JUDGMENT.

MOOKERJEE, J.—On the 21st November 1913, during the early hours of the morning, in execution of a warrant issued by the Deputy Commissioner of Sylhet, a search was made of a room, rented and occupied by one Sasankasekhar Hazra, *alias* Amritalal Hazra, at 296-1, Upper Circular Road, in the eastern suburbs of Calcutta. The search warrant authorised the Commisioner of Police to search the premises for explosives, letters, and documents in connection with a bomb outrage committed at Moulvi Bazar on the 27th March 1913. At the search, the Police arrested Sasankasekhar Hazra as also three other persons, Dinesh Chandra Das Gupta, Chandrasekhar De and Sarada Charan Guha, who were found asleep inside the room. The Police found in the room various articles and papers, and amongst others, a tobacco-tin fitted with three iron discs (two inside and one outside) and four iron clamps, another tin of similar size, four clamps made to fit the second tin, and other discs and clamps, finished and unfinished. According to the prosecution, these articles were made for use as the envelope or shell of a lethal bomb. On the 23rd November, J. N. Ghose, the Police officer to whom the warrant had been endorsed for execution, gave the first information, in which it was alleged that the four persons arrested had committed offences under sections 4 and 5 of the Explosive Substances Act, 1908. On the 26th November, the District Magistrate transferred the case for disposal to Mr. Veitch. On the 6th December, one Kalipada Ghose, *alias* Upendralal Rai Chaudhuri, was arrested in College Street with ten copies of a seditious leaflet called *Liberty* leaflet, of which two were on pink paper and the other eight on white paper. On the 26th January 1914, one Khagendranath Chaudhuri, *alias* Sures Chandra Chaudhuri, was arrested in a house at Baranagore in the northern suburbs of Calcutta. Meanwhile, search warrants had been executed in various places and information gathered as to the antecedents of the persons in custody. The original proceedings, commenced on the 23rd November, were then withdrawn by the Public Prosecutor under section 494, Criminal Procedure Code, and the four persons arrested on the 21st November were discharged on the 19th January 1914. At the same time, a fresh complaint was made in which Sasanka, Dines, Sarada, Chandrasekhar Kalipada and Khagen, along with one Hiranmoy Banerji, who had been, in the interval, arrested at Benares, were charged under sections 4, 5 and 6 of the Explosive Substances Act as also under section 120B of the Indian Penal Code. The consent of the Local Government required by section 7 of the Explosive Substances Act, 1908, was also duly obtained. The Magistrate held that the case against Hiranmoy Banerji had not been established and discharged him. The other six accused were committed to take their trial in the Court of Session. The first charge against them was to the effect that Sasanka, Dines, Sarada and Chandrasekhar, on or about the 21st November 1913, at 296-1, Upper Circular Road, had in their possession or under their control explosive substances, to

wit, Exhibits I, V, VI, VII, and other exhibits, all materials for the creation of bombs, with intent by means thereof to endanger life, and had thereby committed an offence punishable under section 4 (*b*) of the Explosive Substances Act, 1908. The second charge was to the effect that Sasanka, Dines, Sarada, Chandrasekhar, Kalipada, and Khagendra, between March 1911 and 21st November 1913, at 296-1, Upper Circular Road, and other places in British India, had conspired, with one another and other persons, to wit, Biroja, Satischandra Chakrabarti, Bhupendranath Sen, Praphullaranjan Gupta, Jogeschandra Roy, Nirmal Kanta Roy and other persons, to make and keep explosive substances, with intent by means thereof to endanger life or enable other persons to endanger life, an offence punishable under section 4 (*b*) of the Explosive Substances Act, 1908, and had thereby committed an offence punishable under section 120B of the Indian Penal Code. The Sessions Judge, after an elaborate trial with the aid of Assessors, with whose opinion he disagreed, except in the case of Khagendra, came to the conclusion that Sasanka, Dines, Sarada and Chandrasekhar were guilty under section 4 of Act VI of 1908, and that Sasanka, Kalipada, Dines, Sarada and Chandrasekhar were guilty under section 120B, Indian Penal Code. Under section 4 of Act VI of 1908, he sentenced Sasanka to transportation for fifteen years and each of the other three, Dines, Sarada and Chandrasekhar, to transportation for ten years. Under section 120B, Indian Penal Code, he sentenced Sasanka, Kalipada, Dines, Sarada and Chandrasekhar each to transportation for ten years. He further directed the sentences under the two sections to run concurrently. As regards Khagendra he accepted the opinions of the Assessors and acquitted him. Against the order of the Sessions Judge, five appeals have been preferred, one by each of the accused persons who has been convicted. Another appeal has been preferred by the Crown against the acquittal of Khagendra. A Rule has also been obtained by the Crown for enhancement of the sentences upon the five accused who have been convicted by the Sessions Judge. The appeals and the Rule have been exhaustively argued in this Court during 32 days, and the questions of law and fact which arise therein have been discussed from every conceivable point of view. Since the close of the arguments, we have again minutely scrutinised the papers on the record, and we now proceed to record our decision.

On behalf of the five accused who have been convicted, the order of the Sessions Judge has been assailed as contrary to law and to the evidence on the record. We shall first examine the grounds upon which the legality of the trial has been called in question. But before we do so, it is necessary to set out the relevant portions of the sections under which the accused have been convicted.

Section 4 (*b*) of the Explosive Substances Act, 1908, is in these terms:—

"Any person who unlawfully and maliciously makes, or has in his possession or under his control, any explosive substance with intent by means thereof to endanger life, or cause serious injury to property in British India, or to enable any other person by means thereof to endanger life or cause serious injury to property in British India, shall, whether any explosion does or does not take place, and whether any injury to person or property has been acutally caused or not, be punished with transportation for a term which may extend to twenty years, to which fine may be added, or with imprisonment for a term which may extend to seven years, to which fine may be added."

Section 120A, which was introduced into the Indian Penal Code by Act VIII of 1913, is in these terms:—

"When two or more persons agree to do, or cause to be done, (1) an illegal act, or (2) an act, which is not illegal, by illegal means, such an agreement is designated a criminal conspiracy:

"Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy, unless some act, besides the agreement, is done by one or more parties to such agreement in pursuance thereof.

"Explanation:—It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object."

Section 120B provides the punishment for criminal conspiracy.

In the *first* place, it has been argued on behalf of the accused, that the charge under section 4 (*b*) of Act VI of 1908 is materially defective, inasmuch as it omits to state, *first*, that the accused were in possession of explosive substances or had them under their control, "unlawfully and maliciously", and *secondly*, that it was the intent of the accused to endanger life in "British India." In our opinion, the defects in this charge have not vitiated the trial and conviction, and that the case is covered by section 225 and by clause (*a*) of section 537, Criminal Procedure Code. It is worthy of note that the objection was not taken before the Sessions Judge, and regard must be had to this circumstance to determine whether the omissions mentioned have in fact occasioned a failure of justice. An accused is entitled to know with certainty and accuracy the exact value of the charge brought against him, for, unless he has this knowledge, he may be seriously prejudiced in his defence. In the present case, the law and the section of the law against which the offence is alleged to have been committed, were specifically mentioned in the charge, as required by clause (4) of section 221, Criminal Procedure Code; and under clause (5), the fact that the charge was made was equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case. The accused fully understood the nature of the offence with which they were charged and had clearly not been prejudiced by the omissions. The view we take is in accord with that adopted in *Reg.* v. *Munslow* (1) where Lord Russell, C. J., observed that it would be a deplorable, if not an absurd, state of the law if such an omission could not be cured by verdict. The first objection must consequently be overruled.

In the *second* place, it has been contended that the charge under section 120B, Indian Penal Code, is bad, because it does not specify the explosive substance which, it is alleged, the accused had conspired with one another and with other persons to make and keep. The substance of the argument is that to make and keep explosive substances generally is not an offence, which, it is contended, means, according to section 4, clause (*b*) of the Criminal Procedure Code, "an act or omission made punishable by any law for the time being in force," and, according to the second paragraph of section 40, Indian Penal Code, denotes "a thing punishable under that Code or under any special or local law" as defined in sections 41 and 42. Reference has also been made to section 10 of the Indian Evidence Act, where the expression is used, "two or more persons have conspired together to commit *an* offence or *an* actionable wrong." Reliance has been placed in support of the contention of the accused on the decisions in *Rex* v. *Biers* (2), *Reg.* v. *Parker* (3), *O'Connell* v. *Reg.* (4), *Rex* v. *Mason* (5), *Reg.* v. *Mackenzie* (6). Stress has also been laid upon the cases of *Behari Mahton* v. *Queen-Empress* (7) and *Poresh Nath Sircar* v. *Emperor* (8). We are unable to accept as well-founded the contention of the accused that where the illegal act, charged under section 120B, is the unlawful and malicious possession of explosive substances within the meaning of section 4 of the Explosive Substances Act, 1908, it is essential to specify in the charge the explosive substances which the accused have conspired to have in their possession or under their control. It is indisputable that a person may be guilty of criminal conspiracy, even though the illegal act which he has agreed to do or caused to be done, has not been done. As was observed by Cleasby, B., in *Reg.* v. *Hibbert* (9), conspiracy differs from other charges in this respect, that in other charges the intention to do a criminal act is not a crime of itself, until something is done amounting to the doing or attempting to do some act, to carry out that intention ; conspiracy, on the other hand, consists

(1) (1895) 1 Q. B. 758; 64 L. J. M. C. 138; 15 R. 192; 72 L. T. 301; 43 W. R. 495; 18 Cox, C. C. 112.

(2) (1834) 1 A. & E. 327; 3 N. & M. 475; 3 L. J. M. C. 110; 110 E. R. 1230; 40 R. R. 304.

(3) (1842) 3 Q. B. 292; 2 G. & D. 709; 11 L. J. M. C. 102; 114 E. R. 519.

(4) (1844) 11 Cl. & F. 155 at pp. 233, 235; 9 Jur. 25; 1 Cox, C. C. 413; 5 St. Tr. (N. s.) 1; 7 Ir. L. R. 261; 8 E. R. 1061; 65 R. R. 59.

(5) (1788) 2 T. R. 581; 1 Leach, C. C. 487; 2 East P. C. 837; 1 R. R. 545; 100 E. R. 312.

(6) (1892) 2 Q. B. 519; 61 L. J. M. C. 181; 5 R. 10; 67 L. T. 201; 41 W. R. 144; 17 Cox, C. C. 542; 56 J. P. 712.

(7) 11 C. 106.

(8) 33 C. 295; 2 C. L. J. 516; 3 Cr. L. J. 153.

(9) (1875) 13 Cox, C. C. 82 at p. 86.

simply in the agreement or confederacy to do some act, no matter whether it is done or not. We very often get facts sufficient to establish the guilt of parties to a conspiracy other than acts which have been done in pursuance of it. Baron Cleasby then gives an example: "There may be a conspiracy to set fire to London at different places at once, and that conspiracy may be fully proved, though no part of London has in fact been set on fire, inasmuch as the crime of conspiracy consists only in the agreement or confederacy to do an illegal act by legal means or a legal act by illegal means": *Quinn* v. *Leathem* (10). Reference may also be made to the decision in *Reg.* v. *Most* (11), where it was ruled that the accused who had published an inflamatory article in a newspaper not addressed to any individual, in which he recommended the murder not of any specified individual but of crowned or uncrowned heads of States from Constantinople to Washington, was guilty of misdemeanour under section 4 of 24 and 25 Vict., c. 100. If the contention of the accused in the case before us were well-founded, there could be no prosecution for a conspiracy to commit murders or dacoities till a murder or a dacoity had been actually committed in pursuance of the conspiracy, though it might be conclusively proved that the conspiracy had been formed, even before a single overt act was done. The gist of the offence is in the conspiracy or agreement, and if the offence goes no further, it may not be possible to say what murders or dacoities it is proposed to commit, or, in a case such as that before us, what particular explosives the accused intend to obtain [See Russell on Crimes, 1909, Volume I, page 187, foot-note (g)]. The decisions to which our attention has been drawn do not assist the contention of the accused. In *Rex* v. *Biers* (2) the objection to the indictment was upheld on the ground that it misrecited an Act of Parliament (2 Hawkins P. C. Bk. II, Chap. XXV, section 104). *Rex* v. *Mason* (5) is an authority for the proposition that an indictment for obtaining propert by a false pretence must not only expressly allege that the pretence was false but also set out the false pretence sufficiently: *Reg.* v. *Oates*(12), *Reg.* v. *Henshaw* (13). But it is worthy of note that although an indictment, which omits to set out the particular false pretence alleged, is held bad where the objection is taken before verdict, if no such objection is taken and there is a verdict of guilty on such an indictment, the defect is deemed cured by verdict: *Reg.* v. *Goldsmith* (14), *Heymann* v. *Reg.* (15). It is further well-settled that it is not necessary to set out the false pretences in an indictment for a conspiracy to obtain goods by false pretences or for receiving goods obtained by false pretences; in other words, that the indictment in all cases of conspiracy must, in the first place, charge the conspiracy, but that in stating the object of the conspiracy the same degree of certainty is not required as in an indictment for the offence conspired to be committed [*Rex* v. *Gill* (16), *Reg.* v. *Kenrick* (17), *Reg.* v. *Blake* (18), *Sydserff* v. *Reg.* (19), *Reg.* v. *Gompertz* (20), *Reg.* v. *Aspinall* (21), *Taylor* v. *Reg.*(22)]. *Reg.* v. *Parker* (3) is an authority only for the proposition that where the indictment charged the accused with conspiracy to obtain by false pretences divers goods and merchandise, the prosecutor was bound to state whose the goods and merchandise were, as otherwise he might make an indefinite statement and lie in wait for whatever

(10) (1901) A. C. 495 at p. 529; 70 L. J. P. C. 76; 85 L. T. 289; 50 W. R. 139; 65 J. P. 708; 17 T. L. R. 749.

(11) (1881) 7 Q. B. D. 244; 14 Cox, C. C. 5 3; 50 L. J. M. C. 113; 44 L. T. 823; 29 W. R. 758; 45 J. P. 696.

(12) (1855) Dears, C. C. 459; 3 Com. L. R. 661; 24 L. J. M. C. 123; 1 Jur. (N. S.) 429; 3 W. R. 402; 6 Cox, C. C 540.

(13) (1864) L. & C. 444; 33 L. J. M. C. 132; 10 Jur. (N. S.) 595; 10 L. T. 428; 12 W. R. 751; 9 Cox, C. C. 472.

(14) (1873) 2 C. C. R. 74; 42 L. J. M. C. 94; 28 L. T. 881; 21 W. R. 791; 12 Cox, C. C. 479.

(15) (1873) 8 Q. B. 102; 28 L. T. 162; 21 W. R. 357; 12 Cox, C. C. 383.

(16) (1818) 2 B. & Ald. 204; 20 R. R. 407; 106 E. R. 341.

(17) (1843) 5 Q. B 49; D. & M. 208; 12 L. J. M. C. 135; 7 Jur. 848; 114 E. R. 1166;

(18) (1844) 6 Q. B. 126; 13 L. J. M. C. 131; 8 Jur. 145; 66 R. R. 311; 115 E. R. 49.

(19) (1847) 11 Q. B. 245; 12 Jur. 418; 116 E. R. 467.

(20) (1846) 9 Q. B. 824; 2 Cox C. C. 145; 16 L. J. Q. B. 121; 11 Jur. 204; 72 R. R. 458; 115 E. R. 1492.

(21) (1876) 2 Q. B. D. 48 at p. 60; 46 L. J. M. C. 145; 36 L. T. 297; 25 W. R. 283; 13 Cox. C. C. 563.

(22) (1895) 1 Q. B. 25; 64 L. J. M. C. 11; 15 R. 86; 71 L. T. 571; 43 W. R. 24; 18 Cox, C. C. 45.

might come out in the evidence. In *O'Connell* v. *Reg.* (4), Tindal, C. J., observed as follows:—"The crime of conspiracy is complete, if two. or more than two, should agree to do an illegal thing, that is, to effect something in itself unlawful, or to effect by unlawful means something which in itself may be indifferent or even lawful....It has accordingly been always held to be the law, that the gist of the offence of conspiracy is the bare engagement and association to break the law, whether any act be done in pursuance thereof by the conspirators or not." The Lord Chief Justice then proceeded to state, with reference to two of the counts to which exception had been taken, that in the opinion of the Judges those counts did not state the illegal purpose and design of the agreement entered into between the defendants with such proper and sufficient certainty, as to lead to the necessary conclusion that it was an agreement to do an act in violation of the law. The act imputed to the defendants was "intimidation", and with reference thereto, the Lord Chief Justice observed that as the word was not a technical term, not *vocabulum artis*, having a necessary meaning in a bad sense, it was essential to make clear from the context what species of fear was intended or upon whom such fear was intended to operate. This view was confirmed by the House of Lords. Lord Campbell observed that the counts of the indictment which stated generally conspiracies to effect changes in the Government and repeal of the legislative union by intimidation and display of physical force were bad, because they gave the defendants no information of the specific offences which they had to answer. In *Reg.* v. *Mackenzie* (6), where a person was prosecuted under section 7, 38 and 39 Vict., Chap. 6, for intimidating another person with a view to compel him to abstain from doing an act which that other person had a legal right to do, it was held that the conviction was bad, as the summons did not set out the particular acts alleged to be illegal. The cases reviewed are clearly distinguishable and do not support the contention that when the illegal act contemplated by section 120A, Indian Penal Code, is the possession of explosive substances under section 4 (*b*) of the Explosive Substances Act, 1908, it is essential to specify in the charge the particular substance which the accused have conspired to make or have in their possession or under their control. There is, further, plainly no analogy between the case before us and the class of cases of which *Behari Mahton* v. *Queen-Empress* (7) and *Poresh Nath Sircar* v. *Emperor* (8) may be taken as the types, where it has been ruled that the charge in a prosecution for unlawful assembly must specify the common object. We are clearly of opinion that the conspiracy charge is not open to objection on the ground that it does not specify the explosive substances for the preparation or possession whereof the alleged conspiracy was formed. We observe, however, that the charge does not follow the language of section 4 (*b*) of Act VI of 1908, and uses the expression "make and keep" explosive substances, while it omits the expression "unlawfully and maliciously" and "British India." It is a wholesome rule that the Court should adhere to the language of the Statute, as far as practicable, when a charge is drawn up; nothing is gained by a paraphrase, while opportunity is afforded to the accused to take exception to the form of the charge. We hold accordingly that there is no force in the second contention, which must accordingly be overruled.

It has been argued, in the *third* place, that the conspiracy charge under section 120B, Indian Penal Code, is bad, inasmuch as it assigns a wrong date for the commencement of the period during which the conspiracy charged against the accused lasted. The charge specified the period as contained between March 1911 and the 21st November 1913. It is pointed out that sections 120A and 120B did not find a place in the Indian Penal Code before the 27th March 1913, when Act VIII of 1913 became law. It is obvious that the period should have been restricted between the dates 27th March and 21st November 1913. Under section 222 (1), Criminal Procedure Code, particulars as to the time of the alleged offence were necessary, and the prosecution should have been careful in this respect. No objection to the charge on this ground was, however, taken at the trial till a very late stage of the proceedings, in fact, only in the course

of the final arguments, and the error cannot be deemed to have affected the legality of the trial. No doubt, the accused cannot be convicted, unless the prosecution establishes that the accused were members of the conspiracy after the 27th March 1913, but this involves an investigation of the merits of the case. The third ground thus turns out to be unsubstantial and must be overruled.

In the *fourth* place, the legality of the trial has been questioned on the ground of misjoinder of charges. The substance of the argument is that while four of the accused persons are charged with an offence under section 4 (*b*) of Act VI of 1908, all the six accused are charged with conspiracy under section 120B, Indian Penal Code, and it is contended that a joint trial of all these persons for the two offences charged is illegal, on the authority of the decision of the Judicial Committee in *Subrahmania Ayyar* v. *King-Emperor* (23). It cannot be disputed that if misjoinder of charges is established, the trial must be deemed illegal, because held contrary to an express provision of the law relating to the mode of trial. The real question in controversy is, whether there has been a misjoinder of charges in the case before us. On behalf of the accused, it has been contended that the same individual cannot be simultaneously charged with an offence as also with conspiracy to commit that offence, and much less can he be tried jointly with other persons alleged to be his co-conspirators. In support of this view, reliance has been placed upon *King-Emperor* v. *Tirumal Reddi* (24). This decision is, however, of no real assistance to the accused; it is an authority only for the proposition that a man cannot be cumulatively charged with the commission of an offence as also of abetment by conspiracy or otherwise of the very same offence; it is, besides, a decision given before section 120B, Indian Penal Code, was enacted. In our opinion, the legality of the trial in the present case must be determined with reference to the language of section 239 of the Criminal Procedure Code, which, so far as it is relevant to the question before us, is in these terms: "when more persons than one are accused of different offences committed in the same transaction, they may be charged or tried together or separately as the Court thinks fit." No useful purpose would be served by an elaborate examination of the judicial decision in which the expression "same transaction" has been interpreted, although reference has been made at the Bar to many of the recent cases on the point: *Queen-Empress* v. *Fakirapa* (25); *Emperor* v. *Sharufalli* (26); *Emperor* v. *Jethalal Harlochand* (27); *Emperor* v. *Datto Hanmant* (28); *Emperor* v. *Hari Raot* (29); *Emperor* v. *Ganesh Narayan* (30); *Nga Tha Gyi* v. *Emperor* (31); *Ishar Das* v. *Emperor* (32); *Emperor* v. *Ghulam* (33); *Pulin Behary Das* v. *Emperor* (34) and *Choragudi* v. *Emperor* (35). It is not possible to frame a comprehensive formula of universal application to determine whether two or more acts constitute the same transaction; but circumstances which must bear on the determination of the question in an individual case may be easily indicated; they are, proximity of time, unity or proximity of place, continuity of action and community of purpose or design. To take one illustration: *A* and *B* conspire to cheat *X*; in pursuance of that conspiracy and in fulfilment of its object *A* cheats *X* on a specific occasion. The position may clearly be maintained that the two different offences of conspiracy to cheat committed by *A* and *B* and the offence of cheating committed by *A* alone, have been committed in the same transaction. This view is in accord with that adopted in two recent decisions of this Court,

(23) 28 I. A. 257; 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 5 C. W. N. 866; 2 Weir 271.

(24) 24 M. 523 at p. 547; 11 M.L.J. 241; 2 Weir 340.

(25) 15 B. 491.

(26) 27 B. 135; 4 Bom. L. R. 930.

(27) 29 B. 449; 7 Bom. L. R. 527; 2 Cr. L. J. 480.

(28) 30 B. 49; 7 Bom. L. R. 633; 2 Cr. L. J. 578.

(29) 4 Cr. L. J. 420; 2 N. L. R. 147.

(30) 17 Ind. Cas. 705; 14 Bom. L. R. 972; 13 Cr. L. J. 833.

(31) 15 Ind. Cas. 485; 13 Cr. L. J. 485; 5 Bur. L. T. 101.

(32) 8 Cr. L. J. 75; 18 P. W. R. 1908 Cr.

(33) 8 Cr. L. J. 191; 1 S. L. R. 73.

(34) 16 Ind. Cas. 257; 15 C. L. J. 517 at p. 582; 13 Cr. L. J. 609; 16 C. W. N. 1105.

(35) 5 Ind Cas. 847; 33 M. 502; 7 M. L. T. 299; 20 M. L. J. 220; 11 Cr. L. J. 258; (1910) M. W. N. 65.

from which we see no reason to dissent in this respect: *Superintendent and Remembrancer of Legal Affairs* v. *Manmohan Roy* (36) and *Harsha Nath Chatterjee* v. *Emperor* (37). We hold accordingly that if *A*, *B* and *C* conspire to make or have in possession or under control an explosive substance within the meaning of the Explosive Substances Act, and if in pursuance of such conspiracy, *A* makes or has in his possession or under his control an explosive substance, they may, if the Court thinks fit, be charged and tried together under section 120B, Indian Penal Code, and section 4 (*b*) of Act VI of 1908. The fourth ground must accordingly be overruled as unsustainable.

The *fifth* ground on which the legality of the trial is questioned, is that persons who are alleged to be conspirators in the charge have not been prosecuted, although their names and addresses were known to the prosecution. Reference has, in this connection, been made to *Emperor* v. *Lalit Mohan* (*Noni Gopal*) (38), where it was ruled by Jenkins, C. J., that in a conspiracy case the accused can be charged with conspiracy with persons unknown, but that if they are charged with conspiracy with persons known, then such persons must be named in the charge. It is not necessary for our present purpose to determine whether the rule so stated is not too widely formulated; but it may be observed that a different view has sometimes been maintained. Thus, in *Rex* v. *Stoddart* (39), the legality of a conviction for conspiracy was questioned on the ground that though the prosecution knew that one Klinge was an alleged conspirator, he was not named in the indictment. In support of this objection, reliance was placed on *Rex* v. *Walker* (40), *Reg.* v. *Thompson* (41) and *Rex* v. *Robinson* (42), but it was overruled by the Court of Criminal Appeal. That judicial opinion on the point has not been quite uniform is obvious from an examination of the cases mentioned, as also *Rex* v. *Deakin* (43), *Reg. v. Campbell* (44), *Reg.* v. *Stroud* (45), *Reg.* v. *Caspar* (46), *Rex* v. *Bush* (47), *R g.* v. *Esdaile* (48); 2 East, Pleas of the Crown, 651, 781; I Chitty on Criminal Law, 213; Russell on Crimes, (1909) 186, 187, 1292, 1478. The question has also been the subject of elaborate discussion in the Courts of the United States. In *People* v. *Mather* (49), the charge of the indictment was of a conspiracy to abduct William Morgan, who was supposed to have revealed the secrets of the Masonic fraternity. The indictment was of Mather alone and the charge of the indictment was that Mather with "other persons unknown" had conspired, etc., although it was a fact that many of the other persons were well known. The Court held, on the authority of *Reg.* v. *Herne* (50), mentioned in the case of *Rex* v. *Kinnersley and Moore* (51), and *Anonymous* case (52), that the indictment against Mather alone was good; there was a conviction and a new trial was denied. Marcy, J., observed: "In a charge of conspiracy, it seems no more necessary to specify the names of the defendant's co-adjutors than in an indictment for an assault and battery to name others besides the accused who were concerned in the trespass." The view thus taken in *People* v. *Mather* (49) was approved in *People* v. *Richards* (53) and *United States* v. *Miller* (54). Let us assume, however, that the strict rule formulated in *Emperor* v. *Lalit Mohan* (*Noni Gopal*) (38) is well-founded on principle and is supported by balance of authorities; that rule is clearly of no assistance to the accused in this case. That decision does not show that if all

(36) 26 Ind Cas. 307; 21 C. L. J. 195; 16 Cr. L. J. 3; 19 C. W. N. 672.
(37) 26 Ind. Cas. 313; 21 C. L. J. 201; 16 Cr. L. J. 9.
(38) 10 Ind. Cas. 582; 38 C. 559; 15 C. W. N. 593; 12 Cr. L. J. 286.
(39) (1909) 2 Cr. Ap. R. 217 at pp. 224, 237; 25 T. L. R 612; 73 J. P. 348; 53 S. J. 578.
(40) (1812) 3 Camp. 264.
(41) (1851) 16 Q. B. 832; Deafs. C. C. 3; 20 L. J. M. C. 183; 17 Jur. 453; 117 E. R. 1100.
(42) (1817) Holt. 595,
(43) (1800) 2 Leach, C. C. 862; 2 East P. C. 653.
(44) (1843) 1 Car. & K. 82.
(45) (1842) 1 Car. & K. 187; 2 M. C. C. 270.
(46) (1839) 2 M. C. C. 101; 9 Car. & P. 289.
(47) (1818) R. & R. 372.
(48) (1858) 1 F. & F. 213.
(49) (1830) 4 Wendell 229; 21 Am. Dec. 122.
(50) (1709) Unreported.
(51) (1719) 1 Strange 193; 93 E. R. 467.
(52) (1635) Cro. Car. 380; 79 E. R. 932.
(53) (1885) 67 Cali. 412; 56 Am. Rep. 716 at p. 722.
(54) (1878) 3 Hughes 553; 26 Fed. Cas. 1255.

the known co-conspirators named in the charge are not placed on their trial, the trial of some without the others is vitiated. It is, indeed open to the Court to place the co-conspirators on their trial separately: *Rex* v. *Kinnersely and Moore* (51); *Rex* v. *Oxford* (55); *Rex* v. *Nichols* (56); *Reg.* v. *Ahearne* (57); *People* v. *Richards* (53); *United States* v. *Miller* (54), Russell on Crimes, (1909) 149, 180; 3 Chitty on Criminal Law, 1141; Bishop on New Criminal Procedure, Volume I, sections 464, 1022, Volume II, section 225; Mc Clain on Criminal Law, Volume II, section 981. This might, in certain circumstances, be an obvious advantage to the persons actually placed on trial; they would be at liberty, if they so desired, to call the alleged co-conspirators as witnesses, a course which could not possibly be adopted, if all the co-conspirators were tried jointly. But it has been argued that if persons are allowed to be named as co-conspirators in the charge and are yet not placed on their trial, there may be an inducement to the prosecution to mention the names of persons as co-conspirators indiscriminately, with a view to let in evidence under section 10 of the Indian Evidence Act, which would otherwise be inadmissible. This apprehension is, in our opinion, groundless, for whenever evidence is attempted to be made admissible under that section, the defence is entitled to insist on strict compliance with its provisions, namely, upon proof of reasonable ground for belief that the persons named have conspired together. We are unable to hold accordingly that the omission of the prosecution to proceed against the alleged conspirators in this case has vitiated the trial of the other persons. The fifth ground, consequently, fails.

The *sixth* ground on which the legality of the trial has been assailed is that the facts disclosed, if believed, indicate that the accused have committed an offence punishable under section 121A, Indian Penal Code, and should have been tried accordingly. The contention in substance is that the prosecution has been commenced under section 120B, Indian Penal Code, and section 4 (*b*) of Act VI of 1908, with a view to evade the requirements of section 196 of the Criminal Procedure Code, compliance wherewith, as was ruled in *Barindra Kumar* v. *Emperor* (58), is imperative in prosecutions for offences against the State. In our opinion, there is no basis for this contention. No doubt, evidence has been adduced on behalf of the prosecution to show that revolutionary literature was in possession of some of the accused persons; no foundation, however, has been laid to establish that the accused had conspired to commit an offence punishable under section 121A, Indian Penal Code. But even if it be assumed that the accused could have been successfully prosecuted under section 121A, it does not follow that it was obligatory upon the Crown to prosecute them under that section. If the accused have committed an offence under section 4 (*b*) of the Explosive Substances Act, 1908, in pursuance of a criminal conspiracy, it is open to the Crown to prosecute them for such offences, irrespective of the question of the ultimate design of the alleged conspiracy. On the other hand, the accused might legitimately contend that the trial should proceed strictly on the lines of the charges framed and that evidence, such as would have been appropriate to support a charge under section 121A, should not be admitted in the disguise of evidence in support of a prosecution under section 120B. The sixth ground must thus be overruled as untenable. We shall now proceed to examine the merits of the case.

The fundamental question on the merits, which has led to protracted discussion in this Court as in the Court below, relates to the true nature of Exhibits I, V, VI and VII. On behalf of the prosecution, the view has been maintained that these Exhibits constitute materials for the preparation of bombs, while, on behalf of the accused, the theory has been vigorously supported that these articles were used by Sasanka in experiments towards the construction of a cheap acetylene generator. In support of their position, the

(55) (1811) 13 East 411; 104 E. R. 429; 12 R.R. 386
(56) (1742) 13 East 412*n*; 104 E. R. 429; 12 R. R. 388.
(57) (1852) 2 Ir, Com. L. R. 381; 6 Cox, C. C. 6.

(58) 7 Ind. Cas. 359; 37 C. 467; 14 C. W. N. 1114; 11 Cr. L. J. 453.

prosecution have adduced in evidence specimens of bombs, exploded and unexploded, for instance, the Dalhousie Square bomb, dated the 2nd March 1911, the Midnapore bomb, dated the 13th December 1912, the Delhi bomb thrown at the Viceroy on the 23rd December 1912, the Moulvi Bazar bomb, dated the 27th March 1913, the Lahore bomb, dated the 17th May 1913, the Mymensingh bomb, dated the 30th September 1913, and the Bhadreswar bomb, dated the 31st December 1913. Of these, the bombs mentioned first and last did not explode and are practically intact, although the explosive substances contained therein have been removed; all the other bombs exploded and caused destruction of life. The bombs which have been exhibited are obviously all of the same type, and there is expert testimony to this effect. Colonel Muspratt Williams says that the design of these bombs is the work of one controlling mind—not that they had necessarily been made by one man. He adds that he had never met with a bomb of a similar construction before his examination of the series of bombs exhibited in this case. Major Turner says that the series of bombs from Dalhousie Square to Bhadreswar all belong to the same family and that he had never before come across this kind of bomb. The system adopted appears to have been to use for the shell of the bomb a tin of the kind in which tobacco, cigarettes, or condensed milk is sold, and with it to use iron discs and iron clamps. Exhibit I is made up of a similar tin, similar discs and similar clamps. Exhibits V and VI taken together make up another complete shell of a bomb, which consists of a tin case with three discs and four clamps. The total aggregates to 2 tins, 11 discs, 8 completed clamps and several others in various stages of preparation. The similarity of these articles to the tins, discs and clamps actually used in the bombs exhibited is remarkable and is calculated to strike the intelligent observer, without the aid of expert testimony. Two points of difference, however, have been emphasised on behalf of the defence. It has been argued, in the *first* place, that whereas the discs found in the room of Sasanka were made of ordinary iron, the discs used in the bombs exhibited were, in some instances, at least, made of galvanised iron. With reference to this circumstance, it has been contended that discs so made could not be used for the purpose of a bomb, as an explosion would take place as soon as the discs came into contact with picric acid. The obvious answer is that, as in the case of the bombs exhibited, these discs, before they could be used in an actual bomb, would have to be lacquered, and lacquer was in fact found in the room. It may also be pointed out that the inner surface of the tin case itself should, for safety, be protected in the same way as the discs, to avoid the formation of picrate of tin which, according to Colonel Muspratt Williams, is a highly sensitive substance. In the *second* place, it has been argued, that as there is a slight difference in the thickness of the iron used for the discs and clamps found in the room and those used in some of the actual bombs exhibited, the articles suspected could not have been intended for use in the construction of a bomb. There is no force in this contention, for, as Major Turner says, inspite of the fact that some of the parts are lighter, the principle remains the same. After careful examination of the tin cases, discs and clamps found in the room and a comparison therewith of the corresponding parts of actual bombs, we have arrived at the same conclusion as the Sessions Judge, namely, that these articles found in possession of Sasanka were suitable for use as bomb shells. This leads us to the question, whether they could have been intended for innocent use. This inquiry is essential, because it is an elementary rule that in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. As Alderson, B., says in *Reg.* v. *Hodges* (59), to enable the Jury to bring in a verdict of guilty, it is necessary not only that it should be a rational conviction, but that it should be the only rational conviction which the circumstances would enable them to draw. What, then, is the reasonable hypothesis which has been offered as an explanation of the articles found in possession of Sasanka? The theory he puts forward for acceptance is that at the

(59) (1838) 2 Lewin, C. C. 227.

suggestion of one Jogendra Nath Dutt, he was engaged in experiments for the manufacture of a simple and cheap acetylene gas lamp, which could be used as a substitute for the native *kupies*, and that Exhibit I was only a part of the generator made by him under instructions from Jogendra Nath Dutt, to whom were due the details of the lamp, namely, the tin, discs, clamps and general construction. This theory, however, is not consistent with the admitted facts of the case. In the *first* place, if Sasanka was still engaged in experiments for the construction of a cheap lamp, how is it that he was in possession of so many completed discs and clamps? In the *second* place, for the purpose of an experiment in the construction of a lamp, it would be essential to have holes on the side of the shells, into which a tube could be inserted for the passage of the gas generated. But no tube, no burner, no carbide—nothing except a solitary cock—was found in the room; nor was there any hole on the side of either of the two tin cases, in which a tube could have been inserted. In the *third* place, for the purposes of a lamp, even at the experimental stage a disc with a pinhole through which water could pass slowly from one of the chambers to the other, where the carbide would be kept, would be essential, but none such was found. On the other hand, several discs were found with large perforations, precisely as in the case of discs used in actual bombs. In the *fourth* place, this theory of an acetylene generator, was not suggested till a very late stage of the trial. Mr. Lowman, who was present at the search, asked Sasanka what Exhibit I was, as soon as it came into his hands. The only answer which Sasanka gave was "look and see for yourself." Sasanka was subsequently asked the same question by Mr. Tegart and Mr. Denham, but he declined to give any explanation as to the articles found. More than this, there was not the remotest suggestion that he was engaged in experiments on the construction of an acetylene generator, during the entire period that the trial lasted in the Court of first instance, from the 19th December 1913 to the 21st February 1914. In the *fifth* place, if Sasanka, as he stated before the Sessions Judge, was still engaged in experiments at the time of his arrest, how was a model lamp, such as he had in contemplation, prepared and got ready for use under his instruction while he was under arrest? The generator theory was first put to Colonel Muspratt Williams in course of cross-examination on the 6th April 1914. Mr. Craig of the Linde Ice Factory, under whom Sasanka had worked in the oxy-acetylene department, was examined on the 24th April 1914, and the generator theory was again put to him in cross-examination. But these experts pronounced the idea to be impracticable. It now transpires from the evidence that, in the interval, on or about the 16th April 1914, a model lamp had been prepared by a tinsmith under instructions from Sasanka conveyed through his Pleader. With the article so constructed, Sasanka gave an exhibit in Court on the 14th May 1914, and demonstrated that the gas, generated by contact of the water with the carbide, when carried through a tube affixed to the side of the tin shell, and ignited with a match, gave a tolerably bright light. The exhibition was repeated in this Court by Counsel for the accused. It is not necessary to discuss whether what was exhibited as a lamp was capable of practical use as such; the answer would depend upon various factors which have not been investigated, for instance, the total cost of construction of the article, the price of the carbide consumed, the time during which the light would burn, the strength of the generator to keep the gas intact, and other like matters. Let us assume, however, that the article exhibited was fit for use as a lamp and negatives the confident opinion to the contrary given by expert witnesses. The question inevitably arises, when did Sasanka complete his investigation, as according to his own statement, he was still in the experimental stage when he was arrested and the articles were seized? The truth is that the theory of a generator is an ingenious after-thought of a well-skilled mechanic employed in the oxy-acetylene department of the Linde Ice Factory. In the *sixth* place, if Sasanka was engaged in experiments upon the construction of a cheap generator, one might, not unnaturally, have expected to find in his library books and papers on acetylene and on generators; on the other hand, what was found in his possession was seditious literature which advocated the use of bombs for the attainment of revolutionary ideals. Upon a review, then, of all the circumstances of the case, the conclusion appears irresistible

that Exhibit I and other exhibits similar to its component parts were intended for use, not as acetylene generators, but as bomb-shells. The fact that they were kept in a room, apparently without any attempt at secrecy, is explained by the circumstance that they were not calculated to attract the attention, much less to excite the suspicion, of persons not familiar with the mechanism of this particular type of bombs and their construction. We are not unmindful that, as has been strenuously argued by Counsel for the defence, in criminal cases there can be no conviction, unless guilt is established with very great clearness. This presumption of innocence signifies no more than this that if the commission of a crime is directly in issue in any proceeding, it must be proved beyond reasonable doubt; in other words, as Thayer points out, (Evidence at the Common Law, page 558) "the whole doctrine when drawn out is, *first*, that a person who is charged with a crime must be *proved* guilty, that according to the ordinary rule of procedure and of legal reasoning, *præsumitur pro reo*, that is, *neganti*, so that the accused stands innocent until he is proved guilty; and *second*, that this proof of guilt must displace all reasonable doubt." When we test the case in the light of these principles, we feel no doubt that the exhibits in question were intended for use in the construction of bombs-hells.

The *next* important question of fact, which requires determination, is whether the prosecution has proved the existence of a conspiracy to make explosive substances or to possess them or to have them under control, with intent by means thereof to endanger life or to cause serious injury to property in British India. The question may be appropriately considered at this stage, because it is well settled that in a charge of conspiracy, general evidence of the existence of the conspiracy may first be given, before particular facts are proved to show that one or more of the defendants took part in it: *Rex* v. *Sidney* (60), *Queen's* case (61), *Rex* v. *Hunt* (62), *Rex* v. *Frost* (63), *Reg.* v. *Shellard* (64), *Reg.* v. *Desmond* (65), *Reg.* v. *Deasy* (66). It is now admitted that Sasanka manufactured and was in possession of the articles which, in concurrence with the Sessions Judge we have found, were intended for use in the manufacture of bombs. The question is, whether Sasanka had confederates or associates in the design and its accomplishment. An answer in the affirmative is the only solution admissible in view of incontestable facts. The circumstance that bombs of this particular type have been used in various places in British India, as widely separated from each other, as Calcutta, Lahore, Delhi, Sylhet, Mymensingh and Midnapore, points to the conclusion that more than one person is engaged in these transactions: the bombs are not the handiwork of one individual though they may be the work of one controlling mind. This inference is confirmed by the contents of at least one revolutionary document found in the room of Sasanka, which advocates the realization of the independence of India with the aid of heroic patriots by bloodshed and assassination. This aspect of the case does not, in our opinion, stand in need of elaboration, and the only substantial question for consideration with regard to each of the accused persons is the extent, if any, to which his complicity in the conspiracy charged and proved has been established beyond reasonable doubt. Before we deal, however, with the cases of the individual accused persons, it is necessary to decide an important question of admissibiliy of evidence, which turns upon the true construction of the terms of sections 14 and 15 of the Indian Evidence Act.

At the trial before the Sessions Judge, evidence was adduced by the prosecution to establish that some of the accused had associated with Pulin Behary Das in 1908 or 1910 and that they had been seen from time to time in the premises of the Dacca Anusilan Samity whereof Pulin Behary Das was the leader. Exception was taken on behalf of the defence to the admissibility of this evidence, but the objection was

(60) (1683) 9 St. Tr. 817 at p. 841.
(61) (1820) 2 Brod. & Bin. 284 at pp. 302, 310; 1 St. Tr. (N. S.) 1348; 22 R. R. 662; 129 E. R. 976.
(62) (1820) 3 B. & Ald 566; 1 St. Tr. (N. S.) 171; 9 C. & P. 94; 22 R. R. 485; 106 E. R. 768.
(63) (1839) 9 Car. & P. 129; 4 St. Tr. (N. S.) 85; 2 Moody C. C. 140.
(64) (1840) 9 Car. & P. 277.
(65) (1868) 11 Cox, C. C. 146.
(66) (1883) 15 Cox, C. C. 334.

overruled. The objection has been reiterated in this Court, and we have been invited to pronounce a decision on the point. Evidence has been adduced to prove that Pulin Behary Das and some of his associates were convicted in 1912 of offences under section 121A of the Indian Penal Code, but no evidence has been given as to the nature of the activities of the Samity, of the different grades of its members and of the extent of their participation in the ultimate aims and purposes of the society; proof in these respects, could, indeed, be hardly attempted without reproduction of the voluminous evidence adduced at the trial of the Dacca Conspiracy case. The defence, however, have elicited in cross-examination of the prosecution witnesses that the activities of the Anusilan Samity were not known to have been in any way connected with bombs. In these circumstances, we have to decide whether evidence was admissible to prove that some of the present accused had in 1908 or 1910 associated with Pulin Behary Das and had been seen engaged in *lathi* play or in other innocent pursuits on the Samity premises. In our opinion, the evidence was inadmissible and should have been excluded. The prosecution has relied upon section 14 of the Indian Evidence Act, which is in these terms: "Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant, when the existence of any such state of mind, or body, or bodily feeling, is in issue or relevant." But, on behalf of the prosecution, the first explanation to the section, which is absolutely fatal to their argument, has been completely overlooked: "A fact relevant as showing the existence of a relevant state of mind must show that *the state of mind exists, not generally, but in reference to the particular matter in question.*" We invited the Counsel for prosecution to explain how evidence of association with Pulin Behary Das in 1908 or presence in his Samity could have any relevancy with reference to the particular matter in question before us, namely, the intention with which the first four accused had assembled in the room, rented by Sasanka, on the night of the 20th November 1913; but not even a plausible answer was attempted. Illustrations (*i*), (*j*), (*o*) and (*p*) also plainly indicate that the contention of the prosecution is not well-founded. Nor can the prosecution derive any assistance from section 15 of the Indian Evidence Act, which is in these terms: "Where there is a question whether an act was accidental or intentional, or done with a particular knowledge or intention,' the fact that such act formed part of a series of *similar* occurrences, in each of which the person doing the act was concerned, is relevant." Reference, however, was made to a number of judicial decisions which throw light upon the questions in controversy, and particularly to *Makin* v. *Attorney-General for New South Wales* (67), *Blake* v. *Albion Life Assurance Society* (68), *Reg.* v. *Rhodes* (69), *Rex.* v. *Wyatt* (70), *Rex.* v. *Bond* (71), *Rex.* v. *Fisher* (72), *Rex.* v. *Ellis* (73), *Rex.* v. *Ball* (74), *Rex.* v. *Rodley* (75), *Rex.* v. *Shellaker* (76), *Rex.* v. *Hunt* (62), *Reg.* v. *Geering* (77), *Reg.* v. *Garner* (78), *Reg.* v. *Cotton* (79), *Reg.* v. *Jones* (80), *Reg.* v. *Ollis* (81). No useful purpose would be served by an analysis of the special facts of each of these cases, but the principles deducible therefrom, as to the law administered in England, may be briefly formulated. Facts similar to but not part of the same transaction as the main fact are not, in general, admissible to prove either the occurrence of the main fact or the

(67) (1894) A. C. 57; 17 Cox, 704, 63 L. J. P. C. 41; 6 R. 373; 69 L. T. 778; 58 J. P. 148.

(68) (1878) 4 C. P. D. 94; 48 L J.C. P. 169; 40 L. T. 211; 27 W. R. 321.

(69) (1899) 1 Q. B. 77; 68 L.J. Q. B. 83; 79 L.T. 360; 47 W. R. 121; 62 J. P. 774.

(70) (1904) 1 K. B. 188; 73 L. J. K. B. 15; 52 W. R. 285; 68 J. P. 31; 20 Cox, C. C. 462; 20 T. L. R. 68.

(71) (1906) 2 K. B. 389; 75 L. J. K. B. 693; 95 L. T. 296; 54 W. R. 586; 70 J. P. 424; 21 Cox, C. C. 252; 22 T. L. R. 633.

(72) (1910) 1 K. B. 149; 79 L. J. K. B. 187; 102 L. T. 111; 74 J. P. 104; 26 T. L. R. 122.

(73) (1910) 2 K. B. 746; 79 L. J. K. B. 841; 102 L. T. 922; 74 J. P. 388; 26 T. L. R. 535.

(74) (1911) A. C. 47; 80 L. J. K. B. 689; 104 L. T. 47; 22 Cox. C. C. 364; 55 S. J. 190.

(75) (1913) 3 K. B. 468; 82 L. J. K. B. 1070; 109 L. T. 476; 77 J. P. 465; 58 S. J. 51; 29 T. L. R. 700.

(76) (1914) 1 K. B. 414; 83 L. J. K. B. 413; 110 L. T. 351; 78 J. P. 159; 24 Cox. C. C. 86; 30 T. L. R. 19.

(77) (1849) 18 L. J. M. C. 215.

(78) (1864) 4 F. & F. 346.

(79) (1873) 12 Cox, C. C. 400.

(80) (1877) 14 Cox, C. C. 3.

(81) (1900) 2 Q. B. 758; 69 L. J. Q. B. 918; 83 L. T. 251; 49 W. R. 76; 64 J. P. 518; 19 Cox, C. C. 554.

identity of its author. But evidence of similar facts, although in general, inadmissible to prove the main fact or the connection of the parties therewith, is receivable after evidence *aliunde* on these points has been given, to show the state of mind of the parties with regard to such fact; in other words, evidence of similar facts may be received to prove a party's knowledge of the nature of the main fact or transaction, or his intent with respect thereto. In general, whenever it is necessary to rebut, even by anticipation, the defence of accident, mistake, or other innocent condition of mind, evidence that the defendant has been concerned in a systematic course of conduct of the same specific kind as that in question may be given. To admit evidence under this head, however, the other acts tendered must be of the same specific kind as that in question, and not of a different character and the acts tendered must also have been proximate in point of time to that in question. It is plain that the principles thus formulated are of no assistance to the prosecution. The view we take is consistent with the decisions in *Empress* v. *Vyapoory* (82), *Mankura Pasi* v. *Queen-Empress* (83); *Baharuddin Mandal* v. *Emperor* (84); *Girdhari Lal* v. *Emperor* (85) and *Emperor* v. *Debendra Pershad* (86). With reference to the case last mentioned, it may be noted that the Court properly declined to follow *Reg.* v. *Holt* (87), which is no longer authority: *Rex* v. *Smith* (88). We hold, accordingly, that the evidence of association with Pulin Behari Das and the Anusilan Samity is irrelevant, for the purposes of proof of the conspiracy charged in this case, and should not have been admitted.

In the consideration of the individual cases, Sasanka, who has been the central figure in this trial, naturally arrests our attention first. We have already held that he made and was in possession of articles intended for use in the construction of bombs. These articles are manifestly "explosive substances" within the meaning of that expression as defined in section 2 of the Explosive Substances Act, 1908. For the purposes of the Act, the expression "explosive substance" is deemed to include any materials for making any explosive substance, also any apparatus, machine, implement or material used or adapted for causing any explosion in or with any explosive substance, also, any part of any such apparatus, machine or implement. This comprehensive definition obviously covers the articles made by Sasanka and found in his possession. The point for consideration is, whether all the elements essential to sustain a conviction have been established. Here, three points require examination, namely, *first*, were these articles made and possessed by the accused "unlawfully and maliciously"; *secondly*, can it be said that the accused intended, "by means thereof," to endanger life or cause serious injury to property, when it is plain that, in the absence of explosives, the articles are harmless; and *thirdly*, is it proved that the articles were intended for use in "British India" with a view to endanger life or injure property? It is worthy of note that section 4 of Act VI of 1908, which we are called upon to interpret, substantially reproduces the provisions of section 3 of 46 and 47 Vict., Chapter III (Explosive Substances Act, 1883).

In the solution of the *first* question, we may, consequently, interpret the expression "unlawfully and maliciously" in the sense in which it is familiarly used in the criminal law of England. The term "unlawfully," as is plainly indicated by section 5 of the Act VI of 1908, which reproduces the provisions of section 4 of 46 and 47 Vict., Chapter III, signifies "not for a lawful object." The term "maliciously" signifies "intentionally and without justification or excuse or claim of right," *Reg.* v. *Clemens* (89): *Miles* v. *Hutchings* (90). Blackburn, J., observed in *Rex.* v. *Ward* (91) that a man acts maliciously when he wilfully does that which he knows will injure

(82) 6 C. 655; 8 C. L. R. 197; 4 Shome L. R. 125.
(83) 27 C. 139; 4 C. W. N. 97.
(84) 22 Ind. Cas. 187; 18 C. L. J. 578; 15 Cr. L. J. 43.
(85) 6 Ind. Cas. 964; 26 P. W. R. 1910 Cr.; 11 Cr. L. J. 428.
(86) 2 Ind. Cas. 601; 36 C. 573; 9 C. L. J. 610; 13 C. W. N. 973; 10 Cr. L. J. 91.
(87) (1860) Bell, C. C. 280; 8 Cox, C. C. 411; 30 L. J. M. C. 11; 6 Jur. (N. S.) 1121; 3 L. T. 310; 9 W. R. 74.
(88) (1905) 20 Cox. C.C.804; 92 L.T.208; 69 J. P. 51.
(89) (1898) 1 Q. B. 556; 19 Cox, C. C. 18; 67 L. J. Q. B. 482; 78 L. T. 204; 46 W. R. 416.
(90) (1903) 2 K. B. 714; 20 Cox, C. C. 555; 72 L. J. K. B. 775; 89 L. T. 420; 52 W. R. 284.
(91) (1871) 1 C.C.R. 356 at p. 360; 12 Cox. C.C. 123;

another in person or property. This accords with the statement of Littledale, J., in *Macpherson* v. *Daniels* (92), "malice, in its legal sense, denotes a wrongful act, done intentionally, without just cause or excuse," which is identical with the language used by Bayley, J., in the earlier case of *Bromage* v. *Prosser* (93). The dictum of Bayley, J., was quoted with approval by Brett, L. J., in *Clark* v. *Molyneux* (94) and by Halsbury, L. C., and Lord Watson and Lord Herschell in *Allen* v. *Flood* (95); the dictum of Littledale, J., was, on the other hand, adopted by Martin, B., in *Johnson* v. *Emerson* (96). Blackburn, J., had the matter again under consideration in *Reg.* v. *Pembliton* (97), in which he observed that "where any person wilfully does an act injurious to another, without lawful excuse, he does it maliciously." To the same effect is the language used by Bowen, L. J., in *Mogul Steamship Co.* v. *McGregor* (98): "maliciously means and implies an intention to do an act which is wrongful, to the detriment of another; the term wrongful imports, in its turn, the infringement of some right." Reference may also be made, in this connection, to the definition of the term "maliciously" given in the Laws of England, Edited by Halsbury, Volume IX, page 768, Article 1499, as also to the observations of Lord Coleridge, C. J., in *Rex* v. *Martin* (99), of Lord Lindley in *South Wales Miner's Federation* v. *Glamorgan Coal Co.* (100), and of Collins, M. R., in *Read* v. *Friendly Society of Operative Stonemasons* (101). There can be no question, in the case before us, that the bomb, on the construction whereof Sasanka was engaged, was not intended for a lawful object and there can be no controversy also that his act was intentional.

In the solution of the *second* question, namely, the precise import of the expression "by means thereof" we are assisted by a decision in *Rex.* v. *Charles* (102), which turned upon the construction of sections 3, 4 and 9 of 46 and 47 Vict., Chap. 3. It is plain that the "explosive substance" mentioned in section 4 (*b*) of Act VI of 1908 need not be such as to enable a person by *means thereof alone*, without the aid of other substances, to cause danger to life or injury to property. If this view were not adopted, the comprehensive definition contained in section 2 would be nugatory. The term "explosive substance" as used in section 4 (*b*) includes *any part* of any apparatus, machine, or implement intended to be used or adapted for causing or aiding in causing any explosive substance. The definition is of wide generality, and in the case of *Rex.* v. *Charles* (102), it was ruled that any part of a vessel which, when filled with an explosive substance, is adapted for causing an explosion, is itself an explosive substance within the Statute. The articles found with the prisoners in that case were a lead bolt, a fuse, a brass bolt, a screw, a brass casting, and evidence was given to show that these were various parts of a vessel, which, when filled with chlorate of potash or other explosive substance, formed a bomb of a highly dangerous character. The articles found in the present case must, consequently, be deemed "explosive substances" within the meaning of the Statute.

In the solution of the *third* point, we have to bear in mind that the evidence on the record furnishes no indication that the activities of the members of the conspiracy extend beyond the limits of British India; all the bombs produced at the trial have been found in different parts of British India. The articles themselves were found in a house in the suburbs of Calcutta. From the circumstances, the inference of fact may legitimately be drawn that the "explosive substances," made and possessed by Sasanka, were intended for use in British India. We must hold accordingly that all the

(92) (1829) 10 B. & C. 263 at p. 272; 5 M. & Ry. 251; 8 L. J. (o.s.) K. B. 14; 34 R. R. 397; 109 E. R. 448.

(93) (1825) 4 B. & C. 247 at p. 255; 6 D. & R. 296; 1 Car. & P. 475; 3 L. J. (o. s.) K. B. 203; 28 R. R. 241; 107 E. R. 1051.

(94) (1877) 3 Q. B. D. 237; 47 L. J. Q. B. 230; 37 L. T. 694; 26 W. R. 104; 14 Cox, C. C 10.

(95) (1898) A. C. 1; 67 L. J. Q. B. 119; 77 L. T. 717; 46 W. R. 258; 62 J. P. 595.

(96) (1871) 6 Ex. 329 at p. 373; 40 L. J. Ex. 201; 25 L. T. 337.

(97) (1874) 2 C. C. R. 119 at p 122; 12 Cox. C. C. 607; 43 L. J. M C. 91; 30 L. T. 405; 22 W. R. 553.

(98) (1889) 23 Q. B. D. 598 on appeal (1892) A. C. 25; 61 L. J. Q. B. 295; 66 L. T. 1; 40 W. R. 337; 7 Asp. M. C 120; 56 J. P. 101.

(99) (1881) 8 Q. B. D. 54; 14 Cox. C. C. 633.

(100) (1905) A. C. 239 at p. 255; 74 L. J. K. B. 525; 92 L. T. 710; 53 W. R. 693; 21 T. L. R. 441.

(101) (1902) 2 K. B. 732; 71 L. J. K. B. 994; 87 L. T. 493; 51 W. R. 115; 66 J. P. 822.

(102) (1892) 17 Cox, C. C. 499.

elements necessary to sustain a conviction under section 4 (*b*) of the Explosive Substances Act, 1908, have been established in the case of Sasanka. The elements essential for a conviction under section 120B, Indian Penal Code, have also been made out. Consequently, his conviction under both the charges must be upheld.

We have next to consider the individual cases of the group of three persons found in the room of Sasanka on the morning of the 21st November 1913, namely, Chandra Sekhar, Sarada and Dinesh. We shall discuss them in the order just named.

Chandra Sekhar appears to have made the acquaintance of Sasanka in Dacca for the first time in the year 1908, but there is no evidence to show that any communications had passed between them during the five or six years which had elapsed since then. He is proved to have been employed some time past in the Kohinoor Printing Press at Chittagong owned by his brother, and the record of his attendance there shows that he had not left Chittagong for at least two years prior to his arrest in Calcutta. On the 15th November 1913, he left Chittagong for Calcutta, on business connected, it is alleged, with the press. He arrived at Calcutta on the evening of the 16th November, and is shown to have spent the night in the house of Babu Khitish Chandra Sen, a Vakil of this Court, who comes from Chittagong. Next day he went to the place of his cousin, Sarada Charan Dey, with whom he remained until the evening of the 20th November; he left that evening at about 8 or 8-30, saying that he was to visit a friend who had invited him. In the interval he is proved to have paid a visit to the firm of Messrs. S. K. Lahiri & Co., in connection with the printing of question papers for the Chittagong Municipal School. He asserts that one of the objects of his visit to Calcutta was to expedite the printing and despatch of these question papers. His second object, he alleges, was to visit the firm of Messrs. Erasmus Jones and Co. for the purchase of fancy cards and coloured paper for his press. It is not shown, however, that he visited the latter firm, and it is doubtful whether he went to their premises; at any rate, it is proved that he did not meet the proprietor of the firm or the head clerk. In the early hours of the morning of the 21st November 1913, when the door was opened by Sasanka in response to the demands of the Police, Chandra Sekhar was one of the three persons found asleep in the room. To account for his presence in the room, he alleges that on 18th or 19th November, he had met Sasanka (whom he knew by his real name Amrita Lal) at the Ram Krishna Book Depot, where he himself had gone to purchase some books. Sasanka invited him to his place one evening for a chat, so he went there on the evening of the 20th November, and as it grew late, he was asked to spend the night there. He stayed and early in the morning he was arrested by the Police. There is nothing inherently improbable in this story. On the other hand, any possible theory that he had come down to Calcutta from Chittagong at the invitation of Sasanka for the purposes of a criminal conspiracy, is negatived by two significant facts. In the *first* place, when arrested, the return half of a railway ticket was found in his possession; this was produced by the prosecution after considerable effort on the part of the defence and was even then not made an exhibit. The defence has suggested that, in this respect, the prosecution was designedly obstructive. The precise attitude of the prosecution in this matter cannot be very clearly made out from the record. But we desire to emphasise the view expressed by Jenkins, C. J., in *Ram Ranjan Ray* v. *Emperor* (103) in conformity with the ruling in *Reg.* v. *Holden* (104), that it is the duty of the prosecution, not so much to secure a conviction, as to place all the available evidence in the case fairly and fully before the tribunal by which alone the guilt or innocence of the accused is to be determined. This return ticket shows that Chandra Sekhar, when he left Goalando on his way from Chittagong to Calcutta, intended to return within six days. In the *second* place, he had started from Chittagong with the very small sum of Rs. 10; out of this, he left one-half with Babu Khitish Chandra Sen in Calcutta. It could hardly have been his intention, with this small sum at his disposal, to

(103) 27 Ind. Cas. 554; 19 C. W. N. 28; 42 C. 422; 16 Cr. L. J. 170.

(104) (1838) 8 Car. & P. 608 at p. 609.

prolong his stay in Calcutta or to engage in a conspiracy for the manufacture of explosives. In fact, the only circumstance against him is his presence in the room of Sasanka on the morning of the arrest; of this, as we have stated, he has offered a not improbable explanation. The Sessions Judge was, as appears from his judgment, considerably influenced in his opinion against this accused by the evidence of his association with Pulin Behary Das and the Anusilan Samity in 1908. That evidence, as we have already held, was inadmissible and should not have been admitted. We further observe that the Sessions Judge mentions that this accused had, on the 20th November 1908, taken out a seditious book, *Mookti Kone Pathey*, from the Samity Library. This evidence is not quite trustworthy, and had it not been inadmissible, would have been entirely valueless; more than this, the book mentioned has not been exhibited and no proof whatever has been adduced as to the character of its contents. In our opinon the evidence on the record is not sufficient to sustain the conspiracy charge against the accused Chandra Sekhar.

Sarada Charan Guha, the second of the three persons arrested in the room of Sasanka, comes of a family of some means and respectability, resident at Mulgaon in the District of Faridpore. Sarada is the third of the four sons of his father. His second brother, Tara Charan, is demented and is confined in a lunatic asylum. His youngest brother, Debendra, had, notwithstanding the protest of his father, taken in marriage a girl of an inferior caste and had on this account been disinherited. Sarada himself had, as is amply proved by the evidence on the record, incurred the displeasure of his father and of other members of his family by reason of what they considered to be excessive devotion to his wife. The correspondence between the members of the family which has been produced, shows that his conduct at the time of the annual Puja festival had excited unmistakable bitterness of feeling; he was charged not only with the neglect of his father during his illness but also with misappropriation of family funds; the imputation of misconduct in this respect, as appears from the evidence, was, however, a much exaggerated one, if not wholly unfounded. In these circumstances, he is shown to have left Faridpore on the 16th November and reached Calcutta on or about the morning of the 17th November. He states that although he had relations in Calcutta, he did not on his arrival put up with them, but preferred to go to an acquaintance who lived at 88, Upper Circular Road. The next day he happened to meet Sasanka who lived in the same street. Some evidence was adduced to show that he had known Sasanka in 1908; he had at that time a shop at Gosainhat near Mulgaon in Faridpore. Sasanka was then in the employ of the Bajitpur *zemindars* and had often to come to the Settlement Camp at Gosainhat Bazar. This is said to be how Sarada and Sasanka first became acquainted with each other. There is no evidence, however, to show that any communication had passed between the two since Sasanka left the place about the year 1910. Not only is there no trace of any correspondence between them, the evidence makes it clear that Sarada had not been for at least ten years in Calcutta, where Sasanka was continuously employed since 1910. In these circumstances, after the lapse of several years, Sasanka and Sarada met again on or about the 18th November 1913. Sarada says that he mentioned to Sasanka how he had quarrelled with his family and left them; he also told him that he had not much money with him and had, on arrival in Calcutta, been taken ill with fever. Sasanka offered to put him up in his own room till he got well, and this, according to Sarada, explains his presence in that room at the time of the search on the morning of the 21st November. There has been much animated discussion in this Court on the question, whether Sarada was in fact ill at the time. His jail history ticket shows that after his arrest on the 21st November, he was, on the 25th November, placed in hospital; his temperature was high, and according to Dr. Mulvany, who wrote to the Magistrate on the 26th November, Sarada apparently had fever for some days and was very weak then. Dr. Makhan Lal Mandal, who attended on him in jail, states that Sarada was at the time suffering from fever, possibly from about a week before,

This fits in precisely with the evidence that Dr. Sen Gupta had seen Sarada and had prescribed medicine for him for fever on the 17th November. These facts render it extremely probable that Sarada was ill on or about the 17th November and that his illness continued up to the time he was taken to the jail hospital on the 25th November, though there is no direct evidence to show the precise extent of his illness at the time of his arrest. The events so far narrated do not indicate any criminal act on the part of Sarada or tend to connect him with a criminal conspiracy. But, at the search, five letters were found, written by him on Sunday the 16th November 1913, though not posted at the time of his arrest. One of these is addressed to his brother Debendra, who had misconducted himself and had been disinherited, and another is addressed to his uncle Bepin. Two letters are addressed to two elder sisters of his wife, Sarojini and Hemangini; another letter is addressed to his wife, Charuhasini. Much controversy has centred round these letters, and it has been vigorously urged by the prosecution that they have a very sinister significance. In these letters Sarada announced to his various relations that he had made up his mind to apply himself to the practice of *yoga* and that he would accordingly remain *incognito* for a time; he also pressed them to induce his father to alter his testament and to disinherit him. He further stated that he would probably return in six months or a year and referred to the many difficulties in the way of practice of *yoga*. He exhibited great anxiety for the welfare of his wife and child in the interval. In one passage he said: "let me see how *mayer lila* (the inscrutable ways of the mother) ends." It has been suggested on behalf of the prosecution that Sarada was about to embark on a very dangerous enterprise and that he was in fact the person selected by anarchist conspirators to throw the next bomb. This is nothing more than a suggestion; no evidence has been directed to establish this view, and we are unable to hold that the letters are sufficient to support the theory porpounded. The language used in the letters is, no doubt, in some places, peculiar, but on the whole they appear to us to be not very unlike letters such as might be written by a man who had quarrelled with his family and who realised fully, as he himself says in one of these letters, that he had to give up all hopes of paternal property unless he could act in obedience to the orders of his elders. Much stress has also been laid by the prosecution on the use of the expression *mayer lila*. That expression has in itself no evil significance, and is frequently used by a person in distress who finds all efforts unavailing and realises how inscrutable are the ways of the Providence. At the same time, there can be no question that, by a grievous and perverse misapplication of language,—an act of sacrilege which merits the strongest condemnation of all right-minded people—revolutionaries have applied the expression to describe anarchical outrages as if they were deeds sanctioned by the great Mother of the Universe. We have carefully considered the letters of Sarada, and with the knowledge we possess of the circumstances which very probably inspired them, we are unable to say that the expression *mayer lila* used therein has any sinister import. Reference has also been made to the difficulties mentioned in the practice of *yoga* and to the dangers involved therein. This does not, in our opinion, necessarily indicate any criminal purpose in view, for the practice of *yoga* by persons not fully qualified for such work has sometimes been attended with danger. There has been also much discussion as to the purpose Sarada had in view, when he wrote these letters; it is possible that he never seriously intended to practise *yoga* and that his only object was to write a series of what looked like farewell letters to all his relations, so as to excite their sympathy and make them intercede with his father with a view to bring about reconciliation between the old man and his undutiful son. There has also been some discussion as to why the letters were never posted; it may be that Sarada changed his mind; it is also not improbable that as he was taken ill on his arrival in Calcutta, he could not post the letters. We may add that a desperate effort was made by the prosecution to interpret the term *yoga* in these letters in the light of a paper on *yoga* philosophy found in the room of Sasanka. No connection whatever has been established between the two. But even if Sarada was shown to have been aware of the contents of the

yoga pamphlet, it would not in any way alter his position. The laborious attempt made by Counsel for the prosecution to interpret the *yoga* pamphlet, in a sinister sense, was not attended with success. An abstract philosophical disquisition on *yoga* cannot rightly be cut up into isolated sentences and edited so as to furnish a possible text for revolutionary spirits, without positive proof that it was so used. At the same time, one cannot overlook the lamentable fact that the revolutionary literature, brought to light in this instance and in other cases previously reported, does suggest that such principles as the religious principle of absolute surrender to the Divine Will—a doctrine common to many religions—are empolyed by designing and unscrupulous men as a potent means to influence and unbalance weak-minded persons and thus ultimately bend them to become instruments in the commission of nefarious crimes, from which they might otherwise recoil with horror. After a minute scrutiny, however, of the letters found in possession of Sarada, we are of opinion that, taken as a whole, they do not admit of the interpretation suggested by the prosecution and do not connect him with the conspiracy charged. Reference has also been made to the circumstance that Sarada undoubtedly gave a false name and incorrect addresses to the Police, but he has offered a not unreasonable explanation of his conduct. He had been treated by the Police for a long time as a political suspect, and his movements had been constantly watched, a position which even Mr. Tegart admits is not very pleasant. Such attentions on the part of the Police are very irksome and Sarada may well have tried to evade observation. Besides, some foundation has been laid in the evidence to support the allegation of Sarada that he found himself in this unfortunate position because of a quarrel with an influential Panchayet, Akshay Kumar Guha, who gave information to the Police and had him placed under surveillance. It also transpires from draft petitions, found in his possession at the time of his arrest, that he was about to move the Police authorities to have his name removed from the list of political suspects, and to invite an inquiry into the mode of life he led. No weight can also be attached to the fact that when he left Faridpore, he mentioned to a Pleader's clerk an untrue reason for his visit to Calcutta; this may well be explained by a not unnatural reluctance to disclose to every person his family quarrels. On the whole, then, there is really no substantial evidence to connect Sarada with the conspiracy. But, as appears from the judgment of the Sessions Judge, he was to some extent influenced in his opinion against Sarada by evidence of his association with Pulin Behary Das and the Annusilan Samity many years ago. This evidence, as we have held, is inadmissible, but it is also really of the vaguest description and, even if admitted, does not throw any light on the case. Our conclusion is that the conspiracy charge against Sarada has not been established.

Dinesh Chandra Das Gupta forms the third member of the group of persons arrested in the room of Sasanka on the morning of the 21st November 1913. His antecedent history has been determined with considerable approach to precision. During the years 1910-12, Dinesh was a student in the Dacca College. On account of ill health, his attendance at lectures fell short of the required minimum, and he left the College towards the close of the Session 1911-12. He appears to have lived with his parents at Faridpore during the next twelve months. In July 1913, he took his admission into the Krishnanath College at Berhampore, where he stayed till the 21st August 1913. He then took a transfer certificate, came down to Calcutta, and, failing to obtain admission elsewhere, joined the Ripon College. He could not secure a seat in a licensed mess or hostel; he stayed accordingly first with a friend in College Street and then in 86/2, Mechua Bazar Street (apparently an unlicensed mess where students resided), from where he intended ultimately to remove to the place of his brother-in-law at 74, Sookea Street. While resident at the Mechua Bazar Street mess, he became acquainted with one Jogesh Chandra Ray, who lived there and who, at the instance of the prosecution, has been named as a co-conspirator in the charge in this case; but Jogesh Chandra Ray has not only not been placed on his trial, no evidence even has been adduced to prove his participation in the conspiracy. In September 1913, while

still resident at the Mechua Bazar Street mess, Dinesh joined in the relief works undertaken to alleviate the distress of persons affected by the Damodar floods. It was here at Burdwan that he first became acquainted with Sasanka through Jogesh Chandra Ray. He got an attack of malaria in Burdwan, returned to Calcutta and went to his parents at Faridpore in the first week of October. He had a fresh attack of malaria there and could not return to Calcutta till the 12th November 1913, sometime after his College had re-opened. Next day, he attempted to remove from the Mechua Bazar Street mess to the place of his brother-in-law, but was informed that no room was available there. Consequently, he continued to live in the Mechua Bazar Street mess. He asserts that, on the 20th November, Sasanka came into the mess and asked for his help, as Sasanka had a sick friend (Sarada Charan Guha) in his own room who required to be nursed. Dinesh acceded to this request, accompanied Sasanka, stayed in his room during the night, and was arrested early in the morning by the Police. There is nothing intrinsically improbable on the face of this account. The only person who could speak to the alleged incident of Sasanka's visit to the Mechua Bazar Street mess on the 20th November, was Jogesh Chandra Ray; the prosecution alleged him to be a co-conspirator but did not prosecute him. When the defence took out summons to cite him as a witness on their behalf, he was reported to have died. We are thus left with the undoubted fact that Dinesh was found in the room and his explanation as to how he was brought there. We have, in the *next* place, evidence adduced to show that Dinesh and Sasanka knew each other, and that Dinesh possibly now and then visited Sasanka. But nothing really turns on this evidence, because admittedly Dinesh came to know Sasanka in September 1913 on the occasion of the Damodar relief works; yet it is worthy of note that no previous connection whatever between the two has been traced or suggested. Considerable stress, however, has been laid by the prosecution upon a list of names in cipher, found in the breastpocket of a coat claimed by Dinesh as his during the search of the room of Sasanka. The handwriting of this document has not been identified. The cipher list was not put to Jatindra Chandra Majumdar, who had been called to prove the handwriting of Dinesh on two post cards; but it transpired that the document had been shown by the Police to the witness outside Court. Upon this, the defence made the legitimate comment that the document had not been put to the witness in Court, because he had failed to recognise the handwriting when it was shown to him outside. We observe, however, that notwithstanding these circumstances, the Sessions Judge proceeded in his judgment to compare the document with the writing on the post cards, with a view to determine whether it was in the handwriting of Dinesh. This is a course which has not commended itself to high authority: *Barindra Kumar* v. *Emperor* (58), *Kurali Prasad Misser* v. *Anantaram Hajra* (105). Whether the cipher list, however, was or was not written by Dinesh himself, is not very material for the persent inquiry. It has been deciphered and turns out to be a list of names of persons, who apparently paid a small monthly subscription for some purpose undisclosed. The defence has suggested that this was probably a list of subscribers to the library which Sasanka kept in the room; it has also been urged that, in any event, the list does not connect Dinesh with any criminal conspiracy. This is perfectly true; yet one cannot but observe that it would have materially helped the case for the defence if Dinesh had offered a true explanation of the real nature and purpose of this apparently harmless document, instead of suggesting the very improbable theory that it had been planted in his coat pocket by an unscrupulous Police spy. In this connection reference may usefully be made to the following observations made by Tindal, C. J., in *Rex* v. *Frost* (63): "On the part of the prisoner, the learned Counsel who appear for him state, and I think they are justified in so stating, that he is not bound to show what was the object or purpose or intent of the acts that were undoubtedly done by the prisoner at the Bar. His Counsel say, the offence charged against him must be proved by those who made the charge, that he stands only to hear the evidence that is given against him, and, therefore, he is not bound to show at all, or in any way whatever, what

(105) 8 B. L. R. 490 at p. 502; 16 W. R. (P. C.) 16.

his real object or design was. Undoubtedly, the proof of the case against the prisoner must depend for its support, not upon the absence or want of any explanation on the part of the prisoner himself, but upon the positive affirmative evidence of his guilt that is given by the Crown. It is not, however, an unreasonable thing, and it daily occurs in investigations, both civil and criminal, that if there is a certain appearance made out against a party, if he is involved by the evidence in a state of considerable suspicion, he is called upon, for his own sake and his own safety, to state and to bring forward the circumstances, whatever they may be, which might reconcile such suspicious appearances with perfect innocence." In this particular case, however, as we have already said, the document, though in cipher and thus calculated to excite suspicion does not, when deciphered, incriminate the accused in whose possession it was found. Reference has *lastly* been made to the fact that the name of Dinesh appears in a list found at the search of the house of one Madan Mohan Bhowmik. This evidence is obviously valueless, but the Sessions Judge has also correctly held that it is not admissible against the accused. Nothing is known of Madan or of his activities, except that his name appears among some disconnected memoranda contained in a note-book found in Sasanka's room, and the mere fact that Madan had chosen to enter the name of Dinesh in a list prepared by him for some unknown purpose, is obviously irrelevant for the purposes of this trial. On a review of the entire evidence, it is plain that the conspiracy charged against Dinesh cannot be supported.

We have next to consider the charge under section 4 (*b*) of the Explosive Substances Act, 1908, against Chandra Sekhar, Sarada and Dinesh, against whom, as we have just found, the conspiracy charge has failed. It is obvious, indeed this was conceded by the Counsel for the Crown, that the charge under the Explosive Substances Act must necessarily fail along with the conspiracy charge. Reference was made to a number of judicial decisions to show under what circumstances a person may be deemed to be in possession of a moveable: *Queen-Empress* v. *Sangham Lal*(106), *Emperor* v. *Gajadhar* (107), *Kashi Nath* v. *Emperor* (108), *Ashruf Ali* v. *Emperor* (109), *Emperor* v. *Hamid Ali and Government of Eastern Bengal & Assam* v. *Serajuddin* (110), *Jogjiban Ghose* v. *Emperor* (111), *Peary Mohan* v. *Weston* (112), *Weston* v. *Peary Mohan* (113), *Kali Charan Mukherjee* v. *Emperor* (114) and *Nga Pu* v. *Emperor* (115). No useful purpose would be served by an analysis of the circumtances of the various cases discussed at the Bar. It is sufficient to say that while it is not necessary to prove manual possession of the explosive substance by the accused, it must be proved that it was in his power or control; possession to be punishable must also be possession with knowledge and assent. The mere fact that Chandra Sekhar, Sarada and Dinesh were in the room, does not show that they were in possession of all or any of the things contained therein; it is not shown that they were even aware of the existence of the tin cases, discs, and clamps or that they were acquainted with their nature and purpose. We hold accordingly that the charge under section 4(*b*) of Act VI of 1908 fails against each of these persons, quite as much as the conspiracy charge. This result is in conformity with the well-settled principle that when evidence at the disposal of the prosecution is insufficient to secure a conviction for the crime committed, it is inexpedient, even though it may be lawful, to prosecute the accused for a conspiracy the proof whereof really rests on the establishment of that very crime: *Rex* v. *Boulton* (116), *Emperor* v. *Noni Gopal* (*Lalit Mohan*) (38).

We have to examine, in the next place,

(106) 15 A. 129; A. W. N. (1893) 48.
(107) 25 A. 262; A. W. N. (1903) 29.
(108) 32 C. 557; 9 C. W. N. 719; 2 Cr. L. J. 417.
(109) 4 Ind. Cas. 699; 36 C. 1016; 11 Cr. L. J. 29; 14 C. W. N. 233.
(110) 5 Ind. Cas. 555; 37 C. 24; 14 C. W. N. 308.
(111) 2 Ind. Cas. 681; 9 C. L. J. 663; 13 C. W. N. 861; 10 Cr. L. J. 125.
(112) 13 Ind. Cas. 721; 16 C. W. N. 145; 13 Cr. L. J. 65.
(113) 23 Ind. Cas. 25; 40 C. 898 at p. 922; 18 C. W. N. 185.
(114) 22 Ind. Cas. 148; 41 C. 537; 18 C. L. J. 514; 18 C. W. N. 309; 15 Cr. L. J. 4.
(115) 13 Ind. Cas. 778; 13 Cr. L. J. 122; 4 Bur. L. T. 270.
(116) (1871) 12 Cox, C. C. 87 at p. 92.

the case of Kalipada, who was arrested in College Street on the 6th December 1913 with ten copies of the *Liberty* leaflet in his pocket. The only charge against him is that of conspiracy under section 120B, Indian Penal Code; there is no substantive charge against him under section 4 of the Explosive Substances Act, 1908. As regards this accused, there has been prolonged discussion on the question, how he came to be in possession of the *Liberty* leaflets. Counsel on his behalf contended that the leaflets were planted in his pocket by a Police spy, with a view to create evidence of conspiracy against him. This theory, which, in our opinion, has not been placed above the level of a bold hypothesis and has certainly not been established by the evidence, has been indignantly repudiated by the prosecution; the Crown has further sought to prove affirmatively that the leaflets were printed by Kalipada himself at the Loke Nath Press where he was admittedly employed as a compositor. The evidence shows that Kalipada, whose real name is Upendra Lal Ray Choudhury, belongs to a respectable family resident at Benotia in the District of Faridpore. Their circumstances have altered for the worse, and Upendra found himself driven to earn his livelihood in Calcutta, where he came about the middle of the year 1912. He used to reside at 119/4, Upper Circular Road and obtained employment as a compositor in the Loke Nath Press. He alleges that he adopted the name of Kalipada Ghose, because he felt that his humble occupation might bring discredit upon his family. He was employed in the press from October 1912 to 6th October 1913 on a regular monthly wage. Work in the press was thereafter temporarily suspended and his services were terminated. He was re-employed, however, on a daily allowance from the 10th to 16th November 1913. There is internal evidence to show that the *Liberty* leaflet was written after the 30th September 1913, as it makes mention of the College Square outrage, which took place on the 29th September, and the Mymensingh Bomb outrage, which happened on the following day. If, therefore, the leaflet was printed at the Loke Nath Press, it might then have been printed between the 1st and the 6th October or between the 10th and the 16th November. Elaborate evidence of a circumstantial character has been adduced by the Crown to show that the leaflet was printed at the Loke Nath Press. A minute comparison has been made of the types required to print the leaflet with the types found in the press, and quite a number of remarkable coincidences has been discovered. All the types necessary to print the leaflet were found in the press; but the most striking fact in this connection is the presence of a damaged T, which must have been used to print some of the copies of the leaflet. The damage to this type was obviously caused by a pin which fell accross the face as the printing was in progress. It is extremely improbable that a similar accident to a similar type should have happened in some other press. More than this, coincidences almost equally remarkable have been noticed in the case of types of other letters which had either been damaged or had some special feature, some peculiarity in form or shape. This part of the case does not require much elaboration, because we agree in the conclusion of the Sessions Judge that the evidence though circumstantial, is practically conclusive. We hold then that the *Liberty* leaflets, found in the possession of Kalipada, were printed at the press where he was employed as a compositor, and it is probable that they were printed by him. There is also indisputable proof that during the whole of the period that Kalipada was employed as a compositor, he was on friendly terms with Sasanka. They regularly took their meals at the same eating-house; there is also evidence to show that Sasanka guaranteed regular payment by Kalipada whom he introduced to the hotel keeper; it is further clear that as Sasanka moved from one hotel to another, Kalipada followed him. The question, consequently, arises, how far this association between Sasanka and Kalipada carries the case against the latter. In this connection, it must not be overlooked that there is no evidence to show that the *Liberty* leaflets were printed by Kalipada, at the instance or under the direction of Sasanka, and that when the leaflets were first found in his possession, Sasanka had already been in custody for two weeks. But it has been suggested on behalf of the Crown that they must have been actually printed before Sasanka was arrested. If it be assumed, however, that they had been printed by Kalipada under the direction of Sasanka, it is remarkable that no copy was

found when his room was searched on the 21st November. But even if the theory be accepted that the leaflets were printed by Kalipada under the direction of Sasanka, the case against Kalipada is not materially advanced. No doubt, the leaflet is a seditious document of an inflamatory character and advocates the use of bombs for purposes of assassination. But it does not follow that even if Sasanka employed Kalipada to print and disseminate seditious literature, he confided to him all his secrets and took him in as a member of the conspiracy to make and possess explosive substances. There is also no evidence to show that Kalipada was in any way an assenting party to the conspiracy in which Sasanka was engaged, or that he was even aware of its existence. There is a further circumstance which militates against such an hypothesis. According to the prosecution, the conspirators had assembled on the night of the 20th November to hold an important conference; if this assumption be well founded, it is remarkable that Kalipada should have been absent from that meeting. In fact, when all the circumstances come to be analysed, the two outstanding facts proved against Kalipada are that he was on friendly terms with Sasanka, and that a fortnight after the arrest of Sasanka he was arrested in College Street with copies of a revolutionary leaflet in his pocket, which had been printed most probably by himself at the press where he was employed as a compositor. In our opinion, whatever suspicions one may entertain as to the mental tendencies of Kalipada, there is not sufficient evidence to connect him with the particular conspiracy charged.

We have next to consider the appeal preferred by the Crown against the acquittal of Khagendra Nath Choudhury. Evidence was aduced in the Sessions Court to prove that his real name was Khagendra Nath Choudhury and that he had assumed the name of Suresh Chandra Choudhury for a dishonourable purpose. Suresh, his fellow-student and co-villagar, had passed the Intermediate examination whilst he himself was unsuccessful; but he passed himself off as Suresh to enable him to secure the appointment of a teacher in a school at Bhastara in the District of Hooghly. On behalf of the defence, it was contended that this evidence was inadmissible under section 54 of the Indian Evidence Act, but the objection was overruled. In our opinion, as it was admitted that Khagendra had assumed a false name, evidence should not have been allowed to prove the dishonourable purpose for which the false name had been assumed, a purpose in no way connected with the conspiracy charged against him. It is an elementary rule that a man's guilt is to be established by proof of the facts and not by proof of his character; such evidence might create a prejudice but not lead a step towards substantiation of guilt. As Stephen observed in his General View of the Criminal Law of England [Edition 1863, page 309], "a man's general bad character is a weak reason for believing that he was concerned in any particular criminal transaction, for it is a circumstance common to him and hundreds and thousands of other people, whereas the opportunity of committing the crime and facts immediately connected with it are marks which belong to very few, perhaps only to one or two persons; if general bad character is too remote, *a fortiori* the particular transactions of which that general bad character is the effect, are still further removed from proof; accordingly, it is an inflexible rule of English Criminal Law to exclude evidence of such transactions." We must consequently take no account of the circumstances under which Khagendra assumed the name of Suresh. When we come to examine the evidence relevant to the conspiracy charge, we find this much established that he was acquainted with both Sasanka and Kalipada; he appears to have come down on more than one occasion from Bhastara to Calcutta on account of illness and to have stayed in the room of the one or the other in Upper Circular Road; in fact, in each of these rooms medicine prescribed for him and partially used was found. But the mere fact that Khagendra was acquainted with Sasanka and Kalipada and was possibly on friendly terms with them, is obviously insufficient to connect him with the alleged criminal conspiracy. Considerable stress, however, has been laid upon a letter written by one Biroja from Calcutta on the 17th November 1913 and found in the room of Khagendra at Bhastara. In this letter, Biroja promises to send "new paper" in a few days. On behalf of the Crown it has been suggested that the "new paper" mentioned in the letter refers to the *Liberty*

leaflet; the suggestion, however, can take rank only as an unproved hypothesis. More than this, there is no evidence to show who this Biroja was, although, at the instance of the Crown, he was named as a co-conspirator in the charge. We know nothing about his activities, and although an attempt was made by some of the prosecution witnesses to prove that a man named Biroja lived with Kalipada for a few days, that evidence when scrutinised turns out to be contradictory and unreliable. We agree with the Sessions Judge that the evidence is not sufficient to connect Khagendra with the particular conspiracy charged.

We may here conveniently deal with four important questions of law raised and discussed before us in connection with the procedure adopted in the Court below, with regard to the examination of the witnesses and of the accused.

It appears that, in more than one instance, when the prosecution had called a witness to prove a particular point, (for instance, witnesses Rai Mohan Ray and Atul Chandra Das Gupta), the defence directed the cross-examination to matters wholly unconnected with the examination-in-chief, but yet relevant for the purposes of the trial. Two questions thereupon arose, *first*, whether, in a cross-examination of this description, leading questions could be put to the witness, and *secondly*, whether the prosecution were entitled to test, by way of cross-examination, the veracity of their own witnesses with regard to the matters elicited by the defence in cross-examination. The answer to these questions must depend upon the provisions of the Indian Evidence Act. Section 138 is in these terms: "Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then, (if the party calling him so desires) re-examined."

"The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief."

"The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if, new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter."

Section 143 provides as follows:—"Leading questions may be asked in cross-examination."

Section 154 is in these terms: "The Court may, in its discretion, permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party." It is consequently plain that the accused were entitled, in cross-examination, to elicit facts in support of their defence from the prosecution witnesses, though the facts thus elicited had no relation to the facts to which the witnesses had testified on their examination-in-chief. It is also plain that, in course of cross-examination of this character, the defence were entitled, in view of the generality of the provisions of section 143, to ask leading questions. It is finally obvious that the Court might, in its discretion, under section 154, permit the prosecution to cross-examine the witness, even though he had been originally called by them, with regard to the matters elicited by the defence. Indeed, in such circumstances, it would be generally an improper exercise of discretion to refuse the prosecution an opportunity to cross-examine the witness for the purpose indicated. This view is in accord with the law as administered in England. It has been ruled there that though leading questions may, in strictness, be put in cross-examination, even though the witness be favourable to the cross-examiner [*Parkin* v. *Moon* (117)], yet when a vehement desire is betrayed to serve the interrogator, it is certainly improper, and greatly lessens the value of the evidence, to put the very words into the mouth of the witness which he is expected to echo back: *Rex.* v. *Hardy* (118). Again, as the cross-examination is not limited to the matters upon which the witness has been examined-in-chief, but extends to the whole case, it would be obviously unfair to allow the evidence brought out in cross-examination to pass unchallenged: *Morgan* v. *Bridges* (119), *Rex* v. *Murphy* (120). The question was elaborately reviewed by Shaw, C. J., in *Moody* v. *Rowel* (121) where the learned Chief Justice summed up his opinion

(117) (1836) 7 Car. &. P. 409.
(118) (1794) 24 St. Tr. 755.
(119) (1818) 2 Stark 314; 1 B. & Ald. 647; 106 E. R. 238.
(120) (1841) 1 Arms. M. & O. 206.
(121) (1835) 17 Pickering 490; 28 Am. Dec. 317.

as follows:—"There is one authority directly in point, where the objection was taken, and it was decided by Lord Kenyon that such leading question is admissible: *Dickinson* v. *Shee* (122). So, in several recent cases, it has been held that where a witness is called to a particular fact, he is a witness to all purposes and may be fully cross-examined to the whole case, and no distinction is suggested as to the mode of cross-examination: *Morgan* v. *Bridges* (119) *Rex* v. *Brooke* (123). The weight of authority is in favour of the right to put leading questions under the circumstances stated, and this is confirmed by practice and experience". As is pointed out in Taylor on Evidence (Article 1432), in the United States the difficulty is avoided by the adoption of the logically consistent rule that a party has no right to cross-examine any witness, except as to cirumstances connected with matters stated in his examination-in-chief, and if he wishes to examine him respecting other matters, he must do so by making him his own witness and by calling him as such in the subsequent progress of the cause. [See the judgment of the Supreme Court of the United States delivered by Mr. Justice Story in *Philadelphia and Trenton Railroad Co.* v. *Stimpson* (124)]. The view we take is to some extent supported by the decision of the Judicial Committee in *Kalagurla Suryanarayana* v. *Yarlagadda Naidoo* (125). It may finally be added that the matter is eminently one in the discretion of the trial Judge, and his decision is practically conclusive: *Price* v. *Manning* (126), *Rice* v. *Howard* (127).

In the course of the trial before the Sessions Judge, a persistent effort was made by the defence to elicit from individual prosecution withesses whether he was a spy or an informer, and also to discover from Police officials the names of persons from whom they had received information. The Sessions Judge disallowed questions of this character, and, in our opinion, the course he adopted was correct. In *Reg.* v. *Bernard* (128), when objection was taken to a question put to a witness, whether he had gone to a certain place as a spy, Lord Campbell allowed the objection to prevail, on the ground that the question was not relevant, and that the witness was really called upon to draw an inference from facts within his knowledge. Again, in *Rex* v. *Smith O'Brien* (129), it was ruled that disclosures made by informers to the Government, the Magistracy or the Police, with the object of detecting and punishing offenders were privileged. Reference was made to the general rule formulated by Eyre, C. J., in *Rex* v. *Hardy* (118): "It is perfectly right that all opportunities should be given to discuss the truth of the evidence given against a prisoner; but there is a rule, which has universally obtained on account of its importance to the public for detection of crimes, that those persons who are the channel, by means of which that detection is made, should not be unnecessarily disclosed; if it can be made to appear that really and truly it is necessary to the investigation of the truth of the case that the name of the person should be disclosed, I should be very unwilling to stop it, but it does not appear to me that it is within the ordinary course to do it." It may now be taken as settled rule that witnesses for the Crown in criminal prosecutions undertaken by the Government are privileged from disclosing the channel through which they have received or communicated information: *Rex* v. *Watson* (130), *Reg.* v. *Richardson* (131), *Attorney-General* v. *Briant* (132), *Marks* v. *Beyfus* (133); but it has been ruled that a detective cannot refuse on ground of public policy to answer a question as to where he was secreted: *Webb* v. *Catchlove* (134).

(122) (1801) 4 Esp. 68.
(123) (1819) 2 Stark 472; 20 R. R. 723.
(124) (1840) 14 Peter 448; 10 Law. Ed. 535.
(125) 6 C. W. N. 513 (P. C.)
(126) (1889) 42 Ch. D. 372; 58 L. J. Ch. 649; 61 L. T. 537; 37 W. R. 785.
(127) (1885) 16 Q. B. D. 681; 55 L. J. Q. B. 311; 34 W. R. 532.
(128) (1858) 1 F. & F. 240; 8 St. Tr. (N. S.) 887 at p. 935.
(129) (1849) 7 St. Tr. (N. S.) 2 at p. 123.
(130) (1817) 32 St. Tr. 1 at p. 106.
(131) 3 F. & F. 693.
(132) (1846) 15 M. & W. 169; 71 R. R. 610; 15 L. J. Ex. 265.
(133) (1890) 25 Q. B. D. 494; 59 L. J. Q. B. 479.
(134) (1886) 3 T. L. R. 159.

AMRITALAL HAZRA *v.* EMPEROR.

A question has been raised here as to the procedure provided in section 360, sub-section (1), of the Criminal Procedure Code. The Sessions Judge appears to have strictly carried out the provisions of the section, which require that the evidence of each witness, as it is completed, shall be read over to the witness in the presence of the accused, if in attendance or of his Pleader, if he appears by a Pleader. This procedure appears to have occupied considerable time; but in view of the decisions in *Mohendra Nath Misser* v. *Emperor* (135) and *Jyotish Chandra Mukerjee* v. *Emperor* (136), which are in accord with the case of *Kamatchinathan Chetti* v. *Emperor* (137) and were binding on the Sessions Judge, it must be ruled that the procedure he followed is not open to criticism. We may add that in a case of this description, where every possible point was likely to be contested, a strict compliance with the statutory provisions was manifestly desirable.

A question has been raised in this Court as to the propriety of the procedure adopted by the Sessions Judge when he accepted written statements from the accused, and our attention has been drawn to *Emperor* v. *Ansuiya* (138). It is sufficient to state that no objection was taken by the Crown in the Court below when the statements were tendered and received. The procedure followed in this case is in accordance with what we believe is the universal practice in the Courts of this Province, and we do not feel pressed by the doubt suggested in the case mentioned. But it is desirable to state explicitly that such a written statement does not take the place of evidence nor of such examination of the accused as is contemplated by the Code.

Only one other question now requires consideration, namely, the question of sentence upon Sasanka. Counsel on his behalf pressed for a reduction of the sentence, should our ultimate conclusion be in favour of conviction. The Crown, on the other hand, has obtained a Rule for enhancement of sentence. After anxious consideration of the matter, we have formed the deliberate opinion that the order of the Judge should not be touched in this respect. The offences, of which Sasanka has been proved to be guilty, are of the gravest character, and their heinousness is, if possible, accentuated by the fact that the bombs under construction, if completed, would have been employed for the destruction of human life. The demands of justice, consequently, require a deterrent sentence. At the same time, we are of opinion that the maximum sentence should be reserved for offences of even a worse description, which, it is not difficult to imagine, might fall within the scope of the Explosive Substances Act. From these points of view, the sentences passed on Sasanka by the Sessions Judge are appropriate and should not be disturbed.

The result of our decision may now be summarised. Appeal No. 587 of 1914 preferred by Amrita *alias* Sasanka is dismissed. Appeals Nos. 588, 589, 590 and 598 preferred by Dinesh, Sarada, Chandra Sekhar and Upendra *alias* Kalipada are allowed. The convictions and sentences upon each of these persons are set aside, and we direct that they be released from custody. Appeal No. 4 of 1914, preferred by the Crown against the acquittal of Khagendra *alias* Suresh, is dismissed. Rule No. 1293, issued at the instance of the Crown, for enhancement of sentence is discharged.

Appeals Nos. 587 *&* 4 *dismissed*;
Appeals Nos. 588, 589, 590 *and* 598 *allowed*;
Rule No. 1293 *discharged.*

(135) 8 Cr. L. J. 116; 12 C. W. N. 845.
(136) 4 Ind. Cas. 416; 36 C. 955; 14 C. W. N. 82; 10 Cr. L. J. 581.
(137) 28 M. 308; 2 Cr. L. J. 756.
(138) A. W. N. (1903) 1.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION APPLICATION No. 292 OF 1915.

May 19, 1915.

Present:—Mr. Justice Piggott.

MOHAMMAD YASIN—APPLICANT

versus

CHEDA LAL AND ANOTHER—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 195, 467, 471—Execution proceeding—Sanction to prosecute for offences—Appeal to District Judge—Jurisdiction.

An application was made to a Judge of the Court of Small Causes for sanction to prosecute the applicant in respect of offences under sections 195, 467 and 471 of the Penal Code, committed in an execution proceeding before him. The application was rejected. The matter was taken up to the District Judge under section 195, clause 6, of the Criminal Procedure Code. In that Court the application was registered as a criminal appeal:

Held, that the application should not have been registered as a criminal appeal as it was a matter in which the Sessions Judge had no jurisdiction. [p. 540, col. 2.]

Salig Ram v. *Ramji Lal*, 28 A. 554; A. W. N. (1906) 103; 3 A. L. J. 394 (F. B.); 1 M. L. T 219; 3 Cr. L. J. 400; *Kanhai Lal* v. *Chhadammi Lal*, 1 Ind. Cas. 5; A. W. N. (1908) 290; 6 A. L. J. 1; 9 Cr. L. J. 63; 5 M. L. T. 55; 31 A. 48, referred to.

Application for revision against an order of the Sessions Judge of Meerut.

Mr. *M. L. Agarwala*, for the Applicant.

Dr. *S. N. Sen*, for the Opposite Party.

JUDGMENT.—The applicant in this case is one Mohammad Yasin, who on the 21st of February 1914 applied for execution of a certain decree in the Court of Small Causes at Meerut, alleging himself to be a transferee of the decree. He produced a sale-deed purporting to be executed by the decree-holder. On inquiry the Court held the genuineness of that deed to be open to great suspicion and rejected Mohammad Yasin's application. The original decree-holder having died during the pendency of these proceedings, there was some little delay, perhaps not unnatural under the circumstances, before his sons applied to the Judge of the Court of Small Causes for sanction to prosecute Mohammad Yasin in respect of offences punishable under sections 193, 467 and 471, Indian Penal Code, alleged to have been committed by him in the course of this transaction. The application came before the successor of the learned Judge who had tried the matter on the civil side, and sanction was refused by an order dated the 15th August 1914. On the 28th of October 1914, the applicants for sanction brought the matter before the District Judge of Meerut under section 195, clause (6), of the Code of Criminal Procedure. It appears that in this Court a somewhat curious practice prevails of registering applications to the District Judge under this particular provision of the Code of Criminal Procedure as "criminal appeals." One result of this practice was that the learned District Judge felt considerable doubt as to whether the application before him was not barred by Article 154 of the first Schedule to the Indian Limitation Act (IX of 1908). He decided, however, to overrule the objection as to limitation and for the reasons given in his order, dated the 17th of November 1914, he granted the sanction applied for.

The matter was brought before this Court by present application presented on the 13th April 1915, and a further result of the system of registering such applications as criminal appeals in the Court of the District Judge of Meerut has been that the application now before me has been admitted, and notice issued to the opposite side, as an application in criminal revision. On the reported authorities and settled practice of this Court, there can be no doubt whatever that this ought not to have been done. Although in the Court below the application to the District Judge was registered as a criminal appeal, it was an application to the District Judge. It was an application in a matter in which the Sessions Judge could have no possible jurisdiction. I do not think the parties concerned were under any misapprehension as to the matter being before the District Judge of Meerut and not before the Sessions Judge. For authorities in this Court I am content to refer to a decision of the Full Bench in *Salig Ram* v. *Ramji Lal* (1). It is an arguable point, on the wording of section 195 of the Code of Criminal Procedure, and a point as to which there has been difference of opinion between the various High Courts, whether under the circumstances stated Mohammad Yasin is not entitled to bring the matter before this Court by a further application under section 195, clause (6), of the Code of

(1) 28 A. 554; A. W. N. (1906) 103; 3 A. L. J. 394 (F. B.); 1 M. L. T. 219; 3 Cr. L. J. 400.

Criminal Procedure. This point has, however, been settled in the negative so far as this Court is concerned ever since the decision in *Kanhai Lal* v. *Chhadammi Lal* (2). The only revisional jurisdiction, therefore, which I can be asked to exercise in the matter is that limited by section 115 of the Code of Civil Procedure. I am content to say that I find no valid cause for interference under that section. The application is dismissed.

Application dismissed.

(2) 1 Ind. Cas. 5; 31 A. 48; A. W. N. (1908) 290; 6 A. L. J. 1; 9 Cr. L. J. 63; 5 M. L. T. 55.

MADRAS HIGH COURT.

CRIMINAL LETTERS PATENT APPEAL No. 2 OF 1915.

March 26, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Coutts-Trotter.

NARAYANA ASARI AND OTHERS—APPELLANTS

versus

KANDASAMI ASARI—PETITIONER—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 145, scope of—Actual physical possession, consideration of—Possession, nature of, irrelevant—Written statement—Jurisdiction.

Section 145 of the Code of Criminal Procedure is concerned solely with the fact of actual physical possession whether lawful or unlawful, whether in contemplation of law enjoyed by the possessor in his own right or on behalf of others. [p. 542, col. 2.]

Therefore, in proceedings under that section any question as to whether possession is on behalf of others or in one's own right is quite irrelevant. [p. 542, col. 2.]

Tarujan Bibee v. *Asamuddi Bepari*, 4 C. W. N. 426, distinguished.

Questions as to the rights of parties raised by their written statements under section 145, Criminal Procedure Code, are quite irrelevant; as such proceedings are initiated by the Magistrate in the interests of public order and tranquillity and it is his preliminary order that settles the actual issue between the parties and founds his jurisdiction. [p. 542, col. 2.]

Appeal under clause 15 of the Letters Patent against the orders of the Hon'ble Mr. Justice Sadasiva Aiyar, dated the 10th of December 1914, in Criminal Revision Case No. 463 of 1914 (Criminal Revision Petition No. 395 of 1914), reported as 26 Ind. Cas. 644, preferred against the order of the Court of the Divisional Magistrate of Tuticorin, dated the 8th May 1914, in Miscellaneous Case No. 5 of 1914.

FACTS.—In the village of Valavellam Eral in Tinnevelly District the goldsmiths claimed an Amman Temple as their own, whereas the bell-metal workers claimed that the temple belonged to the whole Asari community. The Sub-Divisional Magistrate of Tuticorin took proceedings under section 145, Criminal Procedure Code, and held that the bell-metal workers were in possession and the goldsmiths should not interfere till they got an order of the Civil Court in their favour. Against the order a revision petition was preferred to the High Court. The Hon'ble Mr. Justice Sadasiva Aiyar quashed the proceedings of the Magistrate under section 145, Criminal Procedure Code, on the ground that it was admitted by the bell-metal workers to be a temple common to all the *Asaris*. This Letters Patent Appeal is against the decision of that order.

Mr. *M. D. Devadoss*, for the Appellants:—The Magistrate was only concerned with the fact of actual possession and the bell-metal workers did not claim to be in exclusive possession but only in joint possession, and, therefore, the Magistrate had jurisdiction to pass the order.

Mr. *Jayarama Aiyar*, for the Respondents:—The writen statement of the bell-metal workers does not say anything about possession but speaks only of the rights of the parties. The jurisdiction of the Magistrate is, therefore, ousted.

JUDGMENT.—These proceedings arose out of a dispute as to the right to the possession and management of a temple in the village of Valavellam Eral. Both parties are *Asaris*, the appellants to this Court being bell-metal workers and the respondents goldsmiths. The goldsmiths claimed that no other persons than themselves had any right of access to the temple except by their sufferance; the bell-metal workers have maintained that, while the right of worship and access to the temple is common to all *Asaris*, the management and consequent possession of the temple belongs to certain *huqdars* of whom they are four.

The dispute, which has been in existence for many years, became exceptionally acute

in January of last year. Petitions were presented by both parties to various Magistrates and Police officials; it is not clear, nor is it material, which party took the initiative or what the petitions contained. On the 20th January 1914 with the aid of the Police, *kodai* was performed by the goldsmiths, and it was performed again by the bell-metal workers three days later on the 23rd January, apparently also assisted by the Police keeping order. On the 28th March matters having got no better, the Divisional Magistrate proceeded to exercise the powers conferred upon him by section 145 of the Criminal Procedure Code, and on that day made an order under the section summoning the parties to put in written statements, and to appear before him on the 17th April in support of their respective claims to be in actual possession of the temple. This order was duly served on the persons named in it, including all the appellants and the respondents; they put in written statements and appeared before the Magistrate on the 17th and 18th April, and a large number of witnesses were examined on dates to which the case was subsequently adjourned. He found that the appellants were in actual possession of the temple and forbade interference with such possession until a Court of Law should decide the case upon the merits. There was evidence before him that that possession had lasted since the 23rd January, *i. e.*, for more than two months before his preliminary order, as required by the proviso to sub-section 4 of section 145.

This decision was brought up on revision to the High Court, and its determination came before Sadasiva Aiyar, J.* The learned Judge set aside the order of the Magistrate, on the ground that the present appellants' own case as set out in their written statement was not that they were entitled to exclusive possession, but only to possession on behalf of the whole body of *huqdars* of which they formed only a part and that accordingly their possession could not in law be regarded as exclusive possession. In so deciding, he expressed himself to be following the authority of *Tarujan Bibee* v. *Asamuddi Bepari* (1). We think that such considerations are quite outside the purview of section 145, which, in our view, is concerned solely with actual physical possession, whether lawful or unlawful, whether in contemplation of law enjoyed by the possessor in his own right or on behalf of others. This seems to us clearly to follow from the words of the section. The issue is defined to be the "fact of actual possession" (sub-section 1) and the Magistrate is to decide it "without reference to the merits of the claim of any party to a right to possession" (sub-section 4). The decision in *Tarujan Bibee* v. *Asamuddi Bepari* (1) is not only not inconsistent with the view we take, but supports it; the petitioner there failed because his possession was joint possession with another, not in contemplation of law, but in actual physical fact.

A further contention was pressed upon us by the respondent. It was said that the written statement put in by the appellants dealt only with their legal rights on the merits, contained no allegation that they were in actual possession, and no prayer for confirmation of that possession and that, therefore, the Magistrate had no jurisdiction to make the order in this case. It is the fact that the written statement was directed solely to the question of right and omitted to deal with the one relevant question, that of possession in fact. Where proceedings are initiated by a document emanating from one of the parties, as in the ordinary case of a plaint in a civil suit, the jurisdiction of the Court is, no doubt, limited by the allegations in that document and the relief sought in it. If the allegations disclose no cause of action, and no relief is sought which the Court has power to grant, the Court has no jurisdiction to grant relief which is not sought. But the proceedings under section 145 are of quite a different nature. They are initiated by the Magistrate himself in the interests of public order and tranquillity; and it is his preliminary order which defines the issue to be determined and founds the jurisdiction to determine it. The written statements of the parties are merely materials to assist the Magistrate in ascertaining the grounds on which they claim possession; the fact that the written statement of one party is not required to be served upon the

( ) 4 C. W. N. 426.

* See 26 Ind. Cas. 644.—*Ed.*

other is conclusive to show that its contents neither found nor limit the jurisdiction. A difficulty might arise if it could be shown that the Magistrate was misled by the irrelevance of the written statements and had taken into consideration matters alien to the issue. Nothing of the kind took place here; the Magistrate says in the clearest terms in paragraph 5 of his order: "The present enquiry is only concerned with actual possession of the temple." The Magistrate correctly defined the issue, the evidence was directed to that issue, and the order he made was in accordance with that evidence and was one which he had jurisdiction to make. We allow the appeal with costs and restore the order of the Divisional Magistrate.

Appeal allowed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 240 OF 1915.

May 19, 1915.

Present:—Mr. Justice Piggott.

Raja AUDENDRA PARTAP SINGH SAHAI—APPLICANT

versus

DAMAN SINGH AND OTHERS—OPPOSITE PARTIES.

Criminal Procedure Code (Act V of 1898), s. 145—Dispute as to land between two channels—Boundary—Province of Agra and Oudh—Deep stream of Ghagra *—Magistrate—Jurisdiction.*

The deep stream of the river Ghagra, as it exists at any given point, forms the boundary line between the District of Fyzabad in the Province of Oudh and the District of Basti in the Province of Agra. [p. 543, col. 2.]

A dispute arose about a piece of land situated between the two distinct channels of the river Ghagra between the District of Fyzabad and the District of Basti and the channel which was towards the Fyzabad side was found to be the deep stream of the river:

Held, that the Magistrate of Basti had jurisdiction to take cognizance of the dispute under section 145 of the Criminal Procedure Code. [p. 543, col. 2.]

Criminal revision against an order of the Magistrate of Basti.

Mr. *Satya Chander Mukerjee*, for the Applicant.

Dr. *S. C. Banerji*, for the Opposite Parties.

JUDGMENT.—This is an application in revision arising out of a riparian dispute. The river Ghagra flows between the District of Fyzabad in the Province of Oudh and the District of Basti in the Gorakhpur Division in the Province of Agra. It appears that at a certain point between these two districts the river divides into two disinct channels, northern and southern, leaving an island of alluvial soil between the two. A dispute having broken out between the proprietors of villages situated respectively on the Basti side and on the Fyzabad side of the river with regard to possession of a portion of this alluvial land, a Magistrate of the first class exercising jurisdiction in the District of Basti took cognizance of the dispute under section 145 of the Code of Criminal Procedure, and after issuing notice to the parties and conducting a formal inquiry has passed certain orders. The point taken in the application before me, and the only point with which I have to deal, is that the Magistrate's proceedings were without jurisdiction because the land in dispute was situated in, and formed part of, the Fyzabad District. The *first* question is as to the criterion to be applied. The Magistrate has discussed this point, and in reliance on the statements made by the parties before him and also on the records of custom found by him in the village papers, he has held that the deep stream of the river Ghagra, as it exists at any given point, forms the boundary line between the Districts of Fyzabad and Basti. In this I have no doubt that the Magistrate was right. The reasons given by him for his decision may be confirmed and strengthened by another consideration. The boundary in question is not merely between two districts, but between two provinces. In a case which came before me in the Judicial Commissioner's Court in Lucknow, the same question was raised. I was referred to a notification of the Governor-General in Council fixing the deep stream of the river Ghagra as the boundary between the Province of Oudh and what is now the Province of Agra at this point. I have mislaid the reference for the moment, but my recollection is clear as to the fact. The *next* question is whether according to

this rule the land in dispute is in fact situated in the District of Basti. The Magistrate had to determine on which side of this land the deep stream of the river is situated. In other words, he had to determine whether the northern or the southern of the two streams, of which I have already spoken, could most appropriately be described as the deep stream of the river. He seems to have gone into this matter carefully and to have based his decision in part on the evidence offered before him, and in part on his own observations in the course of two local inspections, during which he visited the two streams and the alluvial land between them at points separated by an interval of about two miles. The conclusion he has arrived at is that the southern stream represents the deep stream of the river. I am not sure how far I should be justified in any case in reconsidering this point on the present application for revision, but I am content to say that I find no sufficient reason for dissenting from the conclusion arrived at by the Magistrate. The main point taken in argument before me against that conclusion seems to be that it was arrived at without taking specific measurements of the depth of the two streams, and indeed after an admission that the Magistrate had found it impossible to take such measurements, at any rate on the occasion on which he inspected the two streams at points immediately to the north and south of the land in dispute. As a matter of fact the question, which of two such streams may fairly be regarded as the deep stream of the river, is one to be decided on an inspection of the two streams along their entire separate course, and on a consideration of the appearance and circumstances of the two streams as a whole, including, of course, the question of the depth of each of the streams at various points. I gather from the Magistrate's order that what really settled the question to his mind was his inspection of the two streams at a point two miles further up stream from the land in dispute. He there found that the northern stream was fordable and was being easily crossed by people on foot whereas boats were lying along the southern stream. This is in effect a finding, though not based on respective specific measurements as to the depth of the two streams at this point. For the reasons given, I find no good cause for interference and dismiss this application.

Application dismissed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 174 OF 1915.
CASE REFERRED No. 16 of 1915.
April 28, 1915.

Present:—Mr. Justice Napier.

In re CHAGANTIPATI CHINA BASAVAPP—ACCUSED.

Arms Act (XI of 1878), s. 14—Spear, deposit of—Failure to deposit—Conviction, if legal.

Section 14 of the Indian Arms Act does not require "a spear" to be deposited with a Magistrate and a conviction for omission to do so is illegal.

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the Sessions Judge of Kistna at Masulipatam, in his letter dated 8th March 1915.

The *Public Prosecutor*; for the Government.

ORDER.—There is no provision in section 14 of the Indian Arms Act requiring a person to deposit a spear: and no other basis for the conviction is put forward by the Magistrate. The conviction and sentence are set aside. The fine should be refunded and the spear should be returned to the accused.

Conviction set aside.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION No. 218 OF 1914.

March 5, 1915.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

RAMACHANDRA NATHA AND OTHERS—PLAINTIFFS—APPLICANTS

versus

THE GREAT INDIAN PENINSULA RAILWAY—DEFENDANT—OPPONENT.

Railways Act (IX of 1890), ss. 47 (1) (f), 72 – R. (2) of rules framed under s. 47—"Delivery to be carried by Railway", meaning of—Commencement of Company's liability, whether dependent upon issue of receipt.

A "delivery to be carried by Railway" means something more than a mere depositing of goods on the Railway premises; it means some sort of acceptance by the Railway, a taking as well as a giving. [p. 545, col. 2.]

The commencement of the liability of a Railway Company for goods delivered to be carried under section 72 is in no way dependent upon the fact of a receipt having been granted and must be determined on the evidence in the case quite independently of rule 2 under section 47, sub-section (1), clause (*f*). [p. 547, col. 2.]

Banna Mal v. *Secretary of State for India in Council*, 23 A. 367; A. W. N. (1901) 107, distinguished.

Application from a decision of the fourth Judge of the Bombay Court of Small Causes in Suit No. 21333 of 1913.

Mr. *Jinnah* (with him Mr. *B. G. Kher*), for the Applicants.

Mr. *Binning* (instructed by Messrs. *Little & Co.*), for the Opponent.

JUDGMENT.

HEATON, J.—This is a case in which the plaintiffs have claimed damages from the Great Indian Peninsula Railway Company on account of certain goods, which were destroyed after they had been placed on the Railway Company's premises and which the plaintiffs allege in effect had been delivered to the Company for the purpose of carriage by Railway. The suit was disposed of by a Judge of the Court of Small Causes at Bombay in favour of the defendant, and after a hearing before the Full Bench the same conclusion was reached.

An application was made to this Court by the plaintiffs, a Rule was issued and we have heard the matter fully argued. As neither the applicants nor the opponent have any objection to our disposing of this matter, I do not propose to say anything on the question of our jurisdiction except that so far as I am enabled to form an opinion in the absence of arguments, I do not see any serious reason to doubt that we have jurisdiction.

Section 72, so far as it covers this case, runs as follows:—

"The responsibility of a Railway administration for the loss, destruction or deterioration of animals or goods delivered to the administration to be carried by Railway shall, subject to the other provisions of this Act, be that of a bailee under sections 151, 152 and 161 of the Indian Contract Act, 1872."

A "delivery to be carried by Railway" means something more than a mere depositing of goods on the Railway premises; it means some sort of acceptance by the Railway, a taking as well as a giving. When that taking occurs, is a matter which depends on the course of business and the facts of each particular case; but it certainly may be completed before a Railway receipt is granted. For by the instructions of the Great Indian Peninsula Railway "a Railway receipt would not be granted until the consignment has been loaded." The loading, it seems to me, would indubitably finish the delivery. As to whether the delivery would be complete at some earlier stage, for example, by the weighment, I say nothing, for the Court below has held that a receipt is essential and that is the only matter we are called on to decide. But it is argued that section 72 alone does not control the case, that the meaning of the section is modified by a rule made under section 47. This rule runs:

"Goods will in all cases be at owner's risk taken over by the Railway administration for despatch and a receipt in the prescribed form has been granted duly signed by an authorised Railway servant."

If that rule is good then the decision of the Court below is correct. Is it good? I think not. Its effect is to define, and by defining change what otherwise would be the meaning of section 72.

The provision to make rules which we are concerned with is contained in section 47 and is as follows:—

47 (*f*)"Every Railway Company.....shall make general rules consistent with this Act... for regulating the terms and conditions on

which the Railway administration will warehouse or retain goods at any station on behalf of the consignee or owner."

This gives no express power to make rules regarding the liability of the Railway and that liability, it seems to me, remains precisely as defined by section 72. To hold otherwise would be to assume that the Legislature conferred, not expressly but indirectly or by implication, a power to modify by rule the natural meaning of a section of the Act. I think this cannot be so, *firstly*, because it is a manner of making laws that I cannot attribute to a responsible Legislature: and *secondly*, because I think it is directly against the provision that the rules must be consistent with the Act.

I would, therefore, make the Rule absolute, set aside the decree of the lower Court and remand the suit to be disposed of with reference to the observations contained in our judgments in this matter.

Costs of this Rule will be costs in the suit.

SHAH, J.—The point argued in this case is whether rule No. 2 under section 47, sub-section (1), clause (*f*), is consistent with the provisions of section 72 of the Indian Railways Act or not, in so far as it makes the responsibility of the Railway administration dependent upon a receipt being granted in the prescribed form.

The learned Judges of the Full Court have held that it is consistent with section 72 of the Act. Their decision proceeds upon the assumption that the goods were marked and weighed after the consignment note was tendered to the Company by the plaintiff's agent.

I have considered whether a point of this kind could be appropriately decided in the exercise of the extraordinary jurisdiction of this Court. Having regard to the importance and nature of the point, as also to the fact that both the parties are willing that it should be decided, I think it is a fit case for our interference, if not under section 115 of the Code of Civil Procedure, under the powers of superintendence which this Court has over the Presidency Small Cause Courts in virtue of section 6 of Act XV of 1882 and of the provisions of 24 & 25 Vic., c. 104.

The goods in this case are said to have been brought on the Railway premises and a consignment note given to the Company by the plaintiffs' agent. The parties are not agreed as to whether the goods were marked and weighed, and there is no finding of the Full Court on the point. It is common ground that no receipt was given by the Company. It is urged on behalf of the applicant that the Company is responsible for the loss or destruction of the goods delivered to the Company to be carried by Railway as a bailee under sections 151, 152 and 161 of the Indian Contract Act—subject, of course, to the other provisions of the Indian Railways Act under section 72 of the Act. Apart from the rule in question it is not seriously disputed—and in my opinion cannot be disputed—by the Company that there may be delivery of goods to be carried by Railway within the meaning of section 72 before any receipt is issued by the Company. The delivery contemplated by section 72 is an actual delivery and marks the beginning of the Company's responsibility. That delivery would, no doubt, involve not merely the bringing of the goods on the Railway premises, but acceptance thereof by the Company for the purpose of carrying the same by Railway. Such acceptance may be expressed or implied in a variety of ways, by the usual course of business, and may be quite independent of any receipt being granted by the Company. Of course it will depend upon the circumstances of each case and the usual course of business of the Railway administration as to whether the goods can be said to be delivered to be carried by Railway under section 72 of the Act.

This being my view of the meaning of the expression 'delivered to be carried by railway' used in section 72, the question is whether rule 2 limits or modifies it in any way, and if it does so, whether it can do so. In my opinion it does not and cannot do so. The rule provides that "goods will, in all cases, be at owner's risk until taken over by the Railway administration for despatch and a receipt in the prescribed form has been granted duly signed by an authorised Railway servant." This rule has been sanctioned by the Governor-General in Council and promulgated under section 47, sub-section

(1), clause (*f*), for regulating the terms and conditions on which the Railway administration will warehouse or retain goods at any station on behalf of the consignee or owner. It relates to wharfage, and is one of the rules under the heading "on goods for despatch waiting to be consigned." The first rule relates in terms to goods brought to railway premises for despatch but not consigned, and to a period before the consignment note is received. If due regard is had to the context as well as to the purpose of the rule in question, it seems to me that it cannot be used as in any way affecting the Company's liability under section 72 of the Act. It is true that the wording of the rule is rather wide and lends itself to the construction that no liability of the Company can arise unless and until a receipt has been granted by an authorised Railway servant. Assuming, however, that the rule can be used for that purpose, it is necessary to consider whether it is consistent with the Act. If apart from the rule the goods can be delivered to be carried so as to render a Railway administration liable as a bailee under section 72 without any receipt being granted, the rule, which postpones the liability until a receipt is granted, seems to me to be inconsistent with section 72. The liability defined by the Act cannot be thus modified by a rule, and the fact that the rule has received the sanction of the Governor-General in Council cannot remove the inconsistency. The result of thus postponing the liability may be serious in some cases. If the rule be allowed to have the effect which the Company contends in this case it has, the goods can practically remain in charge of the Company for an indefinite length of time without the owner having any control over them, and without the Company being in any way liable for their loss or destruction. It is a result which ought to be avoided as far as possible. The Act does not appear to me to contemplate any such result and, in my opinion, it cannot be secured by the rule in question.

It is urged on behalf of the Company that the consequences of holding that there may be delivery of goods within the meaning of section 72 before a receipt has been granted, would be anomalous in those cases where the owner ultimately agrees to limit the responsibility of the Company as provided in sub-section (2) of section 72, inasmuch as there may be the liability of the Company before a receipt is granted, while after it is granted it would cease because of the agreement limiting the responsibility. I do not think that there is any anomaly in this, nor can I think that the possibility of such an agreement being entered into in any case is any ground for not giving effect to the view that the rule in question is not consistent with the terms of section 72. Mr. Binning has relied upon the decision of *Banna Mal* v. *Secretary of State for India in Council* (1). Apparently the only ground urged and considered in that case was whether the rule, which was similar to the rule with which we are concerned in this case, was bad because it was inequitable. It does not appear to have been argued that the rule was inconsistent with the provisions of section 72 of the Act. I am, therefore, unable to accept that case as any guide in deciding the question which has been argued in the present case.

It follows, therefore, that the commencement of liability of the Company for goods delivered to be carried under section 72 is in no way dependent upon the fact of a receipt having been granted, and must be determined on the evidence in the case quite independently of rule 2 under section 47, sub-section (1), clause (*f*).

For these reasons I concur in the order proposed by my learned brother.

Rule made absolute.

(1) 23 A. 367; A. W. N. (1901) 107.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 175 OF 1914-15 OF GONDA DISTRICT.

March 30, 1915.

Present:—Mr. Holms, S. M.

MAHARAJA OF BALRAMPUR—APPELLANT

versus

PIRTHIPAL AND OTHERS—RESPONDENTS.

Oudh Rent Act (XXII of 1886), s. 107E (b)—Notice to resume land—Specific service not mentioned—Notice, defective, effect of.

In a notice issued under section 107E (*b*), it is essential that the specific service which the proprietor no longer requires should be specifically mentioned, otherwise, the notice is defective and invalid. [p. 48, col. 1.]

RAMANAND RAI *v.* MUHAMMAD ABDUL BASHAR.

Second appeal from an order of the Commissioner, Fyzabad Division, dated the 7th October 1914, reversing that of the Assistant Collector, Gonda District, in a case of resumption of *muafi* land.

JUDGMENT.—For the purpose of this appeal, it seems to me unnecessary to consider whether the rent-free land is held for the performance of a specific service under the terms of the original grant of 1845 A. D., for there is a defect in the notice which seems fatal to the appellant's case. It is necessary that in the notice the specific service should be stated, which the proprietor no longer requires under section 107E (*b*). In the notice in this case the only service mentioned is referred to in the words '*khidmat mazhabi*,' which are of the most general description and certainly indicate no specific service.

I dismiss the appeal with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 16 OF 1914-15 OF GHAZIPUR DISTRICT.

May 5, 1915.

Present:—Mr. Holms, S. M., and Mr. Campbell, J. M.

RAMANAND RAI AND OTHERS—DEFENDANTS—APPELLANTS

versus.

Sheikh MUHAMMAD ABDUL BASHAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Oudh Rent Act (XII of 1881), s. 9—Agra Tenancy Act (II of 1901), s. 22—Male occupancy tenant dying while Rent Act in force—Succession by widow—Widow dying after Tenancy Act came in force—Succession—Brother's right to succeed without proving sharing in cultivation.

The plots in suit along with other plots were the joint holding of three brothers *R*, *J* and *K*, who separated in the life-time of *K* and a division of holding took place. *K* died while the Rent Act was in force and was succeeded by his widow who died after the coming into force of the Tenancy Act. Upon the widow's death, *R* and the son of *J* who had died claimed the holding:

Held, that the widow having died while the new Act was in force, succession was governed by section 22 of the Tenancy Act and not by section 9 of the Rent Act and that *R* was, therefore, entitled to succeed his brother *K* without any sharing in cultivation bein proved. [p. 548, col. 2.]

Selected Decision No. 3 of 1907, followed.

But the son of *J* not having co-shared in cultivation with *K* at the latter's death could not succeed to the holding. [p. 549, col. 1.]

Second appeal from an order of the Commissioner, Benares Division, dated the 6th October 1914, reversing that of the Assistant Collector, Ghazipur District, in a case of ejectment.

JUDGMENT.

HOLMS, S. M.—(*April 21st*, 1915.)—The Additional Commissioner has not come to any clear finding as to what the facts of the case are. I have been through the evidence, and the facts so far as the evidence shows appear to be these. The plots in suit along with other plots were originally a joint holding of the three brothers, Ramanand Rai, defendant, Jageshar, father of the defendant, Ramdeo, Kauleshar, the husband of the late tenant, *Mussammat* Janki. During the life-time of Kauleshar, there was a division between the three brothers. Kauleshar died when the old Rent Act of 1881 was in force, and on his death his widow's name was recorded as sole occupancy tenant in respect of the plots in suit. Her name continued to be recorded up to 1309 *Fasli* inclusive, but disappeared from 1310 when the present defendants' names were recorded, presumably as her heirs. One witness who gave his evidence in January 1914 says that *Musammat* Janki died some 12 or 13 years ago. His evidence is consistent with her dying either before or after the 1st January 1902, when the present Tenancy Act came into force. As her name was recorded during the whole of 1309 *Fasli*, in the presence of any other evidence it may be fairly taken that she died after the 1st January 1902, that is to say, in the middle of 1309 *Fasli*.

Under Selected Decision No. 3 of 1907 then, the succession is governed by section 22 of the present Act, and not by section 9 of the former Act which would require proof of sharing in the cultivation by the brother before the brother could succeed, which, as the partition took place sometime before Kauleshar's death, was not the case. Under section 22 then, the brother succeeds at the death of the widow in any circumstances. The respondent argues that only

brothers who remained joint with the original occupancy tenants are entitled to succeed and that as the defendant, Ramdeo, had separated from Kauleshar, they could not succeed. The respondent is unable to produce any ruling in support of this contention, which is oppossed to the clear wording of the section. In this view Ramanand Rai has a right to succeed to *Musammat* Janki in the occupancy holding, and Ramdeo, who is only a brother's son and did not share in the cultivation at the time of Kauleshar's death, has no right.

I would set aside the order of the Additional Commissioner and restore that of the Assistant Collector, respondent paying costs throughout.

CAMPBELL, J. M.—I agree.

Appeal allowed.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 140 OF 1914.

May 19, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

MUNNA LAL—DEFENDANT—APPELLANT

versus

RAM GULAM SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Pre-emption—Recorded co-sharer, meaning of.

Where a person has been a recorded co-sharer in possession of a property by virtue of a sale-deed and no steps have been taken for three years to set aside the sale, or to oust him from possession, he must be regarded as a co-sharer for the purposes of a pre-emption suit.

First appeal from an order of the District Judge of Budaun, dated the 31st of August 1914.

Mr. *Sital Prasad Ghose*, for the Appellants.

Mr. *S. D. Sinha*, for the Respondents.

JUDGMENE.—The facts connected with this appeal so far as they are material to our decision are as follows. The plaintiff is a recorded co-sharer and in possession of certain property in the *mahal*. He has been recorded for three years. It is conceded that if he is a "co-sharer", he is entitled to bring the present suit for pre-emption as against a stranger. The defendant-vendee, however, contends that the plaintiff is not a co-sharer, because his vendor had no title to sell to him; on the contrary that the real owner of the share (which the plaintiff's vendor purported to sell) sold the share to him. The lower Appellate Court has held that the plaintiff being a recorded co-sharer in possession of the property and no step having been taken to set aside the sale, or to oust him from possession, he must be regarded as a co-sharer. In our opinion this view is quite correct.

It is next argued that the Court of first instance having found that the property, in respect of which the plaintiff is recorded, could not be sold by the plaintiff's vendor, and that this share has vested in the defendant in the present suit, and the finding not having been set aside by the lower Appellate Court, the suit should not have been remanded. It is quite impossible that two persons could be the owners of the same share at the same time. In our opinion, the Court below must be taken to have set aside the finding of the Court of first instance.

Under these circumstances the appeal fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 266 OF 1913.

April 12, 1915.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

S. T. U. V. R. MUTHURAMAN CHETTIAR—DEFENDANT—APPELLANT

versus

PONNUSWAMY UDAYAR—PLAINTIFF—RESPONDENT.

Hindu Law—Partition—Provision in partition-deed that on death of one brother without male issue his share should pass to survivors—Provision, whether illegal—Transfer of spes successionis*—Restraint upon alienation.*

A provision in a partition-deed among brothers, that on the death of any one of them without male issue his share must pass to the survivors who should divide it rateably among themselves, is not illegal; it is not a transfer of a *spes successionis* within the meaning of section 6 (*a*) of the Transfer of Property Act, nor is it a restraint upon alienation. [p. 550, col. 2; p. 552, col. 1.]

Per *Wallis, C. J.*—Where a contract to dispose of property by Will is upheld there is no reason why a similar contract to dispose of it by settlement during one's life-time cannot also be given effect to. [p. 550, col. 2.]

Per *Seshagiri Aiyar, J.*—A contract to devise lands can be enforced by persons claiming under the party who makes the contract. [p. 551, col. 1.]

Goilmere v. *Battison*, 1 Vern 48; 23 E. R. 301; *Fortescue* v. *Hennah*, 19 Ves. 67; 12 R. R. 137; 34 E. R. 443; *In re Parkin, Hill* v. *Schwarz*, (1892) 3 Ch. 510; 62 L. J. Ch. 55; 67 L.T. 77; 41 W.R. 120, followed.

A settlement unless it alters the line of succession, should be upheld. [p. 551, col. 2.]

Venkatarammamma v. *Brammanna Sastrulu*, 4 M. H. C. R. 345; *Anantha Tirtha Chariar* v. *Nagamuthu Ambalagaren*, 4 M. 200; *Jatendra Mohan Tagore* v. *Ganendra Mohan Tagore*, 18 W. R. 359; 9 B. L. R. 377; I. A. Sup. 47; 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 85, followed.

Agreements not to divide property are enforceable although they would not preclude a party entering into such an agreement from alienating it. [p. 551, col. 2.]

Anand Chandra Ghose v. *Prankisto Dutt*, 3 B. L. R. O. C. 14; 11 W. R. O. C. 19, *Rajendar Dutt* v. *Sham Chand Mitter*, 6 C. 106, *Ramlinga Khanapure* v. *Virupakshi Khanapure*, 7 B. 538, distinguished.

Parties who are entitled to divide a property can waive their rights but they cannot, by such an arrangement, alter the mode of succession. [p. 551, col. 2.]

Jefferys v. *Jefferys*, Cr. and Ph. 139; 41 E. R. 443; 54 R. R. 249; , *Kantee Chandra Mukerji* v. *Ali-i-Nabi*, 9 Ind. Cas. 935; 8 A. L. J. 199; 33 A. 414, *Ram Nirunjun Singh* v. *Prayag Singh*, 8 C. 138; 10 C.L.R. 66, followed.

Purna Shashi Battacharji v. *Kalidhan Rai Chowdhury*, 11 Ind. Cas. 412; 38 C. 603; 15 C. W. N. 693; 8 A. L. J. 681; 13 Bom. L. R. 451; 14 C. L. J. 1; (1911) 1 M. W. N. 403; 10 M. L. T. 361; 21 M. L. J. 1119, distinguished.

Appeal against the decree of the Court of Temporary Subordinate Judge of Trichinopoly, in Original Suit No. 14 of 1913.

Mr. *T. R. Krisanaswamy Aiyar*, for the Appellant.

Mr. *V. V. Srinivasa Aiyangar*, for the Respondent.

JUDGMENT.

WALLIS, C. J.—The short question in this case, is whether an attachment obtained by the defendant in execution of a decree against the widow of the late Maria Pillai and his three divided brothers should not be declared to be subject to a mortgage in favour of the plaintiff executed by the three surviving brothers in satisfaction of his debts. Ordinarily, of course, his widow would have been his heiress but under the terms of the partition deed, Exhibit A, between the four brothers, it was provided that in the event of the death of any one of them without male issue his share of the joint family properties, after deducting any alienations made by him, should be divided among the surviving brothers. It was held in *Kantee Chandra Mukerji* v. *Ali-i-Nabi* (1), in a precisely similar case that such a settlement was neither in contravention of Hindu Law nor obnoxious to the provisions of the Transfer of Property Act, section 6 (*a*), as being a transfer of an expectant interest in property. After the partition the settlors had full powers of disposition over their respective shares, and were at liberty to provide by settlement *inter vivos* what should become of those shares in the event of their deaths without male issue. They might even, according to the English decisions, have bound themselves by contract to dispose of their property in a particular way by Will, and I see no objection to their doing so by settlement. I think the appeal fails and must be dismissed with costs.

SESHAGIRI AIYAR, J.—Four brothers entered into a partition of their family properties on the 20th of July 1904. The deed of partition (Exhibit A) provided that "the respective parties should take and enjoy the properties which fell to their share, with the right to alienate the same by gift, sale, etc." Then it provided for a right of pre-emption if one of the brothers should desire to sell his share. The clause which is in dispute in this case is in these terms: "As we four have thus entered into a partition, each should enjoy his share until his death and when deceased leaves no male issue the properties which may remain at the death, after excluding the properties that may have been alienated by him, should go rateably to the other sharers." Maria Pillai, one of the four brothers died without male issue but leaving a widow and a daughter. Maria Pillai died in 1911. The defendant in this case obtained a decree against the widow of Maria Pillai and others for a debt due by the deceased. The three surviving brothers executed a deed of mortgage to the plaintiff in this case on the 31st May 1911 for Rs 5,000. The consideration is said to consist of debts payable by the deceased Maria Pillai. When the property was attached in execution of the decree obtained by the defendant, the plaintiff put in a petition that the property should be sold subject to his mortgage. The claim was rejected. The present suit is brought for a declaration of plaintiff's rights under

(1) 9 Ind. Cas. 935; 8 A. L. J. 199; 33 A. 414.

the mortgage. The Subordinate Judge upheld the plaintiff's contention and gave him a decree as prayed. He relied chiefly upon the decision of *Kantee Chandra Mukerji* v. *Al-i-Nabi* (1), which is practically on all fours with the present case. Although the point cannot be said to be free from doubt, I am not prepared to differ from the view taken in *Kanti Chandra Mukerjee* v. *Al-i-Nabi* (1). In the present case there is no restraint upon alienation. The last clause to which I have referred would apply only to residue of the property, which may be left by Maria Pillai after making such alienations as he chose during his life-time. It was contended that the provision for the undisposed of properties devolving upon the remaining brothers is practically a restraint upon the power to make a Will, which is equivalent to a restraint upon alienation. It is doubtful whether Maria Pillai was not competent to dispose of the property by Will notwithstanding the language used in this clause. Even on the supposition that the clause imposes fetters upon the powers of devise, I am not satisfied that such a covenant is invalid.

Under the English Law it was held *Goylmer* v. *Paddisto* (2)] by Lord Chancellor Finch that a contract to devise lands can be enforced by persons claiming under the party who makes the contract. In *Goilmere* v. *Battison* (3), and *Fortescue* v. *Hennah* (4) this view was accepted as correct. All these cases are reviewed in *In re Parkin*, *Hill* v. *Schwarz* (5), where it is pointed out that although the persons in whose favour there is a contract to make a Will can sue to enforce it, the Courts should not give relief if the object of the contract is to enable the grantee to execise only a power of appointment. I think that as Maria Pillai was absolutely entitled to the property and could have disposed of it in any way he chose, the clause in the partition must be construed as a contract to leave the undisposed of residue to his brothers. The English decisions to which I have referred to show that such a contract as this is not void. There is no question in this case of creating a new line of succession as in *Venkatarammanna* v. *Brammanna Sastrulu* (6) and in *Anantha Tirtha Chariar* v. *Naganuthu Ambalagaren* (7). If the clause had directed that the property should go in a particular line of succession, then *Jatendra Mohan Tagore* v. *Gauendra Mohan Tagore* (8) would be applicable and the direction would be invalid. Reference may be made to the cases in which it has been held that agreements not to divide property were held enforceable, although they would not prevent a party entering into such an agreement from alienating it. See *Anand Chandra Ghose* v. *Prankisto Dutt* (9) and *Rajender Dutt* v. *Sham Chand Mitter* (10). The Bombay High Court in *Ramlinga Khanapure* v. *Virupakshi Khanapure* (11) seem to doubt this position. But the preponderance of authority is in favour of the view that the parties who are entitled to divide a property can waive their rights. It was so stated by Lyndhurst, L. C., in *Jefferys* v. *Jefferys* (12). "My impression is that the principle of the Court to withhold its assistance from a volunteer applies equally, whether he seeks to have the benefit of a contract, a covenant, or a settlement." But in later cases it was held that this would not affect provisions in a marriage settlement for giving the property or devising it [see *Lee* v. *Lee* (13)]. This view proceeds on the principle in marriage settlements "consideration permeates all covenants." The same may be said of covenants in partition-deeds entered into among members belonging to a joint family. I am, therefore, prepared to follow *Kantee Chandra Mukerji* v. *Ali-i-Nabi* (1) and *Ram Nirunjun Singh* v. *Prayag Singh* (14). The decision of the Privy Council in *Purna Shashi Bhattacharji* v. *Kalidhan Rai Chowdhury* (15) only lays down that where

(2) 2 Ventris 353; 86 E. R. 482.
(3) 1 Vern. 48; 23 E. R. 301.
(4) 19 Ves. 67; 12 R. R. 137; 34 E. R. 443.
(5) (1892) 3 Ch. 510; 62 L. J. Ch. 55; 67 L. T. 77; 41 W. R. 120.
(6) 4 M. H. C. R. 345.
(7) 4 M. 200.
(8) 18 W. R. 359; 9 B L. R 377; I. A. Sup. 47; 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 85.
(9) 3 B. L. R. O. C. 14; 11 W. R. O. C. 19.
(10) 6 C. 106.
(11) 7 B. 538.
(12) Cr. & Ph. 139; 41 E. R. 443; 54 R. R. 249.
(13) 4 Ch. D. 175; 46 L. J. Ch. 81; 36 L. T. 138; 25 W. R. 255.
(14) 8 C. 138; 10 C. L. R. 66.
(15) 11 Ind. Cas. 412; 38 C. 603; 15 C. W. N. 693; 8 A. L. J. 681; 13 Bom. L. R. 451; 14 C. L. J. 1; (1911) 1 M. W. N. 403; 10 M. L. T. 361; 21 M. L. J. 1119.

an attempt is made to alter the line of succession by means of a provision for the devolution of the estate on the death of one of the members without male issue, such an arrangement is opposed to the decision in *Jatendra Mohan Tagore* v. *Ganendra Mohan Tagore* (8), and that it should not be given effect to. But where there is no attempt to create a new line of succession, I see no reason for holding that as a contract come to at the time of the partition the clause should not be given effect to.

I agree with the learned Chief Justice to hold that the decision of the Subordinate Judge is right and that this appeal must be dismissed with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 1 OF 1909-10 OF BARA BANKI DISTRICT.

February 9, 1910.

Present:—Mr. Porter, S. M., and Mr. Baillie, J. M.

ZAIN ALI—DEFENDANT—APPELLANT

versus

THE HON'BLE *Raja* TASADDUQ RASUL KHAN—PLAINTIFF—RESPONDENT.

Oudh Rent Act (*XXII of* 1886), *s.* 107 (*b*)—*Rent-free grant—Judicial decision—Assessment of revenue.*

In a suit for assessment of revenue on a holding held rent-free in consideration of the surrender by the grantee of the previous proprietary rights there were upon record the judgments of 1865 of the Assistant Settlement Officer and Settlement Officer finding that the grantee was entitled to be maintained in rent-free possession of the land without payment of revenue:

Held, that the judgments were judicial decisions within the meaning of section 107 (*b*) of the Oudh Rent Act, and that the grantee was entitled to hold the land rent-free.

Selected Decision No. 6 of 1909, followed.

Munshi Gobind Prasad v. *Suraj Bakhsh*, Selected Decision No. 4 of 1903, distinguished.

Third appeal from an order of the Commissioner, Fyzabad Division, dated the 4th August 1909, confirming that of the Collector, Bara Banki District, in a case of fixation of rent.

JUDGMENT.

BAILLIE, J. M.—(*February 4th*, 1910).—The suit was for assessment of revenue on a holding held rent-free in consideration of the surrender by the grantee of the previous proprietary rights. The lower Courts have concurrently held that the circumstances are similar to those of the case decided in *Munshi Gobind Prasad* v. *Suraj Bakhsh* (1). It appears to me extraordinary that they have omitted to notice the proved facts which differentiate the case completely, from that of *Munshi Gobind Prasad* v. *Suraj Bakhsh* (1). There are upon record judgments the Assistant Settlement Officer and Settlement Officer, dated 16th November 1865, finding that the grantee was entitled to be maintained in rent-free possession of the land without payment of revenue and refusing an application of the *zemindar* to have revenue assessed on it. The Settlement Officer had at that time the full powers of a Civil Court and was entitled to decree or refuse resumption or assessment of rent if he had thought fit. It is clear that this land was, in the words of section 107 (*b*), held under a judicial decision previously to the first day of January 1902. The case is precisely similar to that in Selected Decision No. 6 of 1909. For the respondent it is urged (*i*) that Mr. Harington's decree applied only during the life-time of Imam Ali Khan, then *zemindar*, and (*ii*) that respondent is not the representative of Imam Ali Khan but an auction-purchaser of the rights of Imam Ali Khan. I find nothing in the judgment of Mr. Harington to justify the first claim. It was clearly and undoubtedly a finding that the grantee was entitled to hold the land rent-free in perpetuity. The second contention appears with reference to section 107 (*b*) irrelevant and I fail to understand that it has any basis as regards any other law. The appeal must be allowed with costs on respondent throughout these proceedings.

PORTER, S. M.—I concur.

Appeal allowed.

(1) Selected Decision No. 4 of 1903.

PHUL KOER *v.* HASHMAT ULLAH KHAN.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 12 OF 1915.

May 13, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

Musammat PHUL KOER—PLAINTIFF—APPELLANT

versus

HASHMAT ULLAH KHAN—OPPOSITE PARTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. IX r. 8, O. XVII, r. 2—Adjourned hearing—Non-appearance of plaintiff—Court, power of—Procedure.

Where neither the plaintiff nor his Pleader appears on a day to which the hearing of a suit has been adjourned, the Court must make an order under Order IX, rule 8 and it is not entitled to proceed to decide the suit on the merits. [p. 553, col. 2.]

First appeal from an order of the Subordinate Judge of Aligarh, dated the 24th October 1914.

Mr. *L. R. Dube*, for the Appellant.

Mr. *G. L. Agarwala*, for the Respondent.

JUDGMENT.—This is an appeal against an order refusing to entertain an application under Order IX, rule 9, of the Code of Civil Procedure. The facts are as follows. The suit was a suit to recover a large sum alleged to be due on foot of two mortgages. One of the pleas raised by the defendant was that the plaintiff had not obtained a Succession Certificate to collect the debts. There seems to have been unavoidable delay in obtaining the certificate for which the plaintiff was not responsible, and the Court after hearing witnesses had allowed the plaintiff time to obtain a certificate on a number of occasions. Finally the 17th of July 1914 was fixed. On that day neither the plaintiff nor the plaintiff's Pleaders appeared. The Court proceeded to decide the case on the merits. It found that the bond was duly executed, that the amount was due but that the Succession Certificate not having been obtained, the plaintiff was not entitled to succeed. The Court made a decree dismissing the suit with costs. The plaintiff then made an application under Order IX, rule 9. The learned Subordinate Judge was of opinion that Order IX, rule 9, did not apply and dismissed the application with costs. It is from this order that the present appeal is taken. Order XVII, rule 2, provides as follows: "Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit." In our opinion if the Court intends to dispose of the case where neither the plaintiff, nor the Pleader, appears on a day to which the hearing of the suit has been adjourned, it must make an order under Order IX, rule 8. It is not entitled to proceed to decide the suit on the merits. It is contended that the concluding words of the rule "or make such order as it thinks fit" entitle the Court to decide the case. We do not think that this is the true construction of these words. In the very next rule where it is intended that the Court should decide the suit, the words used are different. The Court is directed to "proceed to decide the suit forthwith." In our opinion, therefore, the Court below ought not to have decided the suit on the merits but ought, if it did not intend to give the plaintiff or her Pleader any other opportunity of appearing, to have dismissed the suit for "default of appearance." Had it done so, the plaintiff would have had a right to make an application under Order IX, rule 9, and that application would have been decided on its merits. It is contended on behalf of the respondents that the Court, rightly or wrongly, having made a decree, the proper remedy was to appeal from the decree. There is considerable force in this argument. We find, however, that when the application was made to the Court below, the applicant asked that the application should be treated as an application for a review of judgment. We think under the peculiar circumstances of this case and having regard to the fact that the decree of the Court below was not justified by law, it ought to have treated the application as one for a review of judgment, particularly when the plaintiff's Pleader asked that that should be done. We think the justice of the present case will be met by sending back the case to the Court below with directions to treat the application as one for review of judgment. It is stated that there is already pending an application for a review of judgment in the Court below. If this be the case, the Court can put up both matters and dispose of them at the same time. We accordingly allow the appeal, set aside the order appealed from and remand the case with directions to the

Court below to re-admit the application and treat it as one for review of judgment. We make no order as to costs.

Appeal allowed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 5 OF 1914-15 OF AGRA DISTRICT.

March 1, 1915.

Present:—Mr. Holms, S. M., and Mr. Campbell, J. M.

MURLI AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAJA RAM—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 154 (b)—Grant—Specific service—Muafi—Specific service not required—Resumption of grant—Notice—Pleading.

Where in a suit for the resumption of a *'muafi'* land on the ground that it was given for the performance of a specific service no longer required, the plaint did not allege the specific service which the proprietor no longer required, nor was there any evidence to show that the notice mentioning the non-requirement of the specific service was served on the grantee:

Held, that the plaint and the notice were both defective and the suit was not maintainable on these grounds.

Second appeal from an order of the Commissioner, Agra Division, dated the 8th September 1914, reversing that of the Assistant Collector, Agra District, in a case of resumption of *muafi*.

JUDGMENT.

HOLMS, S. M.—(*February 15th*, 1915).—The plaint in this case was most indefinite. The plaintiff sued for resumption, but it is not clear whether under section 154 (1) (*a*) on the ground that it was held rent-free at the pleasure of the grantor, or under (*b*) on the ground that it was given for the performance of a specific service no longer required. It now appears from the plaintiff's Pleader that the suit was under (*b*). The plaint does not mention any specific service. All that it says is that the plaintiff asked the defendant to give up the land several times, and there is mention of a notice by a post card in the preliminary part of the plaint. There is no evidence whatever that the notice that the service was no longer required, ever reached the defendant. The defendant admits before me that he received a post card about the *muafi* being given up, but can say no more. In my opinion the plaint was defective originally, in that it did not allege the specific service which the proprietor no longer required, and the suit must break down at any rate on the ground that there is no evidence whatever that notice in writing was given to the defendant that any specific service was no longer required. In consequence probably of the indefinite nature of the plaint no proper issue as regards the resumability of the land was framed. The Assistant Collector misunderstood the law and decided that the land could not be resumed because the conditions of section 158 were fulfilled—an obviously wrong finding. The Commissioner has held that the grant was one made for the maintenance of a temple, but this allegation has not been made either in the plaint nor by the plaintiff in evidence. It seems to me that the proper course is to dismiss the suit, on the ground that there is no evidence that notice in writing has been given that the plaintiff no longer required the specific service for the performance of which the land is held rent-free.

I would, therefore, set aside the orders of the lower Court and dismiss the suit, respondent paying costs throughout. This will be no bar to his giving proper notice and filing a fresh suit.

CAMPBELL, J. M.—I agree.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 826 OF 1914.

May 26, 1915.

Present:- Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

MARRAM KHAN AND ANOTHER—PLAINTIFFS - APPELLANTS

versus

SAKHAWAT KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Right *given by* Wajib-ul-arz *on* rehan, *Simple mortgage*, whether *rehan*

Where a clause in the *Wajib-ul-arz* of 1875 gave a right of pre-emption in the case of "rehan" (mortgage):

NAND KISHORE PANDE *v.* MUHAMMAD HASAN.

Held, that the right could not be exercised if the transacion was a simple mortgage as defined in the Transfer of Property Act of 1882.

Second appeal from a decision of the District Judge, Azamgarh, dated the 17th March 1913.

The Hon'be Mr. *Abdul Raoof*, for the Appellants.

Dr. *S. N. Sen*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption. The plaintiffs alleged that the transaction between the defendants was in reality a usufructuary mortgage dressed up in the guise of a simple mortgage, so as to defeat their right of pre-emption. They went on further to say that even if the Court found that the transaction was a simple mortgage, they had a right to be substituted in the mortgage. The lower Appellate Court has found as a matter of fact that the transaction was a simple mortgage, and this finding is binding upon us in second appeal.

It is contended, however, on behalf of the appellants that even on this finding the plaintiffs are entitled to pre-empt the mortgage. We shall assume for the purposes of the present appeal that some right of pre-emption does exist. We shall also assume that this right of pre-emption extends to the case of a usufructuary mortgage. The question remains, have the plaintiffs satisfactorily proved the existence of a custom applying to the case of a simple mortgage? The evidence in support consists of an extract from the *wajib-ul-arz* of 1875. This entry records rights of pre-emption in the case of sale, mortgage and conditional sale. With regard to mortgage the expression used is "*rehan*". At the present time no doubt this expression is capable of including any transaction which is a "mortgage" within the meaning of the Transfer of Property Act; but it is an expression which would have been hardly appropriate to a simple mortgage in the year 1875. It is an expression which most people would understand when used by villagers as meaning a usufructuary mortgage. That this is not an unreasonable view of the case is clearly shown by what happened in the Court below. All the arguments and the evidence centred round the question whether the transaction was a simple mortgage or a usufructuary mortgage. This was the only point argued in the Court below, and it seems as if it were there conceded that unless the Court held the transaction to be a usufructuary mortgage, the plaintiffs had no case. In our opinion the plaintiffs failed to prove, by the evidence they adduced, the existence of a custom entitling pre-emption in the case of a simple mortgage.

The appeal fails and is dismissed with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 56 OF 1913-14 OF GHAZIPUR DISTRICT.

May 17, 1915.

Present:—Mr. Holms, S. M., and Mr. Campbell, J. M.

NAND KISHORE PANDE—APPELLANT

versus

Sheikh MUHAMMAD HASAN AND OTHERS—RESPONDENTS.

Mortgage of fixed-rate tenancy—Mortgagor dying heirless—Ejectment of mortgagee without redemption—Revision.

If a fixed-rate tenant mortgages his holding usufructuarily and then dies without leaving an heir the land-holder cannot eject the mortgagee in possession without paying off the mortgage-money. [p. 556, col. 1.]

Tulshi Ram v. *Gur Dayal Singh*, 7 Ind. Cas. 231; 7 A. L. J. 1011; 33 A. 111, referred to.

Beni Ram v. *Ram Prasad*, 3 Rev. L J. 98, followed.

An order wrongly directing the ejectment of a mrotgagee in possession deprives the mortgagee of his legal rights and is, therefore, a serious error of law which justifies interference in revision. [p. 556, col. 1.]

Application for revision from an order of the Collector, Ghazipur (as Commissioner), dated the 6th July 1914, confirming that of the Assistant Collector, Ghazipur District, in a case of ejectment.

JUDGMENT.

HOLMS, S. M.—(*April 19th*, 1915.)—The point for decision is a simple one. A tenant at fixedrates who has usufructuarily mortgagedhis holding dies without heirs. Can the landholder eject the mortgagee in possession without paying off the mortgage-money? For the respondents it is argued that the fixed-rate tenancy came to an end when the

tenant died without heirs and that this being so, the mortgagee's interest came to an end at the same time. The High Court in *Tulshi Ram* v. *Gur Dayal Singh* (1) have held that in such a case the landholder is entitled to redeem the mortgage, though they have not very definitely held whether the landholder can eject the mortgagee without redeeming such a mortgage. They have, however, in that judgment expressed the opinion that a fixed-rate tenancy does not escheat to the Crown but goes back to the estate out of which it was charged and lapses to the landholder. The interest of a fixed-rate tenancy is a transferable interest, and the mortgage was a legal one. There is a decision of the Board in a somewhat analogous case reported as *Beni Ram* v. *Ram Prasad* (2), in which they held that the landholder could not eject the mortgagee of a grove-holder after the grove-holder's death so long as the land retained the character of a grove. The respondents have not produced any decision of the Board contrary to the High Court decision which I have mentioned above, and I am strengthened in my view that the ejectment is not valid by the fact that my predecessor, Sir Duncan Baillie, in admitting this application for revision expressed the opinion that in a case of this sort the landholder cannot eject the mortgagee, without redeeming the mortgage.

There is one special feature in the present case, which is that the mortgagor of the land was the widow of the former fixed-rate tenant, but, as there were no heirs, I am unable to hold that she had no power to execute the mortgage. I am of opinion then that there has been a serious and palpable error of law, which has had the effect of depriving the defendant of his legal rights, and this is a case in which the Board should interfere in revision.

I would set aside the orders of the lower Courts and dismiss the suit for ejectment, respondents paying costs throughout.

CAMPBELL, J. M.—I agree.

Application allowed.

(1) 7 Ind. Cas. 231; 33 A. 111; 7 A. L. J. 1011.
(2) 3 Rev. Law Journal 98.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 122 OF 1913.

April 9, 1915.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

Sri Rajah VENKATA PERUMAL RAJU BAHADUR VARU, MINOR, BY GUARDIAN MR. W. A. VARADACHARIAR—JUDGMENT-DEBTOR—RESPONDENT—APPELLANT

versus

Sri Mahant PRAYAG DOSSJEE VARU—DECREE-HOLDER—PETITIONER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 48—Mortgage-decree making mortgagor "personally liable for balance due under the decree" after sale of mortgaged property, whether a decree for "payment of money" on a certain date—Twelve years to be calculated from date of decree or from date when sale-proceeds prove insufficient to satisfy decree—Decree against estate managed by Court of Wards—Decree not transferred to Collector for execution—Mortgagee, whether entitled to benefit of exclusion of period of management by Court of Wards.

A mortgage decree directing that the "defendants be personally liable for any balance not obtained by such sale," is not a decree for payment of money on a certain date within the meaning of clause (1) (b) of section 48 of the Code of Civil Procedure, and the period of twelve years under that section must be calculated *from the date of the decree*, and not from the date when the sale-proceeds of the mortgaged property prove insufficient to satisfy the decree and the balance is ascertained. [p. 558, col. 2.]

Narhar Raghunath v. *Krishnaji Govind*, 15 Ind. Cas. 822; 14 Bom. L. R. 381; 36 B. 368, dissented from.

Jaimangalbati Misrain v. *Badan Chand Das*, 19 Ind. Cas. 899; *Jnanendra Nath Bose* v. *Khulna Loan Co., Ld.*, 24 Ind. Cas. 35; 18 C. W. N. 492, followed.

Venkatamma v. *Manikkam Nayani Varu*, 26 Ind. Cas. 244; 16 M. L. T. 399, referred to.

A mortgagee holding a decree against an estate under the management of a Court of Wards is not entitled to the benefit of exclusion of the period of management by the Court of Wards, when the decree itself was not transferred to the Collector for execution. [p. 557, col. 1.]

Kumara Venkata Perumal v. *Velayuda Reddi*, 24 Ind. Cas. 195; 27 M. L. J. 25, followed.

Appeal against an order of the District Court of North Arcot, in Execution Petition No. 88 of 1912 (in Original Suit No. 6 of 1890 on the file of the District Court of North Arcot.)

FACTS.—In execution proceedings in respect of a decree of the District Court of North Arcot passed in 1890 the question was whether the application to execute the decree in 1912 was barred by limitation. The decree itself first gave a remedy against the mortgaged properties and for the balance against the person and other properties of the judgment-debtor.

VENKATA PERUMAL *v.* PRAYAG DASSJEE.

Mr. *L. S. Veeraraghava Iyer* for Mr. *L. A. Govindaraghava Aiyar*, for the Appellant:—The clause (1) (*b*) of section 48 of the Code of Civil Procedure will not apply, as it cannot be said that money was payable on a certain date within the meaning of that section. This view is supported by *Jnanendra Nath Bose* v. *Khulna Loan Co. Ltd.* (1) and the recent decision in *Venkatamma* v. *Manikkam Nayani Varu* (2).

Mr. *S. Gopalasami Aiyangar*, for the Respondent:—The "date" becomes "certain" within the meaning of that section, as soon as the remedy against the mortgaged property was exhausted. *Narhar Raghunath Naphad* v. *Krishnaji Govind* (3).

This appeal coming on for hearing on the 17th September 1914, the Court delivered the following

JUDGMENT.—The lower Court's conclusion against the appellant is not sustainable, in so far as it is based on the suspension of respondent's right to execute during the Court of Ward's possession of the former's estate. The first period of that possession was not long enough, if excluded from the computation, to justify respondent's delay; and the second, during which (it is agreed) the decree was not transferred to the Collector for execution, cannot be excluded. [*Kumara Venkata Perumal* v. *Velayuda Reddi* (4)].

Respondent has then urged that he is entitled to execute within 12 years from the date on which he obtained personal decree against the appellant, and that the lower Court should be called on to deal with the application on that footing. The lower Court did not consider this at the hearing before it, because it had another ground of decision, in its own opinion satisfactory. In these circumstances we think that respondent should not be debarred from relying on the computation of time from the date of the personal decree now.

The lower Court is requested to submit a finding on the issue whether the application is barred by limitation in the light of the foregoing. Fresh evidence may be taken. Finding should be submitted within six weeks and seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment, the District Judge of North Arcot submitted the following

FINDING.—The High Court requires a finding in Execution Petition No. 88 of 1912, "whether the application is barred by limitation." This Court took on file the said application, holding that it was not barred, when the period that the Court of Wards held charge of the judgment-debtor's estate was excluded, by the 12 years' rule of section 48, Civil Procedure Code. The judgment-debtor is the appellant.

2. In the High Court it was apparently argued that the decree-holder should be allowed to make his computation of time from the date of the personal decree. There has not, however, been any separate personal decree in the suit (Original Suit No. 6 of 1890). The decree directs, *first*, the sale of the mortgaged property and then proceeds "that the defendant be personally liable for any balance not obtained by such sale." The mortgaged property was sold on 24th July 1893 and the sale confirmed on 26th September 1893. The decree-holder argues that until the mortgaged property had been disposed of he was not at liberty to proceed further, and that, therefore, the portion of the decree which was against the person was not executable until 26th September 1893. He, therefore, argues that he should be allowed to reckon the 12 years allowed to him under section 48, Civil Procedure Code, from that date.

3. As regards the period to be excluded on account of the transfer to the Court of Wards, my predecessor allowed six years and seven months. The date of the notification in the *Fort Saint George Gazette* was 1st August 1899, and the decrees were re-transferred to this Court on 27th February 1906. The period is, therefore, correct within a day or two, and no objection was previously taken to this. The High Court has decided already that this first period should be allowed, and that the second period during which the Court of Wards held charge of the estate should not be allowed; so there is nothing further to discuss on this point.

4. The decree-holder, therefore, claims time up to 26th April 1912, on which date this

(1) 24 Ind. Cas. 35; 18 C. W. N. 492.
(2) 26 Ind. Cas. 244; 16 M. L. T. 399.
(3) 15 Ind. Cas. 822; 36 B. 365; 14 Bom. L. R. 381.
(4) 24 Ind. Cas. 195; 27 M. L. J. 25.

Court had already closed for the annual recess. The execution application now in question was filed on 24th June 1912, the day the Court re-opened after the recess, and it is, therefore, said to be in time.

5. For the judgment-debtor it was argued that as there was no separate personal decree there was no case. I do not read the order of the High Court in this sense. It would certainly appear that it was re-presented to the Court that there was a separate personal decree, but the order is in general terms. I consider that it applies to the personal decree embodied in the original mortgage-decree.

6. The only question which I have to consider is, whether I am to follow the ruling in *Narhar Raghunath Naphad* v. *Krishnaji Govind* (3), that section 48 of the Civil Procedure Code applies only to a decree executable at the date it was passed, and that if it is not so executable, there is 12 years' limitation from the date it becomes executable. It is admitted in the present case that the personal portion of the decree was not executable until 26th September 1893. For the decree-holder it is argued that this Court should follow that decision. For the judgment-debtor reliance is placed upon the Calcutta case of *Jaimangalbati Misrain* v. *Badan Chand Das* (5), in which the decree was a combined decree for sale and personal decree, as in the present case. The Calcutta High Court held that the decree-holder had only 12 years from the date of the original decree. Although the date of this decision is later than the Bombay case, the latter was not mentioned by their Lordships. The decision in *Janendra Nath Bose* v. *Khulna Loan Co. Ld.*(1) is another similar case more recently decided, in which the Calcutta High Court have specifically held that the 12 years run from the date of the original combined decree, and not from the date of sale of the mortgaged property.

7. In a recent appeal from this Court in *Venkatamma* v. *Manikkam Nayani Varu* (2), their Lordships of the Madras High Court have considered the Bombay case, though it was not then necessary to make a decision on the point. Mr. Justice Sadasiva Aiyar appeared very doubtful but said he would feel inclined to follow it (the Bombay decision), if it was necessary to do so in the case in hand, but Mr. Justice Napier had still greater doubts as to the greatness of construction of section 48, Civil Procedure Code.

8. I feel that it is hardly for me to discuss the question when the superior Courts are differing, but unless and until the Madras High Court determines otherwise I shall, without hesitation, follow the Calcutta High Court. My finding, therefore, is that the application is barred by limitation.

This case again coming on for hearing yesterday and this day the Court delivered the following

JUDGMENT.—The lower Court's finding is that execution of the decree is barred.

There is no doubt that, though there is no separate personal decree, a personal decree is included in the terms of the decree under execution, which permit plaintiff to recover from defendant personally "any balance not obtained by the sale" of the mortgaged property.

Authority is unsettled as to the portion of section 48 applicable to such a decree, *Narhar Raghunath Naphad* v. *Krishnaji Govind* (3) being relied on by plaintiff as justifying the view that the twelve years' period runs from the date on which the particular provision in the decree in question becomes executable, and *Jaimangalbati Misrain* v. *Badan Chand Das* (5) and *Jnanendra Nath Bose* v. *Khulna Loan Co. Ld.* (1) by defendant as showing that the twelve years' period must be applied to the decree from the date on which it was passed. The effect of the only decision of this Court which calls for mention, *Venkatamma* v. *Manikkam Nayani Varu* (2), is indecisive. We think it sufficient that the decree before us was never at any time, after it was passed, inexecutable and that it did not provide for the payment of any money by defendant on a certain date. In veiw of these facts we apply section 48 (1) (*a*) and hold that execution is barred. The result is that the appeal is allowed and the execution petition dismissed with costs throughout.

Appeal allowed.

) 19 Ind. Cas. 899.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 13 OF 1913-14 OF GORAKHPUR DISTRICT.

May 5, 1914.

Present:—Mr. Baillie, S. M., and Mr. Tweedy, J. M.

RAM ASRA CHAUDHRI—PLAINTIFF—APPELLANT

versus

BISHAN CHAUDHRI—DEFENDANT—RESPONDENT.

Partition, entries made in course of, binding effect of—Meaning of 'ghair maurusi 13 *years*' *and* 'khud kasht 19 *years*'.

The parties to a partition are bound by the entries made in the course of partition. The entry '*ghair maurusi* 13 years' would not mean an occupancy tenure but a non-occupancy one as the emphasis is on the nature of the tenure. Similarly, '*khudkasht* 19 years' means a non-occupancy tenure and cannot mean an ex-proprietary tenure.

Second appeal from an order of the Commissioner, Gorakhpur Division, dated the 1st September 1913, reversing that of the Assistant Collector, Gorakhpur District, in a case of ejectment.

JUDGMENT.

TWEEDY, J. M.—(*March 16th*, 1914.)—The facts are clearly stated in the Commissioner's judgment but I cannot agree with his view of the law. It is a sound proposition that the parties to a partition are bound by the entries made in the course of the partition, but in the present case they do not mean what the Commissioner supposes. As to No. 5 the entry is "*ghair maurusi* 13 *sal*". Here the emphasis is on the nature of the tenure and not on the period of cultivation. It is clear that this holding, even though described as of 13 years' standing, was treated as non-occupancy at the partition. As to 32/1 the entry is "*khud kasht* 19 years". This is an absurd entry, for in partition it became a tenancy of some kind and could not remain *khud kasht*. If the respondent had claimed the land as his *sir* and it had been so decided at the partition, the tenancy would have been recorded as ex-proprietary. It is clear, therefore, either that he did, not claim the land as his *sir* or that if he did the claim was decided against him. The meaning then to be attached to these two entries is the same, namely, that the holding referred to has been treated as non-occupancy in the partition.

I would, therefore, decree the appeal as to Nos. 5 and 32/1 and dismiss it as to No. 7/4. Costs on parties.

BAILLIE, S. M.—I would concur in Junior Member's decision, dated 16th March 1914.

Appeal partly allowed; Decree modified.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2491 OF 1913.

November 19, 1914.

Present:—Mr. Justice Oldfiled and Mr. Justice Tyabji.

CHOWAKKARAN KELOTH MAKKI KEYI—PLAINTIFF—APPELLANT

versus

KARUVALOTE PARKUM PONNAMBATH KOOMULLI MADHAVI AMMA—DEFENDANT—RESPONDENT.

Malabar Tenants' Improvements Act (*I of* 1900), *s. 5—Decree determining tenancy and directing payment of compensation—Non-payment of compensation—Continuance of tenant on land—Improvements subsequent to decree—"Tenant" entitled to claim compensation under Act.*

A tenant continuing in possession pending receipt of compensation holds subject to the terms of the previous lease, that is, holds as a tenant and retains that status until his improvements are paid for. [p. 560, col. 1.]

Kummatha Vittil Kunhi Kuthalai Haji v. *Antoni Gaveas*, 19 Ind. Cas. 563; (1913) M. W. N. 339; 13 M. L. T. 350; 24 M. L. J. 472, followed.

The fact that no rent was paid by the tenant or that the decree determining his tenancy credited the value of improvements towards the arrears of rent due, does not alter his position. He is, therefore, a "tenant" under the Act entitled to claim compensation for the improvements effected by him subsequent to the decree. [p. 560, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge of North Malabar, in Appeal Suit No. 2 of 1912, preferred against that of the Court of the District Munsif of Badagara, in Original Suit No. 687 of 1910.

Mr. *J. L. Rozario*, for the Appellant.

Mr. *V. Ryru Nambiar*, for the Respondent.

JUDGMENT.—We think that this appeal must be allowed, since the learned Subordinate Judge made two mistakes in his disposal.

Firstly, he held that the appellant's cause of action was the same in this and the previous suit. In fact in the previous suit it was the 1st defendant's holding prior to it. That holding was terminated by the decree

in it, and the holding after decree constituted a fresh cause of action.

Next, though compensation for improvements was awarded by the previous decree, the learned Subordinate Judge did not keep in mind the provisions of section 5 of Act I of 1900, and the fact that a tenant continuing in possession pending receipt of compensation holds subject to the terms of his previous lease, that is, holds as a tenant. *Kummatha Vittil Kunhi Kuthalai Haji* v. *Antoni Goveas* (1). It follows that the 1st defendant must have held as a tenant after the decree against him, and that the learned Subordinate Judge's conclusion to the contrary, based only on the absence of payments of rent is unsustainable.

In reply our attention has been invited to the form of the previous decree, Exhibit I, and the fact that it requires no payment by the plaintiff but credits the compensation due from him against the arrears of rent payable by the 1st defendant. But the result of this is only that the payment must be treated as having been made by credit to the defendant on the date of the decree. The 1st defendant has still to show how further compensation would not be due to him for further improvements, which might have been made, when delivery might be applied for: and in fact the District Munsif's present valuation of improvements, to which the 1st defendant has taken no objection, shows that some have been made since the previous decree was passed. Again, till they are paid for, he will retain his status as a tenant and there will be no ground for a decision that he has held adversely or that the suit is barred under section 11 of the Code of Civil Procedure.

The second appeal is allowed, the decree of the lower Appellate Court being set aside and that of the District Munsif being restored with costs throughout.

Time for deposit of value of improvements will be six months.

Appeal allowed.

(1) 19 Ind. Cas. 563; (1913) M. W. N. 339; 13 M. L. T. 350; 24 M. L. J. 472.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 1 OF 1909-10 OF BENARES DISTRICT.

August 15, 1910.

Present:—Mr. Baillie, S. M. and Mr. Reynolds, J. M.

PAYAG CHOWBEY—DEFENDANT—APPLICANT

versus

Pandit BIJIANAND—PLAINTIFF—RESPONDENT.

Grove, mortgage of—Mortgagor dying without heirs—Mortgagee, whether can be ejected—Grove, if constitutes improvement.

A tenant who had acquired occupancy rights over certain land subsequently planted a grove over it and mortgaged the same usufructuarily. Upon the death of the tenant without heirs, the *zemindar* sued the mortgagee for ejectment on the ground that he was a non-occupancy tenant of less than 12 years' standing:

Held, that as the transfer of the grove by mortgage was a valid transfer and the rights of the mortgagor passed to the mortgagee, the mortgagee could not be ejected. [p. 561, col. 1.]

Held, further, that the order of ejectment in such cases implies the confiscation of existing valuable rights under a law which is entirely irrelevant and is, therefore, so serious a mistake of law as to amount to an illegality. [p. 561, col. 1.]

Held, also, that the grove having been planted before the Tenancy Act is not an improvement for which compensation can be allowed to the mortgagee and an order of his ejectment passed. [p. 561, col. 1.]

Application for revision from an order of the Commissioner, Benares Division, dated the 7th August 1909, confirming that of the Assistant Collector of Benares District, in a case of ejectment.

JUDGMENT.

BAILLIE, S. M.—(*August 7th*, 1910)—The suit was for ejectment from land recorded as held with occupancy rights, which was in fact uncultivated grove land. The defendant, now applicant, was the mortgagee of the person formerly recorded as tenant and has, as such, been in possession for some years. It is now alleged that the recorded tenant has died without heirs and that, therefore, the tenancy has determined. The same question has on several occasions been lately before the Board. In *Beni Rai* v. *Ram Parsad Rai* (1) a similar order was revised by the concurrent opinion of Mr. Porter and myself. Whilst we held that following Selected Decision No. 1 of 1908, the Revenue Court had jurisdiction to decide as to the ejectment, we considered that the

(1) Petition No. 15 of 1908-09.

principles laid down in *Badri Prasad* v. *Bhimsen* (2), still fully apply to all groves planted before the Tenancy Act came in force. That ruling laid down that the custom usual in regard to groves is that "subject to the delivery to the landholder of his share of the produce by the occupant, the latter should continue to occupy the land as long as the grove of trees continued to stand upon it. This condition is altogether apart from and independent of the question of the land having been cultivated by the tenant before the grove was planted, and of his having by previous occupation acquired a right of occupancy under the terms of section 8 of the Rent Act. The tenure of persons having the status of tenants in a *mahal* upon groves of trees rests upon a contract, express or implied, as to the occupation of the land to which contract section 8 is not necessarily applicable. The right to dispose of the trees forming a grove is not uncommonly held by tenants. The landholder cannot be allowed to eject the present grove-holder by notice under section 36 of the Rent Act". These principles fully apply. There is in the undisturbed possession of the defendant reason to believe that the usual custom by which rights of a tenant in groves are transferable, existed in this case. The transfer of these rights transferred also the right to occupy the land so long as the grove was standing. Applicant was, therefore, not liable to ejectment in a suit under section 58.

It is claimed for respondent that the mistake made by the lower Court is not ground for revision. As I have said, the Board have already in previous instances held that a mistake such as this which implies the confiscation of existing valuable rights by ejectment under a law which is entirely irrelevant, is so serious a mistake of law as to amount to an illegality. I consider that there is ground for revision.

Applicant has also claimed that if it is found the mortgagee has a right in the grove, that he (the mortgagee) be compensated for that right as for an improvement. This claim must be dismissed. The grove planted before the Tenancy Act came in force is not an improvement. I would allow the revision and dismiss the suit for ejectment imposing costs on respondent throughout.

(2) Selected Decision No. 2 of 1892.

REYNOLDS, J. M.—I am not prepared to dissent from the previous ruling of the Board that section 185 does give revisional jurisdiction in such cases, and as to the merits of the case I concur entirely.

Application allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 39 OF 1911.

December 23, 1914.

Present:—Mr. Justice Chevis and Mr. Justice LeRossignol.

Musammat RADHI—PLAINTIFF—APPELLANT

versus

PUNNU AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Succession—Hindu Gorewaha Rajputs *of Garhshankar Tahsil, District Hoshiarpur—Daughter—Collaterals of fifth degree—Preferential heir—Ancestral property.*

Among agricultural tribes in the Punjab near collaterals do, as a general rule, exclude daughters from succession to ancestral property and it is for the daughter to prove her right to oust the collaterals. [p. 562, col. 1.]

Where on the death of *K*, a Hindu *Gorewaha Rajput* of the Garhshankar Tahsil, Hoshiarpur District, his widow held the land and after her death mutation was effected in favour of the collaterals who took possession: On a suit for possession by the daughter of *K*

Held, that she had failed to prove that by custom among Hindu *Gorewaha Jats* of Garhshankar Tahsil, Hoshiarpur District, a daughter was entitled to succeed to the ancestral property of her father in preference to his collaterals in the fifth degree. [p. 562, col. 2.]

Ranjhi Khan v. *Musammat Kamun*, 17 P. R. 1889, distinguished.

Second appeal from a decree of the Additional Divisional Judge, Hoshiarpur Division, at Ludhiana, dated the 7th October 1910.

Rai Bahadur Pandit *Sheo Narain*, for the Appellant.

Lala *Dharam Das Suri*, for the Respondents.

JUDGMENT.—The dispute in this case relates to the land of Khazana, who died about 20 years ago. His widow held the land till her death in 1907. Then mutation was effected in favour of the collaterals, who took possession. So *Musammat* Shiami, a widowed daughter, brought this suit for possession. *Musammat* Radhi, another daughter (married) of Khazana, was made a *pro forma* defendant. The claim

was decreed by the first Court, but dismissed by the lower Appellate Court, so a further appeal was preferred to this Court by both the daughters, though what right a defendant had to appeal is not clear.

While the appeal was pending in this Court, *Musammat* Shiami died, and as Counsel had no instructions from *Musammat* Radhi, it was understood that she did not wish to press the appeal, so it was dismissed by order of this Court, dated 12th January 1914. Since then *Musammat* Radhi has moved this Court. She is the representative of her sister. We set aside the order of 12th January 1914, and, having heard arguments on behalf of the appellant, we proceed to decide the appeal on the merits.

A preliminary objection, that the appeal was time-barred, turned out to be ill-founded and was not pressed.

The parties are Hindu *Ghorewaha Rajputs* of the Garhshankar Tahsil of the Hoshiarpur District.

A good deal depends on the question, who should bear the initial burden of proof in such cases. In the present case the collaterals are related to the last male owner in the 5th degree. No doubt there is no general presumption that among agricultural tribes in the Punjab collaterals, however remote, exclude daughters. But it can safely be said that near collaterals do, as a general rule, exclude daughters from succession to ancestral property and it has not been even suggested to us that the land in suit is not ancestral. Where the collaterals are very distant, no presumption in their favour can be made.

It is apparently impossible to lay down any definite limit as to the degree of relationship, but it seems pretty obvious that the more remote the collateral, the less right he has to claim that any presumption should be made in his favour. In the present case, if no presumption is made in favour of either side, we can only fall back on the general rule, and hold that it is for the daughter, who is out of possession and invokes the aid of the Courts, to prove her right to oust the collaterals.

On behalf of the daughter's claim, stress is laid on *Ranjhi Khan* v. *Musammat Kamun* (1), which held that among *Naru Rajputs* of the Hoshiarpur Tahsil daughters were entitled to succeed in preference to collaterals beyond the fourth degree. This decision, however, was based largely on the provisions of the *riwaj-i-am* of the Hoshiarpur Tahsil, which distinctly lays down that daughters succeed in the absence of descendants of the great-grandfather.

This ruling, we note, was followed in a later ruling published as *Fatteh Din* v. *Ram Rakha* (2). But the ruling is distinguishable, since the *riwaj-i-am* of the Garhshankar Tahsil lays down that, as a general rule, daughters have no right of succession and can only succeed in the absence of collaterals (*karabatian jaddi wa goti*). It is urged on behalf of the appellant that such an entry, unsupported by instances, can have no weight, and that we should presume that the true custom has been incorrectly stated and should be presumed to be the same as in the Hoshiarpur Tahsil. We note, however that the *riwaj-i-am* of the Dasuya Tahsil also is against the daughters, stating that they never succeed. There is no reason why, if we are to allow the *riwaj-i-am* of a neighbouring Tahsil to have weight, we should adopt the Hoshiarpur custom rather than the Dasuya one.

No instances in the daughter's favour have been proved and there is no authority which has been cited in her favour except *Ranjhi Khan* v. *Musammat Kamun* (1), which, for reasons already stated, cannot be regarded as a guide to follow in the present case.

Then it is urged that, if the custom is uncertain, we should take it that the custom favours the daughter because Hindu Law would favour her. But the parties are governed by custom, and it is not a case in which we can hold that no custom exists and that the case must be decided according to the personal law of the parties.

We agree with the learned Divisional Judge that the plaintiff has failed to prove her right to oust the defendants, and we dismiss the appeal with costs.

Appeal dismissed.

(1) 179 P. R. 1889.
(2) 8 Ind. Cas. 225; 32 P. L. R. 1910.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 1 OF 1914-15 OF GHAZIPUR DISTRICT.

May 4, 1915.

Present:—Mr. Holms, S. M., and Mr. Campbell, J. M.

Maharaja KESHO PRASAD SINGH BAHADUR—PLAINTIFF—APPELLANT

versus

SUBA KHAN—DEFENDANT—RESPONDENT.

Appeal, second—Question of fact decided without there being evidence to support finding—Question of law.

Where a Court decides a question of fact without there being any evidence whatever to support its finding, there is a question of law and the Board will interfere in second appeal.

Application for revision from an order of the Collector, Ghazipur (as Commissioner), dated the 19th June 1914, confirming that of the Assistant Collector, Ghazipur District, in a case of ejectment.

JUDGMENT.

HOLMS, S. M.—(*April 20th*, 1915)—This case has not been well tried by either of the lower Courts. The ground of appeal before the Collector with the powers of a Commissioner was that the defendant cultivated the land without the landholder's consent and without paying rent and, therefore, could not acquire occupancy rights. The only evidence on the record is that of the *patwari*, who states that the rent of the holding No. 123 consisting of 10 fields is Rs. 10-12-0, and the extract of the *khatauni* which the *patwari* also files and attests as correct, which shows that this holding is divided into two parts, the first being composed of the plots in suit *plus* plot No. 500 which are entered as *bila tashkhis*, and three other numbers not in suit of which the rent is recorded as Rs. 10 odd. The extract of the *khatauni* filed by the *patwari* should be taken as correct, and it was clear that there was an error made in recording his statement, as he could not have said that the rent of Rs. 10 odd was entered in respect of the plots in suit in face of the *khatauni*. I find, therefore, that there is no evidence whatever to support the finding that the tenant cultivated with the landholder's consent. On the contrary, what evidence there is, shows that the land was

held without any rent being assessed and is against contention. The fact that the Court decides the question of fact in one direction without any evidence whatever to support his finding is treated as a question of law. In this view I would hold that the Collector has fallen into a gross and palpable error of law which may cause substantial injustice.

I would, therefore, remand the case for a finding on the issue:—

"Did the defendant cultivate the land in suit with or without the landholder's consent?"

Fresh evidence to be taken, if necessary. Objecton in 10 days; if none filed, I will not necessarily fix another date.

CAMPBELL, J. M.—I agree.

Appeal dismissed; Cause remanded.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 847 OF 1913.

May 26, 1915.

Present:—Sir John Woodroffe, KT., and Mr. Justice Newbould.

AKHIL CHANDRA SEN AND OTHERS—DEFENDANTS—APPELLANTS

versus

TRIPURA CHARAN CHOWDHURY AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Grant—Occupancy right, if acquired after grant—Bengal Tenancy Act (VIII of 1885)—Eviction—Only occupancy raiyat protected by law

If at the date of the grant of a permanent interest there was no occupancy right which had matured, an occupancy right cannot be acquired after the date of the grant. [p. 564, col. 1.]

It is not every *raiyat* who is protected from eviction but only an occupancy *raiyat*, under the Bengal Tenancy Act, VIII of 1885. [p. 564, col. 1.]

Pachi Dasi v. *Bala Das*, 2 Ind. Cas. 405; 13 C. W. N. 1031, referred to.

Appeal against the decree of the Subordinate Judge, first Court, Chittagong, dated the 6th of August 1912, affirming that of the Munsif, third Court, Patiya, dated the 25th of July 1911.

Babus *Mohini Mohan Chakravarti* and *Khitish Chandra Sen*, for the Appellants.

Babu *Dhirendra Lal Kastgir*, for the Respondents.

JUDGMENT.—This appeal is concerned with certain *dags*, which I may classify as group I and group II. The argument as regards group I is that the appellants must be taken to be occupancy *raiyats* in the estate sold to the plaintiffs, and they claim a protected interest in the *dags* covered by this group as against the plaintiffs, who as auction-purchasers of the *taraf* were entitled to cancel all the encumbrances. We have been referred on this point to the *pattah* granted in the year 1848, set out in the paper-book at page 13. From this it appears that what was given was a permanent *raiyati* interest described as *istemrari kaimi raiyat* and *istemrari daimi kaimi pattah*. If this was the grant of a permanent interest, and if, as is admitted, at the date of this grant there was no occupancy right which had matured, then it seems to me not possible that an occupancy right could be acquired after the date of the grant. But if we read this document in reference to this permanency as relating solely to the fixity of rent, then I think the argument of the learned Pleader for the respondents avails, that the appellants would in that case be in the position of *raiyats* at fixed rates. It is not every *raiyat* who is protected, but only an occupancy *raiyat*, and I think the distinction on which he has relied and which is that set out in the Bengal Tenancy Act, distinguishing occupancy *raiyats* from *raiyats* at fixed rates and non-occupancy *raiyats*, must be borne in mind, and on this point he has referred to the case, *Pachi Dasi* v. *Bala Das* (1). I must hold, therefore, that the appellants were not occupancy *raiyats*. They were, therefore, not protected from eviction in respect of the *dags* covered by group I. It seems that less can be said as regards the *dags* of group II because the *khatian* records that the *raiyati* belonged to one Guru Das. The argument of the appellant has been that as the lands are recorded as being *raiyati* (though of some third party), he is entitled to reap the benefit of that record and to be protected But he is in no way connected with Guru Das. Whatever answer Guru Das, as a *raiyat*, if he be such, may have against the plaintiff, it is not a matter which seems to me to concern the appellants, who have stated that there was a *dur-raiyati* under the *raiyati* of one Mohesh.

The result is that this appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 2 Ind. Cas. 405; 13 C. W. N. 1031.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 19 OF 1913-14 OF BALLIA DISTRICT.

December 11, 1914.

Present:—Mr. Holms, S. M., and Mr. Campbell, J. M.

LONHAR TIWARI—DEFENDANT—APPLICANT

versus

JAGTOO TIWARI—PLAINTIFF—RESPONDENT.

Service of summons—Defendant not found—Summons served by being affixed on defendant's door, whether sufficient service—Revision.

In a suit for ejectment, the process-server, not meeting with the defendant, affixed the summons on his door:

Held, that this was not a good service, that it was the duty of the process-server to make reasonable endeavours and reasonable search for the defendant and that if the defendant was merely temporarily absent from his house it should not have been noted that he could not be found (*vide* rule 12, Board's Circular 2-III). [p. 565, col. 1.]

Held, further, that under the circumstances of this case to hold the service on the defendant to be a sufficient service was gross and palpable error of law which caused substantial injustice and that this was a ground for interference in revision. [p. 565, col. 1.]

Application for revision from an order of the Commissioner, Benares Division, dated the 10th December 1913, confirming that of the Assistant Collector, Ballia District, in a case of ejectment.

JUDGMENT.

HOLMS, S. M.—(*December 8th*, 1914.)—The summons purported to have been served by affixation on the 3rd November. As to this the Assistant Collector wrote:—"The summonses were served on the applicant properly, as they were affixed to his house." The Additional Commissioner, though in no clear words, seems to have accepted this view. There is no evidence as to the service of the summons except the endorsement, which shows that, as the process-server

did not meet with the defendant, he affixed the summons on his door: This is not a good service. It was his duty to make reasonable endeavours and reasonable search for the defendant. If the defendant were merely temporarily absent from his home when the process-server called, it should not have been noted that he could not be found: see rule 12, Board's Circular No. 2-II. There is no evidence then to support the finding of the lower Courts that the summons was properly served. There was thus a gross and palpable error of law which caused substantial injustice.

I would set aside the Assistant Collector's orders of the 18th and 21st August 1913 and the Commissioner's order and restore the case to the file of the Assistant Collector for re-trial of the suit for ejectment on its merits, respondent paying costs of all the proceedings so far.

CAMPBELL, J.M.—I agree.

Application allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 656 OF 1914.

May 20, 1915.

Present:—Justice Sir George Knox, KT.

Musammat MANOHRI—PLAINTIFF—APPELLANT

versus

BHURA—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 197—Suit for ejectment—Adverse possession—Jurisdiction—Issue not tried.

In a suit instituted in a Revenue Court for ejectment on the ground that the defendant was in possession without the plaintiff's consent and without the payment of any rent, the defendant pleaded that he was in proprietary and adverse possession of the land but this issue was not tried:

Held, that the District Judge on appeal ought to have acted under the provisions of section 197 of the Agra Tenancy Act and disposed of the plea of jurisdiction.

Balli v. *Naubat Singh*, 16 Ind. Cas. 120; 9 A. L. J. 771, followed.

Nandan Singh v. *Ganga Prashad*, 20 Ind. Cas. 892; 35 A. 512; 11 A. L. J. 786 and Selected Decision No. 30 of 1910, referred to.

Second appeal from a decision of the District Judge, Saharanpur, dated 30th April 1914.

Mr. *Nihal Chand*, for the Appellant.

Mr. *M. L. Agarwala*, for the Respondent.

JUDGMENT.—The suit out of which this appeal arises was instituted in the Court of an Assistant Collector. The suit as laid was for the ejectment of one Bhura. The Court of first instance passed an order for ejectment. Bhura appealed from the decree to the Court of the District Judge of Saharanpur. The allegation of the plaintiff was to the effect that the defendant was in possession of the land in dispute without the consent of the plaintiff and without the payment of any rent, and the defendant on the other hand raised the plea that he was in proprietary and adverse possession of the land. This issue apparently was never tried. The District Judge held that the suit did not lie under the Tenancy Act, as the Revenue Courts had no power to eject a trespasser. The learned Judge admitted in his judgment that he was bound by a ruling of this Court in *Balli* v. *Naubat Singh*(1), but he has preferred to follow what he himself calls an *obiter dictum* in *Nandan Singh* v. *Ganga Prashad* (2) together with Selected Decision No. 3 of 1910 of the Board of Revenue.

The learned Judge might with more propriety have saved himself all this extraordinary procedure on his part and confined himself to the law as laid down in section 197 of the N.-W. P. Tenancy Act.

I set aside the decree of the lower Appellate Court and send the case back to that Court, with directions to re-admit the appeal on its file of pending appeals and dispose of it according to law. Costs will follow the event.

Decree set aside; Case sent back.

(1) 16 Ind. Cas. 120; 9 A. L. J. 771.
(2) 20 Ind. Cas. 892; 35 A. 512; 11 A. L. J. 786.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 13 OF 1914-15 OF BALLIA DISTRICT.

May 4, 1915.

Present:—Mr. Holms, S. M., and Mr. Campbell, J. M.

Pandit GANGA PRASAD PANDE AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

TUNDI AHIR—DEFENDANT—RESPONDENT.

Mortgage of sir land before the passing of the Agra Tenancy Act (II of 1901), effect of, on sir land.

NATIONAL INSURANCE & BANKING CO. v. BISWAMBAR CHOWDHURY.

A mortgage with or without possession before the 1st day of January 1902 has no effect whatever upon *sir*.

Sultan Husain Khan v. *Sewak Singh*, 27 Ind. Cas. 586; 2 O. L. J. 11, followed.

Harpal Singh v. *Balgobind*, 7 A. 586; A. W. N. (1885) 134, distinguished.

Second appeal from an order of the Commissioner, Benares Division, dated the 13th November 1914, reversing that of the Assistant Collector, Ballia District, in a case of ejectment.

JUDGMENT.

HOLMS, S. M.—(*April 23rd*, 1915.)—The respondent relies on the High Court Full Bench decision of 1885, *Harpal Singh* v. *Balgobind* (1). In that particular case after the mortgage previous to the present Tenancy Act, the land ceased to be recorded as *sir* and the actual cultivators were recorded as tenants-in-chief apparently for a period of 36 years. The High Court held that, as the land ceased to be recorded as the *sir* of the proprietor and was not leased as the *sir* of a subsequent lessor, it had not retained its character of *sir* when the tenancy commenced and a right of occupancy therein could be acquired. The facts in the present case are somewhat different. The only period in dispute is the period between the mortgage and the sale, that is, between 1895 and and 1904. There is no evidence on record as to whether the land ceased to be recorded as *sir* or not during these years. Sir Duncan Baillie in the case referred to by the Additional Commissioner, *Balgobind* v. *Bhakaun Pande*, dated 19th March 1909, appears to have held that the tenant of a mortgagee of *sir* could acquire occupancy rights, the mortgage being before the present Tenancy Act. On the other hand, there is a later decision of Messrs. Tweedy and Baillie, dated April 1914, in *Sultan Husain Khan* v. *Sewak Singh* (2), which is opposed to this decision and to the view taken by the Additional Commissioner. It is stated in this decision that it has been repeatedly held by the Board that a mortgage with or without possession before the 1st of January 1902 has no effect whatever upon *sir*, and I have followed this view in a recent case.

(1) 7 A. 586; A. W. N. (1885) 134.
(2) 27 Ind. Cas. 586; 2 O. L. J. 11.

I would, therefore, hold that the respondent was merely a sub-tenant of *sir* before 1904. I may add that the respondent admits that there are certain plots in which he has not twelve years' cultivation and only contests the suit in respect of certain plots. I would set aside the order of the Commissioner and restore that of the Assistant Collector, respondent paying costs throughout.

CAMPBELL, J. M.—I agree.

Appeal allowed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 40 OF 1915.

May 28, 1915.

Present:—Justice Sir John Woodroffe, KT., and Mr. Justice Mullick.

THE NATIONAL INSURANCE AND BANKING CO., LTD.—DEFENDANTS—PETITIONERS

versus

BISWAMBAR CHOWDHURY—PLAINTIFF AND ANOTHER—DEFENDANT—OPPOSITE PARTIES.

Provincial Small Cause Courts Act (IX of 1887), s. 25—Jurisdiction—No objection taken before lower Court—High Court, discretion of, to interfere.

A revision application based mainly on the ground that the Small Cause Court had no jurisdiction to try the suit, an objection which was never taken in the lower Court, has no merits and the High Court will not interfere. [p. 567, col. 1.]

Rule against the judgment of the Munsif, first Court, Patiya, exercising the powers of a Court of Small Causes.

Babus *Ram Charan Mojumdar* and *Nagendra Nath Ghose*, for the Petitioners.

Babu *Probodh Kumar Das*, for the Opposite Parties.

JUDGMENT.—It does not appear to us in this case that there are any merits which should induce us to interfere upon this appliction, which is mainly based upon the ground that the Small Cause Court had no jurisdiction to try the suit. No objection of this kind seems to have been taken in the lower Court and from the report which the learned Munsif has submitted to us, it

would appear that no such objection was taken. He says that if such an objection had been taken, it would have been found mentioned in the findings or the judgment as is usually done in other cases. He further points out in his report that "it is significant that Bona Charan Nandi, who swore two affidavits on behalf of the petitioners, did not mention this fact in his first affidavit, and on receipt of intimation from Calcutta he swore a second affidavit to that effect".

We may point out, further, in this case, the disadvantage to which the plaintiff might be put by the absence of objection as to jurisdiction and the allowance of this application—in that, though his claim was for Rs. 156 he abandoned Rs. 56 of that claim in order to bring the matter within the jurisdiction of the Court. In these circumstances, it appears to us that the matter being one of discretion we should not interfere and we accordingly discharge the Rule with costs. As this Rule has been three times argued, we assess the hearing fee at three gold *mohurs*.

Rule discharged.

PUNJAB CHIEF COURT.

MISCELLANEOUS CIVIL APPEAL NO. 2492 OF 1914.

January 16, 1915.

Present:—Mr. Justice Shadi Lal.

Lala KANSHI RAM—OBJECTOR—APPELLANT

versus

KISHOR CHAND, LIQUIDATOR OF THE ENGINEERS AND CONTRACTORS COMPANY, LIMITED—RESPONDENT.

Companies—Right to forfeit shares, when properly exercised and by whom—Liability as contributory.

A right to forfeit shares must, in order to be effectually exercised, be pursued with the greatest exactness by the proper parties, *i. e.*, by the Directors properly appointed and by the requisite number of them and in the proper manner and for proper cause. The right must be exercised *bona fide* for the purpose for which it was conferred. [p. 567, col. 2.]

Where, therefore, the Board of Directors passed a resolution authorizing the Managing Director to settle the matter of the appellant's liability with him and to place the result of such settlement before the next meeting of the Board for consideration and the Managing Director thereupon wrote to the appellant informing him that his shares had been forfeited, but the matter was never laid before the Board which, under the Articles of Association, was the only body empowered to forfeit the shares:

Held, that the Managing Director's action was altogether *ultra vires* and not binding upon the Company and that on the Company going into liquidation the appellant was rightly placed on the list of contributories and his name could not be removed. [p. 567, col. 2; p. 568, col. 1.]

Miscellaneous appeal from an order of the District Judge, Amritsar, dated the 6th of October 1914.

Mr. *Obedulla*, for the Appellant.

Mr. *Mukerjee*, for the Respondent.

JUDGMENT.—The point for decision in this appeal is whether the shares allotted to the appellant, Lala Kanshi Ram, were duly forfeited before the commencement of the winding-up. It appears that, on the 7th July 1912, the Board of Directors passed a resolution authorizing the Managing Director to settle the matter of the appellant's liability privately with him and to place the result of such settlement before the next meeting of the Board for consideration. The Managing Director thereupon wrote a letter to Lala Kanshi Ram on the 6th August 1912, informing him that his shares had been forfeited. It is quite clear that the matter was never laid before the meeting of the Board which, under the Articles of the Association, was the only body empowered to forfeit the shares, and it seems to me that the Managing Director's action was altogether *ultra vires* and is not binding upon the Company. There is reason to believe that the action taken by the Managing Director was not altogether *bona fide*.

A right to forfeit shares must, in order to be effectually exercised, be pursued with the greatest exactness: it must be exercised by the proper parties, *i. e.*, by Directors properly appointed, and by the requisite number of them and in the proper manner and for proper cause. The right must be exercised *bona fide* for the purpose for which it was conferred. The power to forfeit is a trust, the execution of which will be narrowly scanned by the Court. It cannot, for example, be exercised surreptitiously, for the purpose of expelling a share-holder, nor by connivance, for the purpose of assisting him in getting rid of shares and retiring from the Company in fraud of the other share-holders. A Court will not sanction or recognise as valid a forfeiture made *mala fide* for any such purpose (*vide* Lindley on Companies, pp. 726—727).

For the aforesaid reasons, I am of opinion that the appellant was rightly placed upon the list of the contributories and that his name must remain there. I, therefore, affirm the order of the lower Court and dismiss the appeal with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 6 OF 1913-14 OF BIJNOUR DISTRICT.

August 12, 1914.

Present:—Mr. Baillie, S. M.

RAM LAL—DEFENDANT—APPELLANT

versus

UMRAO SINGH—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 194—Decree passed against several persons—Whether one of them can appeal without others joining him.

Section 194 of the Tenancy Act does not apply to appeals. Therefore only one out of a number of persons against whom a decree has been passed can sustain an appeal even though others do not join him.

Second appeal from an order of the Commissioner, Rohilkhand Division, dated the 14th March 1914, reversing that of Assistant Collector, Bijnour District, in the a case of ejectment.

JUDGMENT.—Though I must say that the burden of evidence appears to me in favour of the finding of the Court of first instance, the question involved is one of fact and I am unable in second appeal to interfere. The question was, whether the appellant or Man Singh was the tenant-in-chief during the three years for which Man Singh's name is recorded. The Commissioner has found that Man Singh was the tenant and apparently that appellant the sub-tenant. As I have said, this is a question of fact. It is urged that section 194 bars one party sustaining an appeal on behalf of others who do not join in it, but I do not think that section 194 applies in the case of an appeal. The law on the subject is laid down in the Civil Procedure Code and allows one party to sustain an appeal, even though others did not join him.

The appeal is dismissed with costs on appellants.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 45 OF 1915.

May 31, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

INAYAT-UN-NISSA—PLAINTIFF—APPELLANT

versus

SALIM-UN-NISSA—DEFENDANT—RESPONDENT.

Occupancy holding—Suit for declaration of title between rival tenants—Landlord not party to suit—Civil or Revenue Court—Jurisdiction.

A suit between rival claimants to an occupancy holding, to which the landlord is no party, for a declaration of title or in the alternative for possession is cognizable by a Civil Court. [p. 569, col. 1.]

Bhup v. *Ram Lal*, 11 Ind. Cas. 268; 33 A. 795; 8 A. L. J. 1009; *Kanhi Ram* v. *Durga Prasad*, 27 Ind. Cas. 913; 13 A. L. J. 278; 37 A. 223, followed.

First appeal from an order of the Additional Subordinate Judge of Aligarh, dated the 19th of January 1915.

Dr. *S. M. Suleman*, for the Appellant.

Mr. *Ibn-i-Ahmad*, for the Respondent.

JUDGMENT.—The point of law raised by this second appeal is whether a suit by one person claiming to be the occupancy tenant of a certain holding against another person also claiming to be the occupancy tenant of the same holding, in which the relief sought is a declaration of the plaintiff's title or in the alternative recovery of possession, where the *zemindar* to whom the rent of the holding is payable is no party, is maintainable in a Civil Court. Sitting singly we have both of us been disposed to take the same view on this controverted point as did another learned Judge of this Court, on the strength of whose reported decision the lower Appellate Court has dismissed the suit. We find, however, that so far as reported decisions of two Judges of this Court go, there is a strong concensus of opinion the other way. We may refer to the cases of *Bhup* v. *Ram Lal* (1) and *Kanhi Ram* v. *Durga Prasad* (2). We think it better that there should be uniformity of decision upon a question of this sort; and whatever our personal opinion regarding this point of law may be, we are satisfied that we should, sitting as a Bench, follow the trend of authority

(1) 11 Ind. Cas. 268; 33 A. 795; 8 A. L. J. 1009.
(2) 27 Ind. Cas. 913; 13 A. L. J. 278; 37 A. 223.

in this Court. We accordingly allow this appeal, set aside the decision of the lower Appellate Court and, as that Court has dismissed the suit upon a preliminary point, we return the case to the said Court with directions to restore the appeal to the file of pending appeals and dispose of it according to law. Costs of this appeal will abide the event.

Appeal allowed; Case returned.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 10 OF 1914-15 OF FYZABAD DISTRICT.

March 10, 1915.

Present:—Mr. Holms, S. M., and Mr. Campbell, J. M.

BABU RAM—PLAINTIFF—APPELLANT

versus

JALPA SINGH—DEFENDANT—RESPONDENT.

Oudh Rent Act (XXII of 1886), s. 126 (1)—Lambardar collecting rent—Right to eject.

Where there is no specific and definite evidence on record to show that any co-sharer other than the *lambardar* collects rent of a definite portion of a holding, Selected Decision No. 2 of 1910 will not apply and the *lambardar* alone will be entitled to eject tenants by notice.

Selected Decision No. 1 of 1897, *Deepa* v. *Udai Ram*, Selected Decision No. 6 of 1903 and *Bhan Partap Sahi* v. *Manohar Lal*, 5 Oudh and Agra Law Rep. 6, referred to.

Second appeal from an order of the Commissioner, Fyzabad Division, dated the 10th August 1914, confirming that of the Assistant Collector, Fyzabad District, in a case of ejectment.

JUDGMENT.

HOLMS, S. M.—(*March 3rd*, 1915.)—The appellant first contends that this village falls under section 126 (2) of the Oudh Rent Act being a *pattidari* estate. On the whole, in view of the entry in the *mahalwar* assessment statement at last Settlement, I cannot say he is wrong.

The appellant next says that, even if section 126 (1) is applicable, the *lambardar* must be considered to be a manager authorised to collect the rents on behalf of all the co-sharers, and refers me to Selected Decision No. 1 of 1897 and *Deepa* v. *Udai Ram* (1), and also to a case reported from the Judicial Commissioner's Court, *Bhan Partab Sahi* v. *Manohar Lal* (2), in which it is held that the word "manager" referred to in section 126 (1) of the Oudh Rent Act means the *lambardar*, and "that, speaking generally, a *lambardar* in an undivided *mahal* is entitled to collect the rents". Against this the respondent refers me to Selected Decision No. 2 of 1910, which lays down that "the mere fact of being *lambardar* does not empower a co-sharer who does not collect the rent to eject tenants." It is a pity that the Commissioner did not examine the *patwari* in more detail on the question of collection, for the evidence on the record is not very definite on this point. The impression on my mind is on the evidence that, as a rule, the *lambardar* collects in the *shamilat patti* in which this land is, but that sometimes one or other of the two co-sharers collects as well. We have an indefinite statement by one of the co-sharers, Shankar Lal, that he collects some of the rent in the holdings in dispute and Babu Ram, the *lambardar*, collects some. There are apparently at least three holdings in dispute and there is no definite allegation in respect of any one holding that the other co-sharer either collects rent or a definite portion of it. This being so, I do not think that Selected Decision No. 2 of 1910 applies.

I would, therefore, set aside the orders of the lower Courts and dismiss the suit to set aside the notice of ejectment, parties bearing their own costs throughout in the circumstances of the case.

CAMPBELL, J. M.—I agree.

Appeal allowed.

(1) Selected Decision No. 6 of 1903.
(2) 5 Oudh & Agra Law Rep. 6.

KESAR SINGH *v.* *Musammat* DAYALI.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1176 OF 1913.

January 22, 1915.

Present:—Sir Alfred Kensington, KT., Chief Judge.

KESAR SINGH AND ANOTHER—DEFENDANTS —APPELLANTS

versus

Musammat DAYALI—PLAINTIFF—RESPONDENT.

Government Tenants (Punjab) Act (III of 1893)—Re-grant of lapsed occupancy tenancy by Revenue officer—Civil Court, whether can interfere.

The Civil Courts have no jurisdiction to interfere with the arrangements made by the Revenue authorities in the matter of the re-grant of a lapsed occupancy tenancy which is covered by the Government Tenants Act, III of 1893.

Second appeal from a decree of the Divisional Judge of the Gujranwala Division, dated the 8th April 1913.

Mr. *Morton*, for the Appellants.

Mr. *Nand Lal*, for the Respondent.

JUDGMENT.—The question to be here determined is whether the Civil Courts have any jurisdiction to interfere with the arrangements made by the Revenue Authorities in the matter of re-grant of a lapsed occupancy tenancy which is covered by the Government Tenants Act, III of 1893.

It is not in dispute that Sawan Singh, the original occupancy tenant to whom the grant was made, has died without heirs, as determined by section 59 of the Punjab Tenancy Act. As has been held in *Sahibzada* v. *Jawaya* (1), the Revenue Authorities were then entitled to treat the grant as having lapsed, and to re-grant the tenancy to any one they pleased. They did in fact re-grant it to the present appellants, near collaterals of Sawan Singh, by the order of the Collector, dated 9th September 1910.

The plaintiff-respondent has claimed half the land as being a collateral in the same degree as the appellants. His relationship has been found to be established as a fact and this is a finding which cannot be interfered with in second appeal. It does not, however, follow that the plaintiff has any right to half the tenancy, and the learned Divisional Judge appears to me to have misconstrued the ruling in *Ali Mardan* v. *Bakar Khan* (2), as justifying him in giving plaintiff a decree. He has done so on a qualified statement by one of the appellants which he has treated as an admission of plaintiff's rights, and has thereby gone a good deal further than was contemplated by the ruling quoted.

I take it to be quite immaterial whether Kesar Singh's statement should be treated as an admission or not. The tenancy is limited to the existing grantees under section 6 of the 1893 Act and no one else has rights which can be recognised by the Civil Courts. It is open to Kesar Singh to allow the plaintiff to join with him in cultivation of the land if he pleases, though I do not understand his statement to mean that he is willing to do so. But it is quite another matter to treat the plaintiff as having a definite share in the tenancy without authority from the representatives of the Local Government.

I cannot follow the argument of the lower Appellate Court in its suggestion that Government should be put to the trouble of ejecting the plaintiff or otherwise enforcing the conditions of the tenancy, if so advised. The position seems to me to be the reverse one. If plaintiff considers that he has any right to share in the new grant, his remedy is not by suit in the Civil Court but by application to the Revenue authorities to modify their orders of 1910. Whether they would listen to him or not is a matter which no Civil Court can say, but it is easy to understand that they might strongly object to an addition to the existing grantees, and to my mind it is clear that the Courts cannot go over the heads of the responsible authorities in a suit to which Government is not even a party. It is their duty under the law to scrupulously refrain from any sort of encroachment on the powers of the Local Government where their action has no legal authority and may prove embarrassing.

The defendants' appeal is accordingly accepted. The decree of the lower Appellate Court in plaintiff's favour is set aside, and the plaintiff's suit is dismissed with costs throughout to the defendants.

Appeal accepted.

(1) 14 P. R. 1908; 107 P. L. R. 1908; 24 P. W. R. 1908.
(2) 17 Ind. Cas. 6 0; 7 P. W. R. 1913; 27 P. L. R. 1913; 13 P. R. 1913.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2739 OF 1913.

May 20, 1915.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice N. Chatterjea.

PRIYA NATH BACHHER—PLAINTIFF—APPELLANT

versus

MIANJAN SARDAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 149, scope of—Court-fees, deficiency of, made up after several orders, effect of—Discretion—Appeal.

A plaint was presented to a Civil Court on the 19th April. On the 29th April an order was made on the plaintiff to pay the deficit Court-fees within a week. This was followed by several other orders providing for payment on later dates. Ultimately there was an order on the 7th August under which the balance was to be paid within five days, but it was paid the next day, the 8th August:

Held, that there was an order and also payment in conformity with that order within the meaning of section 149, Civil Procedure Code.

A discretion exercised properly under the section cannot be challenged in appeal.

Appeal against a decree of the Subordinate Judge, first Court, Alipur, Zillah 24-Perganas, dated the 12th of May 1913, confirming that of the first Munsif, Sealdah, dated the 29th of June 1912.

Babus *Sarat Chandra Roy Chowdhury* and *Dhirendra K. Roy*, for the Appellant.

Babu *Jogendra Narayan Mozumdar*, for the Respondents.

JUDGMENT.

JENKINS, C. J.—This is an appeal from a decision of the Subordinate Judge, first Court, Alipur, affirming the decision of the first Munsif at Sealdah. The suit was for recovery of money and it was presented in the Small Cause Court at Sealdah on the 18th April 1911. That Court had no jurisdiction, so it was returned on the 19th. On the same date it was presented to the Munsif's Court. On the 29th of April an order was made on the plaintiff to pay the deficit Court-fees within a week. This was followed by several other orders providing for payment on later dates. Ultimately there was an order on the 7th August under which the balance was to be paid within five days. In fact it was paid the next day, the 8th August. Notwithstanding this, it has been held that the suit was not within time and must be dismissed. This appears to me to be an erroneous reading of section 149 of the Code, which provides for the power to make up deficiency of Court-fee and for that purpose vests the Court with powers, in its discretion, at any stage to allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such Court-fee, and upon such payment the document, in respect of which such fee is payable, is to have the same force and effect as if such fee had been paid in the first instance. In this case we have such an order as section 149 contemplates and there was payment in conformity with the terms of the order. So that I can see no reason why the provisions of section 149 should not apply.

Some doubt has been suggested as to whether the Judge exercised his discretion in making the various orders to which I have referred. It appears to me impossible to go into a question of that kind. He must be taken on the record, as it stands to have, exercised his discretion as provided by section 149. The result is, in my opinion, the decree of the Subordinate Judge and of the Munsif must be set aside and the case sent back to the Court of first instance in order that it may be heard in accordance with law. Costs hitherto incurred will follow the result.

N. CHATERJEA, J.—I agree.

Decree set aside.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 75 OF 1912-13 OF FYZABAD DISTRICT.

November 25, 1913.

Present:—Mr. Baillie, S. M.

INDARDAWAN SINGH—PLAINTIFF—APPELLANT

versus

JAGDUTT SINGH—DEFENDANT—RESPONDENT.

Oudh Rent Act (XXII of 1886), ss. 33, 79—Tenant holding under a heritable, non-transferable lease—Enhancement or alteration of rent.

Where a tenant holds a lease of *sir* land under a heritable but non-transferable lease, the rent of such a tenant cannot be enhanced under section 33 of the Oudh Rent Act, but it can be altered under section 79 of the Land Revenue Act at the time of Settlement. [p. 572, col. 1.]

Second appeal from an order of the Commissioner, Fyzabad Division, dated the

6th May 1913, reversing that of the Assistant Collector of Fyzabad District, in a case of enhancement of rent.

JUDGMENT.—I do not think it is necessary to add to any considerable length to the clear and well-reasoned decision of the Commissioner, with which in its entirety I agree. I realise that in so deciding I go against certain decisions of the Board of Revenue, and in particular, one by Messers. Evans and Roberts pronounced in 1901. I find it difficult to understand how the Board in that case did not refer more in detail to the way in which the Settlement Officer remarked on the nature of the rights decreed to the respondents. The Settlement Officer considered that the rights decreed to them were equivalent to non-tranferable *sir* and this interpretation by the Appellate Court of the decree in appeal before them must be regarded as authoritative and conclusive. Non-transferable *sir*, like Mr. Pet, I understand to imply a heritable and non-transferable lease and in such a case the rent must be fixed by the Settlement Officer under section 79 and cannot otherwise be fixed. This suit was brought to have rent fixed under section 33. Section 33 gives three grounds on which rent can be enhanced and none of these grounds in any way apply to this case even under the interpretation of the decree accepted by Messrs. Evans and Roberts.

I entirely agree with the Commissioner that no suit under section 33 lies and that the respondents are persons whose rent can be altered only at Settlement and by an order of the Settlement Officer under section 79 of the Land Revenue Act.

The appeal is dismissed with costs on appellant.

Appeal dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1314 OF 1913.

February 13, 1915.

Present:—Mr. Justice Shah Din and Mr. Justice LeRossignol.

Musammat BHAMBUL DEVI—JUDGMENT-DEBTOR—APPELLANT

versus

NARAIN SINGH—DECREE-HOLDER—RESPONDENT.

Custom—Ancestral land, whether liable to attachment in hands of widow of deceased proprietor—Onus—*Effect of attachment.*

Where a male proprietor governed by Customary Law has contracted a debt, in respect of which a simple money-decree has been passed against him, and thereafter has died leaving ancestral landed property, which has come into the possession of his widow on the usual life-estate, such property is liable to be attached at the instance of the deceased proprietor's judgment-creditor in execution of his money-decree. [p. 572, col. 2.]

The burden of proving that the deceased's estate in the hands of his widow is not liable for his just debts lies heavily on the person asserting this. [p. 573, col. 2.]

An attachment of property does not affect any title therein, but merely prohibits its transfer. [p. 573, col. 1.]

Jagdip Singh v. *Bawa Narain Singh*, 15 Ind. Cas. 866; 4 P. R. 1913 (F. B.); 160 P. W. R. 1912; 173 P. L. L. 1912, distinguished.

First appeal from an order of the District Judge, Ambala, dated the 16th May 1913.

The case was referred to a Division Bench by the following order delivered by

SHAH DIN, J.—(*December 10th*, 1914.)—The question for decision in this appeal is whether, where a male proprietor governed by Customary Law has contracted a debt, in respect of which a simple money-decree has been passed against him, and thereafter has died leaving ancestral landed property, which has come into the possession of his widow on the usual life-estate, such property is liable to be attached at the instance of the deceased proprietor's judgment-creditor in execution of his money-decree.

This question is not directly dealt with in the Full Bench ruling of this Court, *Jagdip Singh* v. *Bawa Narain Singh* (1), though the terms of the reference and of the answer of the Full Bench thereto are wide enough to cover it. As cases of this description are by no means uncommon, I

(1) 15 Ind. Cas. 866; 4 P. R. 1913 (F. B.); 160 P. W. R. 1912; 173 P. L. R. 1912.

think that it is desirable to have an authoritative decision by a Division Bench on the question involved; and I refer the case to a Division Bench accordingly.

Mr. *Nand Lal*, for the Appellant.

Mr. *Oertel*, for the Respondent.

JUDGMENT.—The matter for the decision in this case is clearly stated in the referring order. Before us a fresh point has been raised, that the fact of the attachment of the property during the life-time of the debtor establishes a kind of charge on it.

It is, however, admitted that attachment does not quite amount to a charge on the property; the point is not pressed with any warmth, and we are aware of no authority or principle which would justify the conclusion at which we are asked to arrive.

Attachment of property does not affect any title therein, but merely prohibits its transfer. We notice also that in the case on which *Jagdip Singh* v. *Bawa Narain Singh* (1) is based, the property had there too been attached during the life-time of the original debtor.

The difficulty in this case proceeds from the necessity of determining whether the widow is to be considered the next holder, as the term is used in *Jagdip Singh* v. *Bawa Narain Singh* (1).

The tenure of the widow is very different from that of the reversioner both in its nature and in its origin. The widow's life-tenure originated in her right to maintenance, but though originally her right was one only of maintenance which in course of time became a right to the enjoyment of the whole estate, whether it exceeded her needs or not, it is not now disputable that her right is to the whole estate.

That right she derives from her marriage; she is her husband's representative and so far has this principle been carried that in many tribes she represents her husband even in collateral succession.

Had her husband remained in existence, he could not have resisted attachment of his property. How then can his widow, who derives all her right from her husband, claim a privilege which her husband did not enjoy?

The reversioners, on the other hand, derive their right not from the last male holder, but from the common ancestor and their right is antagonistic to that of the last male holder.

In this view *Jagdip Singh* v. *Bawa Narain Singh* (1) would appear not to cover the case of a widow, nor is there any internal evidence in the body of that judgment that the case of a widow was present to the minds of the learned Judges who decided the case.

In the past, it has been a generally accepted proposition that a widow for necessity may alienate her deceased husband's property and the satisfaction of his just debts has invariably been regarded as necessity.

Now, as has often been remarked, custom is not always logical, and to seek to extend custom by logical processes, *e. g.*, by analogy, is a dangerous proceeding which may lead to very untoward and unexpected results.

Not without good reason, therefore, has it been laid down that custom is not a matter of inference, but a matter of proof. Custom is, in fact, whatever can be proved to be the custom, nothing more and nothing less.

As remarked above, it has been customary to regard the deceased's estate in the hands of his widow as liable for his just debts, but, if that view is erroneous and is to be superseded, the burden of proving that it is incorrect and deserving of that fate, lies heavily on the person asserting this. But no custom, unless consecrated by time, has the force of law.

In regard to the question now before us, we consider the widow's estate a continuation of her deceased husband's and hold that his property, so long as it remains in her hands, is liable to satisfy his debts. In this view we dismiss this appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 481, 541 AND 544 OF 1912.

April 27, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Sadasiva Aiyar.

RAMALINGA REDDI AND ANOTHER—PLAINTIFFS—PETITIONERS

versus

MUTHU THEVAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), ss. 23, 30—*Money lent*

for gambling purposes—Finding to be specific and clear.

Where in a suit upon a promissory note the defence is that it was executed in respect of money advanced for gambling purposes, to render the money irrecoverable under section 23 or 30, Contract Act, 1872, it is not enough for the Court to find generally that the debt was contracted for gambling purposes, but it must also find whether it was lent for future play or for past play and what portion of it was used for such a purpose.

Subbaraya v. *Devandra*, 7 M. 301, followed.

Petitions, under section 25 of Act IX of 1887, praying the High Court to revise the decrees and judgments of the Court of the District Munsif of Tirumangalam, in Small Cause Suits Nos. 449, 448 and 442 of 1912, respectively.

Mr. *K. N. Aiya*, for the Appellants.

Mr. *K. R. Shenoi*, for the Respondents.

JUDGMENT.—In these cases the lower Court has held no satisfactory trial. It has in each formulated the points for decision far too generally, and has failed to consider that the defendant in each set up a particular case in evidence, to which he had made no definite reference in his written statement. The conclusion that the debts sued for were contracted for gambling purposes is not clearly sufficient to render them irrecoverable with reference to section 23 or 30, Indian Contract Act, since it might cover alike money lent (1) for payment to others for losses already incurred, or (2) to enable defendant to gamble in the future, or (3) even to pay the amount of loss already due to plaintiff for past play. It is not clear that money lent in each of these different sets of circumstances could be irrecoverable, *vide*, for instance, *Subbaraya* v. *Devandra* (1).

It is a further objection to these decisions that they do not refer to or contain any conclusions regarding the details of the defence evidence. For instance, in Small Cause No. 481, though the written statement denied receipt of consideration, the defendant in evidence admitted that in exchange for the promissory note chits, apparently representing costs, were given, yet the judgment contains no reference to this. Nor do the other judgments to similar points.

In Civil Revision Petition No. 544 we consider that the lower Court has dealt with the evidence, as though the burden of proof regarding the passing of valid consideration were on plaintiff. It should have imposed it on defendant.

In these circumstances the lower Court's decisions must be set aside and the Small Cause Suits remanded for re-admission and re-trial. The lower Court must call on the defendants to submit amended written statements, in which their pleas are set out definitely and particularly. It should then set out the points for decision clearly in each case in the light of the foregoing.

Costs will follow the result.

Petition allowed; Suit remanded.

(1) 7 M. 301.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 405 OF 1913.

February 26, 1915.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Tyabji.

GOTTIMUKKALA CHINA SOMARAJU—PLAINTIFF—APPELLANT

versus

SRIMAT SURANGAM NALLANI CHAKRAVARTHULA SINGARACHARYULU AYYAVARLAM GARU AND ANOTHER—DEFENDANTS—RESPONDENTS.

Madras Rent Recovery Act (VIII of 1865), s. 12—Tenancy from year to year—Oral notice to quit—Wrongful ejectment—Suit for possession—Damages.

A notice of ejectment under the Madras Rent Recovery Act (VIII of 1865) must be in writing. [p. 575, col. 1.]

Where there was merely an oral notice to quit and the tenant was wrongfully dispossessed the tenancy being from year to year:

Held, that he was entitled to be in possession for a year after the period when he was ejected and was entitled to one year's mesne profits as damages in lieu of possession. [p. 575, col. 1.]

Second appeal against the decree of the District Court of Kistna at Masulipatam, in Appeal Suit No. 619 of 1911, preferred against that of the Court of the Sub-Collector of Narsapur Division, in Summary Suit No. 53 of 1906.

Mr. *V. Ramadoss*, for the Appellant.

Mr. *P. Narayanamurthi*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit under section 12 of the Rent Recovery Act. The learned District Judge has

found that the tenancy of the appellant was from year to year. We are not prepared to say that in deciding this question of fact the learned Judge has committed any such error as can be corrected in second appeal, and accept that finding. He has also found that there was in effect oral notice to quit at the time when the tenant was wrongfully ejected. On these findings the tenant was entitled to be in possession for a year after the period when he was ejected, and the learned Judge's decree giving one year's mesne profits as damages in lieu of possession is, therefore, quite correct.

The second appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2300 OF 1912.

March 25, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

GRAMANI ADAM SAHIB AND OTHERS—DEFENDANTS NOS. 1, 3, 5 AND 6—APPELLANTS

versus

S. HAJI ABDULLA SAHIB AND OTHERS—DEFENDANTS—RESPONDENTS.

Dedication to religious or charitable purposes—Land once dedicated to one purpose, whether can be used for any other.

If a piece of land is dedicated to one purpose, it cannot, contrary to the terms of the dedication, except in cases which fall under the *cy-pres doctrine* (or its equivalent in Muhamadan Law) be utilised for any other purpose.

Second appeal against the decree of the Court of the Subordinate Judge of North Arcot, in Appeal Suit No. 127 of 1911 (A. S. No. 408 of 1910 on the file of the District Court of North Arcot), preferred against that of the Court of the District Munsif of Ranipet, in Original Suit No. 1 of 1909.

Messrs. *C. V. Ananthakrishna Aiyar* and *Hamid Hassan*, for the Appellants.

Messrs. *Mir Sultan Moideen*, *Mir Zyauddin* and *S. Dorasami Aiyar*, for the Respondents.

JUDGMENT.—Both the lower Courts have held that the land which forms the subject of the suit was portion of a burial ground, actually used at some time as such. It is not denied by the appellants that it was so used till about 20 years ago. On the other hand, there is some evidence that burials have taken place in the land until four or five years of the suit. On this finding the decree of the District Munsif (confirmed by the lower Appellate Court) was quite correct.

We have had some difficulty in following the argument before us. Authorities were cited to show that in some cases land which has once been used as a burial ground may be utilised for other purposes. These authorities distinguish a graveyard from land which has been dedicated for a mosque: the latter can never be used for any other purpose, whereas the former may, if it is no longer in use as a burial ground and if certain conditions (which need not be specified) are fulfilled. But those authorities can have no bearing on the question which is now sought to be argued before us. It is elementary law that if a piece of land is dedicated to one purpose, it cannot, contrary to the terms of the dedication and except in cases which fall under the *cy-près doctrine* (or its equivalent in Muhammadan Law), be utilised for any other purpose. No attempt was made to bring the present case under any of the special rules or exceptions.

The decree under appeal must stand and the appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 80 OF 1913.

January 18, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

MESSRS. HOPE PRUDHOMME AND CO.—DEFENDANTS—APPELLANTS

versus

M. EARNEST LOUIS MAX, BY HIS DULY CONSTITUTED AGENTS, MESSRS. CHAMBERS AND CO.—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 19—Misrepresentation avoiding contract must be one of fact—Damages for breach of contract—Criterion for assessing damages.

Where the question is whether a certain statement is a substantive part of a contract or a mere representation, it is essential that the statement should be descriptive of the contract, in order to

HOPE PRUDHOMME & CO. *v.* M. EARNEST MAX.

make it a term of the contract. [p. 577, cols. 1 & 2.]

Behn v. *Burness*, 3 B. & S. 751; 32 L. J. Q. B. 204; 9 Jur. (N. S.) 620; 8 L. T. 207; 11 W. R. 496; 122 E. R 281; 124 R. R. 794, referred to.

Where one of the contracting parties says: "I am well-known to the National Bank in your city", it is not a statement of fact, but only his own opinion as to the state of his credit, though it may be false; such statement is not one of fact, and even if false, does not avoid the contract under section 19 of the Indian Contract Act (IX of 1872). [p. 577, col. 2.]

In assessing damages for breach of contract the price ruling on the date on which the contract was finally cancelled must be taken to be the criterion and not that prevailing on any previous date. [p. 578, col. 1.]

Appeal from the decree and judgment of the Hon'ble Mr. Justice Wallis, dated the 17th of September 1913, in the ordinary original civil jurisdiction of this Court, in Civil Suit No. 317 of 1912.

Messrs *D. Chamier*, *K. Krishna Pandalai*, *Rencontre* and *Tirumalai Pillai*, for the Appellants.

Messrs. *W. Barton*, *Branson* and *Branson*, for the Respondents.

JUDGMENT.—This is an appeal from the judgment of the Chief Justice, then Mr. Justice Wallis, sitting on the original side. The suit was brought by Monsiour Max, a merchant living in Marseilles, against Messrs. Hope Prudhomme and Co. for damages for breach of two contracts to supply ground-nuts. The contracts were admitted by the defendants, who claim to have been entitled to avoid them as they were procured by fraud and misrepresentation. The sole issue settled was whether the plaintiff made certain representation and, if so, whether the representation was false and whether the defendants were entitled to cancel the contract. The representation alleged in the written statement was that the plaintiff stated as a fact that he was sufficiently known to the National Bank of India here and that his drafts will be promptly discounted without banker's credit. The learned Judge found that there was no misrepresentation and that even if there was, the consent of the defendants to the contract was not caused by the misrepresentation within the meaning of section 19 of the Contract Act and that the defendants were accordingly not entitled to avoid the contracts. He, therefore, gave judgment for the plaintiff with damages based on the difference between the contract rate of 30·5 *francs* per 100 *kilos* and 33 *francs*, the price which the plaintiff had to pay in March in Marseilles for the same class of ground-nuts.

On appeal Mr. Chamier, for the defendants, renews the argument put before the learned Judge, further contends that the representation was a term of the contract and seeks to make out that the contract was not for delivery of ground-nuts in Marseilles, but for delivery to the National Bank of India as agents for the plaintiff in Madras on payment under discount of the bills drawn by the defendants upon M. Max. The first objection to this argument is that it was never set up in the written statement, and no issue was taken on it, and it was not urged before the learned Judge. Mr. Chamier contends that as it is a pure point of law arising on the construction of the correspondence, he can take it in appeal. We have allowed him to argue it and are satisfied that there is no foundation for the contention. The history of the contracts is set out by the learned Judge. The material facts are that the defendants opened negotiations with M. Max in May with a view to business during the ground-nuts season and suggested that payment should be by three months' drafts on him for 93 per cent. of the amount of the invoice against customary credits (*vide* Exhibit A). By Exhibit B the plaintiff stated that he was willing to do business, but that he could not accept for more than 90 per cent. of the net amount of the invoice, and with regard to the proposed customary credit he wrote as follows: "Letters of credit are not customary but I am sufficiently known to the National Bank of India in your city, so that your drafts will be promptly discounted." In Exhibit C the defendants renewed their demand for 93 per cent. of the invoice amount, and with regard to the other matter in dispute wrote as follows:

"As you are reluctant to open letters of credit, we shall give your counter-proposal a trial when an opportunity occurs and trust we shall have no difficulties in carrying out the same." There was further correspondence and the final letters are, Exhibit E, of the 14th October, from the plaintiff in which he stated he was willing to make a trial allowing the defendants to draw for 93 per cent., and Exhibit F from the defendants containing a clause headed

"Finance," which ran as follows: "We are very pleased to learn that you are now agreeable to accept our condition of drawing 93 per cent. of the invoice amount." The actual contracts were for 100 tons ground-nuts at 30·5 *francs* per 100 *kilos* C. F. Marseilles for December-January shipment and 200 tons at the same price and terms for January-February shipment. Mr. Chamier argues that the word "shipment" indicates that delivery was to be on board ship. When pressed as to the person who is to take delivery, he falls back on the reference to the National Bank and states that delivery was to be to them. It is sufficient to say that that was obviously not the contract. The contract was C. F. Marseilles and the word "shipment" has only reference to the period within which the ground-nuts might be shipped. This is made clear by the evidence of P. W. No. 2, who explains that the words mean that the goods may be shipped in the one case to the end of January and in the other case to the end of February at the opinion of the shipper. Another complete answer is that the defendants did not proceed on this footing; for they did not take the shipping documents to the National Bank at first but went to their own Bank, the Mercantile Bank, to get them discounted. It is, therefore, quite unnecessary to decide whether the language in Exhibit B could have been treated as a term of the contract if the defendants had themselves so treated it. But bearing in mind that they sought by Exhibit A to get as a term of the contract an agreement by the plaintiff that they should draw against customary credits and that the plaintiff at once repudiated the idea that there was any such custom and refused to give the credit, it would be very difficult to hold that the language "I am sufficiently known," etc., was an alternative term. The case relied upon by Mr. Chamier of *Behn* v. *Burness* (1) does not assist him. What was decided in that case was that the statement *in a charter party* that "the ship is now in the port of Amsterdam" was intended to be a substantive part of the contract and not a mere representation, the ruling being as follows: "With respect to statements in a contract descriptive of the subject-matter or of some material incident thereof . . . . . the true doctrine appears to be that, if they were intended to be a substantive part of the contract, then they become a condition precedent." It has only to be pointed and that in this case there is no formal contract and that the statements are not descriptive of the subject-matter and are not *contained in the contract.*

If the defendants could succeed, it could only be on the basis of a misrepresentation. This has been dealt with very fully by the learned Judge and we do not think it necessary to cover the same ground. It is sufficient to say that the words used are not a positive assertion of that which is not true. They mean nothing more than this: "I can assure you that as far as my credit is concerned, I am sufficiently well known to the National Bank for your drafts on me to be promptly discounted." That is certainly a statement of his financial status in Madras: but the rest of it is purely an inference. He had no power to compel the National Bank to discount any draft. That was a matter for the Bank itself. It appears that his confidence in his financial status was too great; for the Manager of the National Bank states in evidence that he regarded the plaintiff as a "weak name." But there is nothing to show that the plaintiff was not warranted by the information then in his possession in making the statement. The learned Judge has given reasons for holding this and we agree with him.

Further, it is abundantly clear that the defendants' consent to the contract in December was not caused by this representation, for in October they specifically state that they will give the plaintiffs' counter-proposal a trial when opportunity occurs—which can only mean that they were prepared to make the contracts and see if there was any difficulty in getting the drafts discounted. That this is the true view is clear from the facts that they did not take the drafts to the National Bank first, but went to their own Bank and when that Bank, the Mercantile Bank, refused to discount the bills, they cabled for a credit not on the National Bank, but on the Mercantile Bank and that they sought to have the contracts cancelled by

(1) 3 B. & S. 751; 32 L. J. Q. B. 204; 9 Jur. (N. S.) 620; 8 L. T. 207; 11 W. R. 496; 122 E. R. 281; 124 R. R. 794.

Exhibit W before they even went near the National Bank.

Lastly, we are strongly inclined to think that in any case the exception to section 19 would apply; for although it may be that the National Bank would not have made any statement about the plaintiff's credit to a casual inquirer, we can hardly doubt that if the defendants had before closing the contracts taken the letter, Exhibit B, to the National Bank and asked them whether they would discount the drafts for those contracts, they would have got an answer one way or the other from the Bank. For these reasons we agree with the learned Judge that the defendants were not entitled to avoid the contracts.

The only question that remains is the amount of damages. Mr. Chamier has argued that the damages should be assessed as at the date of Exhibit BB "The National Bank of India refuse to take up. If you cannot arrange with the Bank cancel the contract in consequence of, which is on the 3rd instant" (January), relying chiefly on his argument that the contract was for delivery to the Bank. We have already decided against him on this point: and further we are of opinion that the plaintiff was entitled to await the arrival of a definite repudiation by letter before taking action, especially in view of the fact that the defendants had up to the end of January in one case and the end of February in the other case to fulfil the contract.

We cannot, however, agree with the learned Judge that the damages should be assessed on the price in March. The learned Judge was led to fix that date by the view which he expresses on page 12, that the goods ought to have been shipped by the end of January and the end of Feburary and would have been delivered in the course of Feburary and the course of March. We think that he has overlooked the evidence as to the option of the shipper; and we, therefore, take the price at the end of January, the date on which the plaintiff received the definite repudiation by Exhibit CC. The price then was 32·50 *francs* as against 33 given by the learned Judge. We allow the appeal to this extent but in the circumstances without costs.

Appeal partly allowed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 35 OF 1914.

April 20, 1915.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

KOTHAL MAMMAD HAJI—DEFENDANT—COUNTER-PETITIONER—APPELLANT

versus

PYDAL NAIR AND ANOTHER—PLAINTIFFS—PETITIONERS NOS. 1 AND 2—RESPONDENTS.

Malabar tarwad—Properties given to member in lieu of maintenance—Restraint on alienation except by way of lease—Member's interest, whether attachable—Civil Procedure Code (Act V of 1908), s. 60 (1) (n).

Where certain properties are given to a member of a Malabar *tarwad* in lieu of maintanance under a *karar* which prohibits alienation except by way of lease, his interest in the properties is not exempt from attachment under section 60 (1) (*n*) of the Civil Procedure Code. [p. 579, col. 1.]

Raja Kamodana Venkatanarasimha Ramachandra Row Bahadur} Zamindar Garu v. *Raja Lakshminarasamma Row Zamindar Garu*, 30 M. 266; 2 M. L. T. 188; 17 M. L. J. 139; *Tara Sundari Debi* v. *Sarada Charan Bandopadhya*, 7 Ind. Cas. 80; 12 C. L. J. 146, followed.

Appeal against the decree of the Court of the Subordinate Judge of North Malabar, dated the 20th November 1913, in Appeal No. 624 of 1912, preferred against that of the District Munsif of Kuttabaramba, in Execution Petition No. 251 of 1912, in Original Suit 1037 of 1908.

FACTS.—The plaintiff obtained a money-decree against the defendant, a member of a Malabar *tarwad*, and in execution of that decree, attached certain properties given to the defendant and his *tavashi* in lieu of maintenance. The defendant put in a claim counter-petition to raise the attachment, on the grounds that the property was not liable to attachment and that the *karar* under which he had got the property, prohibited any alienation by him except by way of lease, *kurhikanom*, etc. Both the lower Courts held that the defendant had an attachable interest in the property and following a decision in *Govinda Pillai* v. *Meenatchi Achi* (1) disallowed the defendant's claim. The defendant appealed.

Mr. *K. P. Ramakrishna Aiyar*, for the Appellant:—The decision in *Munisami Naidu* v. *Ammani Ammal* (2) governs the case. The appellant's right

(1) 13 Ind. Cas. 152; 10 M. L. T. 493; (1911) 2 M. W. N. 563; 22 M. L. J. 204.

(2) 15 M. L. J. 7.

is only to the income from the property and not to the property itself. The appellant could not obtain any interest in the property except by a partition of the whole *tarwad* and, therefore, his maintenance right should not be attached. *Tara Sundari Debi* v. *Sarada Charan Bandopadhya* (3) and *Padmanand Singh* v. *Rama Prasad* (4).

Mr. *K. Govinda Marar*, for the Respondents.

JUDGMENT.—We think that the lower Appellate Court has applied the authorities rightly. We need only add to them *Raja Kamodana Venkatanarasimha Ramachandra Row Bahadur Zamindar Garu* v. *Raja Lakshminarasamma Row Zamindar Garu* (5) and *Tara Sundari Debi* v. *Sarada Charan Bandopadhya* (3). We agree that the appellant's interest is not exempt from attachment under section 60 (*n*) of the Code of Civil Procedure.

It is also argued that the property cannot be attached because appellant's *tarwad* will have a right to object to its attachment The appellant cannot rely on this objection. It can be dealt with if the *tarwad* makes it.

The appeal against appellate order is dismissed with costs.

Appeal dismissed.

(3) 7 Ind. Cas. 80; 12 C. L. J. 146.
(4) 17 Ind. Cas. 284; 16 C.L.J. 354; 17 C. W. N. 662.
(5) 30 M. 266; 2 M. L. T. 188; 17 M. L. J. 139.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 557 OF 1914.

March 24, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

SUBBARAYALU NAIDU—PLAINTIFF—APPELLANT

versus

PAPAMMAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 33 — Dismissal of suit as time-barred against one defendant—High Court, whether can dismiss it against other defendants who were not impleaded.

Where a suit is dismissed against one of the defendants as time-barred, the High Court can dismiss it against those other defendants who did not appeal and were not impleaded in the lower Appellate Court.

Peria Krishnasami Naik v. *Aiyappa Naik*, 24 Ind. Cas. 924; 1 L. W. 376; *Venkatachela Pillai* v. *Ranga Pillai*, 28 Ind. Cas. 694; 17 M. L. T. 220; 28 M. L. J. 334, followed.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Trichinopoly, in Appeal Suits Nos. 249, 250 and 251 of 1913, preferred against that of the District Munsif of Srirangam, in Original Suit No. 348 of 1911.

Mr. *G. S. Ramachandra Aiyar*, for the Appellant.

Messrs. *S. T. Srinavasa Gopalachariar* and *N. Rajagopalachariar*, for the Respondents.

JUDGMENT.—There is no doubt that Article 44 of the Limitation Act is the Article properly applicable : and that the suit is time-barred as regards all the suit properties. Its dismissal as against the defendants who did not appeal and were not impleaded in the lower Appellate Court is justified by Order XLI, rule 33, of the Code of Civil Procedure [vide *Peria Krishnasami Naik* v. *Aiyappa Naik* (1) and *Venkatachela Pillai* v. *Ranga Pillai* (2)].

The second appeal is dismissed with costs (one set).

Appeal dismissed.

(1) 24 Ind. Cas. 924; 1 L. W. 376.
(2) 28 Ind. Cas. 694; 17 M. L. T. 220; 28 M. L. J. 334.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 250 OF 1911.

March 17, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

Jagirdar Mir A. SHROOF SAHIB AND OTHERS—DEFENDANTS NOS. 1, 2, 4 AND 5—APPELLANTS

versus

RAGHUNATHA SIVAJI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 4 (3)—Guardian ad litem, appointment of—Consent of proposed guardian, necessity of—Ex parte decree against minors, when liable to be set aside.

Order XXXII, rule 4 (3), of the Code of Civil Procedure, makes it imperative that the consent of the proposed guardian should be obtained for his appointment; and the appointment of any person as guardian *ad litem* without his consent is not a legal appointment. An *ex parte* decree obtained against both the major and minor defendants without a guardian properly appointed to the minors is one that is liable to be set aside so far as minors are concerned and the fact that the proposed guardian subsequently made an application to set aside the *ex parte* decree against the minors will not validate the originally invalid appointment. [p. 580, col. 1.]

Bal Kishan Lal v. *Topeswar Singh*, 14 Ind. Cas. 845; 15 C. L. J. 446; 17 C. W. N. 219; *Kunwar Partab Singh* v. *Bhabuti Singh*, 21 Ind. Cas. 288; 18 C. L. J.

384; 17 C. W. N. 1165; (1913) M. W. N. 785; 14 M. L. T. 299; 25 M. L. J. 492; 11 A. L. J. 901; 16 O. C. 247; 15 Bom. L. R. 1001; 35 A. 487; 40 I. A. 182, followed.

Appeal against the order of the District Court of Ganjam, in Interlocutary Appeal No. 771 of 1910, in Original Suit No. 14 of 1910.

Mr. *C. S. Venkatachariar*, for the Appellants.

Dr. *S. Swaminadhan*, for the Respondents.

JUDGMENT.—This is an application on behalf of defendants Nos. 4 and 5 who are minors as well as on behalf of the other defendants who are majors, to set aside the *ex parte* decree passed against them. So far as the major defendants are concerned, we see no reason to differ from the conclusion at which the learned Judge in the Court below had arrived. The case of the minors is different. Notice was issued to the 1st defendant, their father, to show cause why he should not be appointed their guardian *ad litem* : the notice was not served personally, but was affixed to the house. The service has been held by the District Judge to be sufficient and we see no reason to differ from him. The 1st defendant did not appear ; nor did he intimate his willingness to the Court to be the guardian. Under these circumstances, he ought not to have been appointed as guardian. Order XXXII, rule 4 (3), makes it imperative that the consent of the proposed guardian should be obtained for the appointment. This was not done. The fact that in the subsequent proceedings the father applied on behalf of the minors to set aside the *ex parte* decree, will not validate the original invalid appointment. The decision of Sankaran Nair and Ayling, JJ., in Letters Patent Appeal No. 3 of 1913 is in point. Reference may also be made to *Bal Kishan Lal* v *Tapeswar Singh* (1) and *Kunwar Partab Singh* v. *Bhabuti Singh* (2).

We must set aside the *ex parte* decree in so far as the defendants Nos. 4 and 5 are concerned, and ask the lower Court to try the case against them on the merits. Costs will abide the result.

Appeal allowed.

(1) 14 Ind. Cas. 845; 15 C.L J. 446; 17 C. W. N. 219.
(2) 21 Ind. Cas. 288; 18 C. L. J. 384; 17 C. W. N. 1165; (1913) M. W. N. 785; 14 M. L. T. 299; 25 M. L. J. 492; 11 A. L. J. 901; 16 O. C. 247; 18 C. L. J. 384; 15 Bom. L. R. 1001; 35 A. 487; 40 I. A. 182.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3656 OF 1913.

May 21, 1915.

Present: – Justice Sir Asutosh Mookerjee, KT and Mr. Justice Roe.

HARINATH CHOWDHURY—DEFENDANT —APPELLANT

versus

HARA DAS ACHARJA CHOWDHURY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Deposit in Court—Money paid under compulsion of legal order, recovery of—Conditional payment—Judicial order, nature of—Rules of Supreme Court, O. XLV, rr. 5, 6, scope of—Inherent power of Court.

The principle that, where money has been paid by the plaintiff to the defendant under compulsion of legal process which is afterwards discovered not to have been due, the plaintiff cannot recover it back in an action for money had and received, cannot apply in a case where money was deposited by the plaintiff, *C*, on the faith of an order which stated explicitly that the money would be retained in Court pending the determination of the question whether the money belonged to *B*, the then judgment-debtor of *A*, or to *D*, the alleged creditor of the depositor *C*, but where without holding any inquiry and without notice to the depositor and his alleged creditor the Court paid it out to *A* on his application. [p. 581, col. 2; p. 582, col. 1.]

Marriot v. *Hampton*, 7 T. R. 269; 2 Smith's Leading Cases 421; 2 Esp. 546; 4 R. R. 439; 101 E. R. 969 and *Moses* v. *Macferlan*, 2 Burr. 1005; 1 W. Bl. 219; 97 E. R. 676, referred to.

Cadaval v. *Collins*, 4 A. & E. 858 at p. 866; 111 E R. 1006 at p. 1009; 6 N. & M. 324; 2 H. & W. 54; 5 L. J. K. B. 171; 43 R. R. 499 and *Ward & Co.* v. *Wallis*, (1900) 1 Q. B. 675; 69 L. J. Q. B. 423; 82 L. T. 261; 16 T. L. R. 193, referred to.

A deposit made by order of a Court pending adjudication of the question whether *B* or *D* is beneficially interested in the money, is a conditional one. [p. 582, col. 2.]

No judicial order can be made to the detriment of a person till he has been afforded ample opportunity to defend his rights. [p. 582, col. 2.]

The Rules of the Supreme Court in England contemplate not an *ex parte* order to the prejudice of third person who may be really interested in the debt due from the garnishee but an inquiry in the presence of all the persons interested. [p. 582, col. 2.]

The Code of Civil Procedure (Act V of 1908) does not contain any specific rule of the type of rules 5 and 6 of Order XLV of the Rules of the Supreme Court in England. But the Court has inherent powers to guard against an abuse of its process and to ensure that its orders do not operate to the prejudice of persons who have no notice of the proceedings. [p. 582, col. 2; p. 583, col. 1.]

Roberts v. *Death*, 8 Q. B. D. 319; 51 L. J. Q. B. 15; 46 L. T. 246; 30 W. R. 76, referred to.

The money deposited does not cease to be the money of the depositor merely because he brought it into Court on the faith of a conditional order,

which directed its retention in Court pending inquiry into the question raised. [p. 583, col. 1.]

The Court has full authority to compel a party to bring back such money into Court to be re-paid to the other party entitled to it. [p. 583, col. 1.]

Mrinalini Dasi v. *Abinash Chunder Dutt*, 6 Ind. Cas. 508; 14 C. W. N. 1024; 11 C. L. J. 533, referred to.

Appeal against the decree of the Subordinate Judge, Mymensingh, dated the 11th August 1913, confirming that of the Munsif, third Court of that District, dated the 17th July 1912.

Mr. *A. Guha*, Babus *Birendra Kumar Dey* and *Akhil Chandra Guha*, for the Appellant.

Babus *Joti Prosad Sarbadhicary* and *Prokash Chandra Mazumdar*, for the Respondents.

JUDGMENT.—The problem which requires solution in this appeal may be concisely stated. On the 30th June 1909 *A* sued *B* for recovery of money. On the same day *A* obtained an order for attachment before judgment under rule 5 of Order XXXVIII, Civil Procedure Code. The property attached was a debt due obviously from *C* to *D*; but the debt was attached on the allegation that *B*, and not *D*, was the person beneficially interested in it. The result was that a prohibitory order was issued upon *C*. On the 13th August 1909 *A* obtained an *ex parte* decree in his suit against *B*. *C* was then called upon to pay into Court the money due from him ostensibly to *D*. On the 8th October *C* applied to the Court and intimated that he was willing to bring the money into Court, provided he was absolved from liability to pay a second time to *D* and provided also that interest ceased to run upon his debt from that date. The Court thereupon ordered that the money, if deposited, would be retained in Court till the adjudication of the question, whether *B* or *D* was beneficially interested therein. On the faith of this order the money was brought into Court on the 13th December 1909. Thereafter, without notice to *C* or *D*, the Court on the application of *A* paid out the money to him. *D*, who had no intimation of these proceedings, subsequently sued *C* and recovered judgment against him on the debt. *C* now sues *A* to recover the money which he had deposited in Court and which, without notice to him or to his creditor *D*, had been withdrawn by *A*. The Courts below have decreed the claim and *A* has appealed to this Court. The substantial question in controversy on the merits in this litigation consequently, plainly, is whether *B* or *D* was beneficially interested in the debt. The Courts below have concurrently answered this against *A*, and have found that *B* had no interest in the money, in other words, that not *B* but *D* was the real creditor of *C*. This is a finding of fact which cannot be successfully challenged in second appeal, indeed no attempt has been made to assail it before us; but the question has been mooted, has *C* any cause of action against *A*? On behalf of *A* it has been argued that there is no cause of action, *first*, because the money was recovered under compulsion of legal process, and cannot accordingly be recovered by any form of suit; and, *secondly*, because by virtue of Order XXI, rule 46, of the Code of Civil Procedure, the money, as soon as deposited, ceased to be the money of the plaintiff; and that consequently, he is not entitled to recover it back. In our opinion there is no foundation for either of these contentions.

As regards the *first* ground, it is clear that the principle of the rule in *Marriot* v. *Hampton* (1), which has been the bulwark of the arguments for the appellant, is of no real assistance to his cause. The principle is that where money has been paid by the plaintiff to the defendant under compulsion of legal process, which is afterwards discovered not to have been due, the plaintiff cannot recover it back in an action for money had and received. The foundation of this doctrine was thus stated by Lord Kenyon:—"After a recovery by process of law, there must be an end of litigation, otherwise there would be no security for any person." To the same effect is the observation of Grose, J.:—"It would tend to encourage the greatest negligence if we were to open a door to parties to try their causes again, because they were not properly prepared the first time with their evidence." Lawrence, J., added that if the case alluded to, that is the decision of Lord Mansfield in *Moses* v. *Macferlan* (2), be law, it would go the length of establishing this that every species of evidence which was omitted by accident to be brought forward

(1) 7 T. R. 269; 2 Smith's Leading Cases 421; 2 Esp. 546; 4 R. R. 439; 101 E. R. 969.

(2) 2 Burr. 1005; 1 W. Bl. 219; 97 E. R. 676.

at the trial might still be of avail in a new action to overrule the former judgment, which is too preposterous to be stated. The principle was again formulated by Patterson, J., in *Cadaval* v. *Collins* (3): "Money paid under compulsion of law cannot be recovered back as money had and received. And, further, where there is *bona fides*, and money is paid with full knowledge of the facts, though there be no debt, still it cannot be recovered back." We refer to this statement in order to emphasize the qualification to the general rule formulated in the following terms by Kennedy, J., in *Ward & Co.* v. *Wallis* (4); "There must be *bona fides* on the part of the party who has got the benefit of his opponent's payment in order to bring the principle laid down in that case [*Marriot* v. *Hampton* (1)] into force; if the person enforcing a payment, under legal process has therein taken an unfair advantage or acted unconscientiously, knowing that he had no right to the money, the principle laid down in *Marriot* v. *Hampton* (1) may not prevent the defendant from recovering the money back."

Let us examine the application of this principle to the circumstances of the present case. Here money was deposited by the plaintiff *C* on the faith of an order which stated explicitly that the money would be retained in Court pending the determination of the question whether the money belonged to *B*, the then judgment-debtor of *A*, or to *D*, the alleged creditor of the depositor *C*. That inquiry was never made, but the Court, without notice to the depositor and his alleged creditor, paid out the money to the present defendant on his application. So that neither *C* nor *D* was allowed an opportunity to defend his rights. We need not hold that this conduct of *A* was in any way designedly fraudulent, but this much is plain that he was able to appropriate the money by what constituted a grave abuse of the process of the Court. The principle of the decision in *Marriot* v. *Hampton* (1) has no application to these circumstances.

As regards the *second* ground it is contended that under Order XXI, rule 46, the money, as soon as it was deposited, ceased to be the money of the depositor. Clause (3) of rule 46 is in these terms: "A debtor prohibited under clause (1) of sub-rule (1) may pay the amount of his debt into Court and such payment shall discharge him as effectually as payment to the party entitled to receive the same." This clearly contemplates a case where there is no dispute that if the suit results into a decree against the defendant or if there is a pre-existing judgment against him, the money is recoverable thereunder from the depositor. In the present case, the deposit was clearly conditional. The order of the Court makes it plain beyond all controversy that the deposit was made pending the adjudication of the question whether *B* or *D* was beneficially interested in the money. But it has been contended on behalf of the appellant that this order was irregular, as the Code neither contemplates an inquiry, nor provides for the issue of notices upon parties affected by its order. This argument overlooks the elementary principle that no judicial order can be made to the detriment of a person till he has been afforded ample opportunity to defend his rights. Our attention has been drawn in this connection to rule 5 of Order XLV of the Rules of the Supreme Court in England. An examination of that rule shows that there is no foundation whatever for the contention of the appellant. There the rule expressly provides for an inquiry in the events which have been happened here. Rule 5 is in these terms: "Whenever in proceedings to obtain an attachment of debts, it is suggested by the garnishee that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the Court or a Judge may order such third person to appear, and state the nature and particulars of his claim upon such debt." Rule 6 then provides that after the allegation of any third person under such order as in rule 5 mentioned and of any other person who by the same or any subsequent order may be ordered to appear or in case of such third person not appearing when ordered, the Court may order execution to issue to levy the amount due from such garnishee. Consequently the rules of the Supreme Court in England contemplate not an *ex parte* order to the prejudice of third persons who may be really interested in the debt due from the garnishee, but an inquiry in the presence of all the persons interested. Our Code does not contain any specific rule of the type

2 (3) 4 A. & E. 858 at p. 866; 111 E. R. 1006 at p. 1009; 6 N. & M. 324; 2 H. & W. 54; 5 L. J. K. B. 171; 43 R. R. 499.

6 (4) (1900) 1 Q. B. 675; 69 L. J. Q. B. 423; 82 L. T. Rl. 16 T. L. R. 193.

of rules 5 and 6 of Order XLV of the Rules of the Supreme Court in England. But the Court has inherent power to guard against an abuse of its process and to ensure that its orders do not operate to the prejudice of persons who have no notice of the proceedings. In the case before us the Court was competent, indeed it was incumbent upon the Court, to make a conditional order of this description and to provide that the money deposited was not paid to the decree-holder till adjudication of the question of title to that money. Reference may in this connection be usefully made to the instructive decision of the Court of Appeal in *Roberts* v. *Death* (5). In that case the garnishee who was ordered to bring the money into Court contended that the money was due to the judgment-debtor, not in his personal capacity but in his capacity as a trustee. The question arose whether the money, if deposited, should be paid without inquiry. Lord Justices Brett, Colton and Lindley unanimously held that it would not be right to make the payment without an inquiry into the question, whether the money was trust money or not, and they directed that the money should be brought into Court to abide the event of an inquiry. In our opinion the money deposited in this case did not cease to be the money of the plaintiff, merely because he had brought into Court on the faith of a conditional order which directed its retention in Court pending inquiry into the question raised.

We feel no doubt whatever that the justice of the case lies entirely with the respondent and that the Court has full authority to compel the appellant to bring back the money into Court to be re-paid to the plaintiff, [*Mrinalini Dasi* v. *Abinash Chunder Dutt* (6)].

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

(5) 8 Q. B. D. 319; 51 L. J. Q. B. 15; 46 L. T. 246; 30 W. R. 76.

(6) 6 Ind. Cas. 508; 14 C. W. N. 1024; 11 C. L. J. 533.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 474 OF 1913.

April 16, 1915.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

UMMACHAKUTTI AND OTHERS—DEFENDANTS NOS. 2 AND 6—APPELLANTS

versus

C. UMMERKUTTI HAJI—PLAINTIFF AND OTHERS—DEFENDANTS NOS. 1, 3, 4 AND 5—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 53—Assignments in fraud of creditors—Part payment of consideration for a previous mortgage—Right of subrogation, whether exists.

The fact that an assignment is set aside as being one in fraud of creditors under section 53, Transfer of Property Act, does not prevent the Court from declaring a charge upon the property assigned to the extent of the payment made by the assignee towards the redemption of a previous mortgage. [p. 584, col. 2.]

Palamalai Mudaliyar v. *South Indian Export Company Ld.*, 5 Ind. Cas. 33; 33 M. 334; 7 M. L. T. 167; 20 M. L. J. 211; (1910) M. W. N. 239, followed.

In the absence of any conflicting equities the mere fact that the consideration for the previous mortgage has not been paid in full does not prevent the assignee from claiming the right. [p. 585, col. 1.]

Hanumanthaiyan v. *Meenatchi Naidu*, 12 Ind. Cas. 412; 35 M. 183; (1912) M. W. N. 158; 10 M. L. T. 380; 22 M. L. J. 12, distinguished.

Jaladanki Chinna Pitchia, In re, 11 Ind. Cas. 868 10 M. L. T. 183; (1911) 2 M. W. N. 152; 36 M. 29 followed.

Second appeal against the decree of the District Court of South Malabar, in Appeal Suit No. 209 of 1912, preferred against that of the Subordinate Judge of Cochin in Original Suit No. 33 of 1910.

Mr. *C. V. Ananthakrishna Iyer*, for the Appellants.

Mr. *J. L. Rozario*, for the Respondents.

This appeal coming on for hearing on the 2nd October 1914 the Court delivered the following

JUDGMENT.—This appeal is argued on the ground that in setting the assignment aside the lower Courts should have given the defendants Nos. 2 to 6 a charge for Rs. 500, the amount of Exhibit III. We think that appeal ground No. 10 in the lower Appellate Court was intended to raise this point, and we are not prepared to assume that it was abandoned there. Whether defendants made any payment for Exhibit III, and whether they are entitled to a charge in virtue of it, are questions on which the lower Appellate Court must now submit findings, as regards the latter with

reference to *Palamalai Mudaliyar* v. *South Indian Export Company Ld.* (1). The findings are due in six weeks; seven days will be allowed for filing objections.

In compliance with the above order of this Court, the District Judge of South Malabar submitted the following

FINDINGS.—It is directed that findings be returned on the questions

(1) Whether defendants made any payment for Exhibit III and

(2) whether they are entitled to a charge for it with reference to *Palamalai Mudaliyar* v. *South Indian Export Company Ld.* (1).

On the *first* question the evidence of payment is that of the 4th and 5th witnesses for the defendants. The 4th witness who attested the document of sale by the first defendant (Exhibit II) says that Rs. 400 were paid to Ayissumma on the date of Exhibit II and that she gave a receipt. He did not actually witness the receipt being given but saw the payment being made.

The 5th witness who attested the mortgage in favour of Ayissumma (Exhibit III), also states that she saw the payment made and Ayissumma giving a receipt. Both witnesses agree as to the source from which the money came but differ in details. The receipt (Exhibit VII) for Rs. 400 by Ayissumma to the 1st defendant and others is registered. On the whole I think that the payment of Rs. 400 is proved and find on the first question that Rs. 400 were paid towards Exhibit III.

On the *second* question, in *Palamalai Mudaliyar* v. *South Indian Export Company Ld.* (1) it was held that since the transferee had discharged a valid mortgage previously binding on the property, it would not be equitable to give the plaintiffs the relief for which they asked, except upon the terms of giving the defendant a charge for the Rs. 7,500 which he had expended in discharging a mortgage-decree against the suit property. In the present case, however, no complete but only a partial discharge of the mortgage evidenced by Exhibit III has been effected by the payment of Rs. 400, and it has been held that there can be no subrogation if any part of the debt remains unpaid. *Gurdeo Singh* v. *Chandrika Singh* (2) (Ghose on the Law of Mortgage, 4th Edition, page 332). In this view I find on the second question that the defendants are not entitled to a charge for the payment of Rs. 400.

This second appeal coming on for final hearing on the 8th April 1915, after the return of the finding of the lower Appellate Court upon the issues referred by this Court for trial and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

OLDFIELD, J.—On the lower Appellate Court's finding of fact, which we accept, the case stands thus. The plaintiff sues for a declaration that the suit property is liable to attachment in execution of his money-decree against the 1st defendant. The defence is a prior conveyance of the property to defendants Nos. 2 to 6 by Exhibit II. That defence was rejected with reference to section 53 of the Transfer of Property Act. But we were then asked to hold that, as Rs. 400 out of the total consideration of Rs. 1,000 for Exhibit II is found by the lower Appellate Court to have been actually paid towards discharge of a mortgage, Exhibit III, 2nd to 6th defendants (of whom 2nd and 6th defendants are the appellants) are entitled to a charge on the suit property for the amount they paid, the equitable principle referred to in *Palamalai Mudaliyar* v. *South Indian Export Company Ld.* (1) being relied on. That was the point dealt with in second issue stated in our order of remand.

On that issue and the question it raised directly, whether the existence of bad faith, which vitiated Exhibit II, also deprived defendants Nos. 2 to 6 of the right to a charge for what they actually paid, the lower Appellate Court has said very little. But we read its finding as being that defendants Nos. 2 to 6 would be entitled to such a charge, but for the further distinct defect in their position that their payment of Rs. 400 did not discharge Exhibit III, which was for Rs. 500, entirely. Argument here has proceeded on

(1) 5 Ind. Cas. 33; 33 M. 334; 7 M. L. T. 167; 20 M. L. J. 211; (1910) M. W. N. 239.

(2) 1 Ind. Cas. 913; 36 C. 193; 5 C. L. J. 611.

this interpretation of the finding, and we adopt it.

Dealing then with the contention that defendants Nos. 2 to 6 are not entitled to a charge, because they did not pay off the encumbrance, Exhibit III, entirely, we hold that it is irrelevant in these proceedings. It rests on *Hanumanthaiyan* v. *Meenatchi Naidu* (3). But the basis of that decision was the impossibility of working out the rights of the different persons, each of whom had contributed towards the discharge of the mortgage in question, when a distribution of the sale-proceeds between them had to be considered; and it was held that, as their rights could not be worked out, they could not participate. In this case, however, at the stage it has reached and as between the parties to it, among whom the mortgagee under Exhibit III is not included, no such conflict is in question; and for all that appears none ever need be, since defendants Nos. 2 to 6 may prevent it by agreeing with the mortgagee under Exhibit III as to the distribution of any amount realisable on it or by obtaining an assignment of her rights. In these circumstances, whatever considerations may arise when defendants Nos. 2 to 6 attempt to recover, the mere grant of a charge will not necessarily be within the mischief contemplated in *Hanumanthaiyan* v. *Meenatchi Naidu* (3) and the lower Appellate Court's finding based thereon cannot be accepted. This conclusion is consistent with that of Sundara Aiyar, J., in *Jaladanki Chinna Pitchia, In re* (4), though the case relied on by plaintiff was not referred to by him. We allow the second appeal to the extent that defendants Nos. 2 and 6 will be given a charge for Rs. 400 on the mortgage amount in virtue of their payment evidenced by Exhibit VII dated 12th November 1907, but dismiss it in other respects. In view of the extent to which defendants Nos. 2 and 6 have failed, we make no change in the orders of the lower Courts as to costs and direct the parties to bear their own in this Court.

TYABJI, J. I agree.

Appeal allowed.

(3) 12 Ind. Cas. 412; 35 M. 183; (1912) M. W. N. 158; 10 M. L. T. 380; 22 M. L. J. 12.

(4) 11 Ind. Cas. 868; 36 M. 29; 10 M. L. T. 183; (1911) 2 M. W. N. 152.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 77 OF 1914.

November 2, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

PONNUSAWMY MUDALIAR—DEFENDANT—APPELLANT

versus

MUTHUSAWMY MUDALIAR—PLAINTIFF—RESPONDENT.

Registration Act (XVI of 1908)—Deed in possession of mediators—One of the parties capable of presenting it for registration—Other party, when liable.

Where a document is in the possession of mediators and could have been obtained and presented for registration by one of the parties, he cannot hold the other party liable unless the non-registration was not due to any default on his part. [p. 585, col. 2.]

Venkatasami v. *Kristayya*, 16 M. 341; 3 M. L. J. 169, distinguished.

Subba Reddiar v. *Visvanatha Reddiar*, 22 Ind. Cas. 941; *Nynakka Routhen* v. *Vavana Mahomed Routhen*, 5 M. H. C. R 123; *Chinna Krishna Reddi* v. *Dorasami Reddi*, 20 M. 19, referred to.

Appeal against the order of the Court of the Subordinate Judge of Trichinopoly, in Appeal Suit No. 350 of 1913, preferred aganist that of the District Munsif of Karur, in Original Suit No. 163 of 1912.

Mr. *K. S. Ganapathi Aiyar*, for the Appellant.

Mr. *N. Rajagopalachariar*, for the Respondent.

JUDGMENT.—The District Munsif dismissed the suit, applying the decision in *Venkatasami* v. *Kristayya* (1) and assuming that the document was not registered through the defendant's default. The learned Subordinate Judge rightly distinguished that case on the ground that the document in the present case was in the possession of mediators, not of the planitiff. But he also then made an assumption, that the plaintiff was not in default in respect of the failure to register it. There is no finding of either Court as to the conditions on which the madiators had the document or on whose behalf they held it or whether the plaintiff could have got it from them and presented it for compulsory registration. He would be entitled to relief only if, in the words used in *Subba Reddiar* v. *Visvanatha Reddiar* (2), the non-registration was not due to any default on his part. Vide also *Nynakka Routhen* v. *Vavana*

(1) 16 M. 341; 3 M. L. J. 169.

(2) 22 Ind. Cas. 941.

Mahomed Naina Routhen (3) and *Chinna Krishna Reddi* v. *Dorasami Reddi* (4).

We, therefore, set aside the decrees of the lower Courts and direct the District Munsif to restore the suit to file and dispose of it according to law in the light of the foregoing. Costs to date in all the Courts will be costs in the case.

Appeal allowed; Suit remanded.

(3) 5 M. H. C. R. 123
(4) 20 M. 19.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1693 OF 1912.

November 17, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Hannay.

MUNIANDI SERVAI – APPELLANT

versus

RAMASAMI, MINOR BY NEXT FRIEND MOOKKAYI *alias* KARUPPAYI AND OTHERS — RESPONDENTS.

Contract Act (IX of 1872), s. 45—Payment to one of several heirs of a promisee, whether operates as a discharge.

A payment made to one of the several heirs of a deceased promisee is not binding on other heirs.

Mannava Annapurnamma v. *Uppala Akkayya*, 19 Ind. Cas. 12; 36 M. 544; 13 M. L. T. 268; (1913) M. W. N. 328; 24 M. L. J. 333, distinguished.

Second appeal against the decree of the District Court of Ramnad, in Appeal Suit No. 1 of 1910, preferred against that of the Subordinate Judge of Madura East, now Ramnad, in Original Suit No. 25 of 1904.

Mr. *K. N. Aiyar*, for the Appellant.

Messrs. *C. S. Venkatachariar* and *A. Srininvasa Aiyangar*, for the Respondents.

JUDGMENT.—Exhibit VI, in our opinion, is valueless as evidence and the omission of the learned District Judge to refer to it is wholly immaterial.

As regards the alleged payment to one of the heirs of the original mortgagee, the Subordinate Judge finds that the alleged payment was a sham. The District Judge's judgment is obscure on that point. The Full Bench case in *Mannava Annapurnamma* v. *Uppala Akkayya* (1) only decides

(1) 19 Ind. Cas. 12; 36 M. 544; 13 M. L. T. 268; (1913) M. W. N. 328; 24 M. L. J. 333.

that the payment to one of the several joint promisees in a contract is binding on the others, and it does not decide the question whether payment to one of the several heirs of a single deceased promisee is binding on the other heirs. On the other hand, two at least of the three opinions incline against the view that such payment is binding.

The second appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 728 OF 1914.

January 8, 1915.

Present:—Mr. Justice Sadasiva Aiyar.

In re ACHATH SANKARAN NAIR— PLAINTIFF—APPELLANT

Transfer of Property Act (IV of 1882), s. 83—Conditional deposit of mortgage money in Court—Condition requiring return of documents to which mortgagor not entitled, effect of—Tender conditional, whether valid.

A condition requiring a return of certain documents to which the mortgagor is not entitled attached to a deposit by the mortgagor under section 83 of the Transfer of Property Act vitiates the tender.

Kora Nayar v. *Ramappa*, 17 M. 267, distinguished.

Second appeal against the decree of the District Court of South Malabar, in Appeal Suit No. 175 of 1913, preferred against that of the District Munsif of Ottapalam, in Original Suit No. 195 of 1912.

Mr. *K. P. M. Menon*, for the Appellant.

JUDGMENT.—The case in *Kora Nayar* v. *Ramappa* (1) merely decided that a request for return (of those title-deeds which the mortgagee was bound to return before he takes out the money from Court) accompanying a tender made under section 83 of Act IV of 1882, was not a condition vitiating the tender.

In the present case, the appellant insisted on a return of certain title-deeds which he was not entitled to a return of, as a condition of the tender and "refused to pay the money until he had recovered the documents and possession of the property" (paragraph 3 of the District Judge's judgment). Section 55 of the Transfer of

(1) 17 M. 267.

Property Act does not apply, as rightly decided by the District Judge.

I dismiss the second appeal.

Appeal dismissed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 214 OF 1912.

December 4, 1913.

Present:—Mr. Justice Miller and Mr. Justice Sadasiva Aiyar.

SAYABKHAN SANDOJAI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BEEBEE KHATHOO—PLAINTIFF—RESPONDENT.

Muhammadan Law—Dower—Father, whether can be made liable for dower-debt of his son—Majority Act (IX of 1875), s. 2, applicability of.

Section 2 (*a*) of the Indian Majority Act provides that nothing in that Act shall affect the capacity of any person to act in the matter of dower and the fact that a Mussalman is a minor at the time of his marriage does not take away his liability to pay the dower of his wife.

Where the son was not a minor under the Muhammadan Law at the time of his marriage, his father, in the absence of a contract of guarantee, cannot be made liable for the dower payable by his son simply on the ground that the son has no property.

Appeal against the decree of the District Court of Cuddapah, in Original Suit No. 5 of 1910.

FACTS.—A Muhammadan boy's marriage was arranged for by his father. The boy married another wife. The first wife now brings a suit to enforce the *mahar*, both against the father in-law and her husband. The husband has no property and the lower Court decreed the suit against the father-in-Law. The appeal is against that decree.

Mr. *S. Gopalasami Aiyangar*, for the Appellant.

Mr. *T. V. Seshagiri Aiyar*, for the Respondent.

JUDGMENT.—We agree with the District Judge that the evidence establishes the fact that the dower of the plaintiff was fixed at 9 *vakyas* of gold, and we are unable to differ from his finding that the value of this dower is the amount claimed in the plaint. But on the 2nd issue in the suit we are unable to agree that the 2nd defendant is liable. The 1st defendant was according to Muhammadan Law at the time of his marriage a person capable of contracting for his marriage and for the dower payable to his wife. The plaintiff did not allege that he was a minor incapable of doing these things, and the District Judge does not find that he was incapable according to his personal law. Section 2 (*a*) of the Indian Majority Act provides that nothing in that Act shall affect the capacity of any person to act in the matter of dower, and the 1st defendant's capacity in respect of his wife's dower is, therefore, unaffected by that Act.

No authority has been shown to us which supports the view of the District Judge that the father can be made liable for the dower payable by his son, unless in cases where he has made himself surety for the payment and it is not alleged in the plaint or found by the District Judge that the 2nd defendant made himself a surety in this case.

The passage on which the District Judge relies applies only to the case where the son married as a minor is dead, and it may be that it applies only when he dies while a minor. Whether that is so or not, we cannot accept it as authoritiy warranting us in holding that where the son was not a minor under Muhammadan Law at the time of his marriage his father, in the absence of a contract of guarantee, can be made liable for the dower payable by his son, simply on the ground that the son has no property.

We allow the appeal, and modify the decree by dismissing the suit as against the 2nd defendant. But we think, as he joined the 1st defendant in setting up the case that the dower was already paid by a gift of jewels at the marriage, we should not require the plaintiff to pay his costs.

In other respects we confirm the decree. The 1st defendant must pay plaintiff's costs in both Courts and 2nd defendant must pay his own.

Appeal allowed

RANGASAWMI AIYANGAR *v.* SOWRI AIYANGAR.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 803 OF 1914.

April 30, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

RANGASAWMI AIYANGAR (DIED) AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SOWRI AIYANGAR—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), ss. 92, 94—Mistake in description of property sold—Evidence to prove what was actually sold, whether admissible—Rectification of sale-deed—Specific Relief Act (I of 1877), s. 31.

Under section 92, clause (*a*), of the Evidence Act any fact may be proved which would entitle a person to a decree on the ground of mistake of fact or law, and there is nothing in the section giving such a right to a plaintiff alone. [p. 588, col. 2; p. 589, col. 1.]

Mahendra Nath Mukerjee v. *Jogendra Nath Roy Chaudhry*, 2 C. W. N. 260; *Dagdu* v. *Bhana*, 28 B. 420; 6 Bom. L. R. 126; *Karuppa Gounden* v. *Periathumbi Gounden*, 30 M. 397; 2 M. L. T. 336; *Mahadeva Iyer* v. *Gopala Iyer*, 8 Ind. Cas. 390; 34 M. 51; 8 M. L. T. 289; (1911) 1 M. W. N. 36, followed.

Where there is a misdescription of the property sold, the vendee can claim a rectification of the sale-deed under section 31 (*a*) of the Specific Relief Act. [p. 588, col. 2.]

Such a right can be used as a shield when possession is sought to be wrested from the party entitled to the rectification, and the fact that he is a defendant does not disable him from setting up the plea which could have availed him as plaintiff. [p. 589, col. 1.]

The combined effect of section 92, clause (*a*), Evidence Act, 1872, and of section 31, Specific Relief Act, 1877, is that the defendant can resist a suit on the ground that what was sold to him was different from what the sale-deed contained [p. 589, col. 1.]

Second appeal against a decree of the Court of the Temporary Subordinate Judge of Tanjore, in Appeal Suit No. 464 of 1913, preferred against that of the District Munsif of Tiruvalur, in Original Suit No. 73 of 1912.

FACTS.—The plaintiff sued to recover possession of the suit land from the defendant. Both the defendant and the plaintiff claimed it under the same vendor. The defendant was a prior purchaser. His case was that a wrong survey number had been inserted in his sale-deed by mistake and that the intention of both the vendor and himself was to sell and purchase the suit land. The District Munsif went into the evidence and dismissed the plaintiff's suit. The Subordinate Judge on appeal held that as there was no ambiguity in the sale-deed and as it applied accurately to existing facts, no evidence could be admitted in a suit for possession and the proper remedy was a suit for rectification of the instrument, and section 94 of the Indian Evidence Act did not apply. The defendant appealed.

Messrs. *K. Parthasaradhy Aiyangar* and *R. Rangachariar*, for the Appellants, contended that evidence was admissible under section 92 (*a*) to show the intention of parties in a case where rectification of the sale-deed could be applied for under section 31 of the Specific Relief Act. *Karuppa Gounden* v. *Periathumbi Gounden* (1), *Mahadeva Iyer* v. *Gopala Iyer* (2) and *Mahendra Nath Mukerjee* v. *Jogendra Nath RoyChaudhry* (3) were relied on.

Mr. *T. Narasimha Aiyangar*, for the Respondent:—Section 94 of the Indian Evidence Act applied to this case and no evidence could be admitted. He also relied on *Velappa Gounden* v. *Palani Gounden* (4).

JUDGMENT.—This is a suit to recover possession. Plaintiff's case was that he purchased survey No. 92B from the owners in April 1911 and that the defendant is wrongfully in possession of it. The defendant pleaded that the same vendors conveyed to him the property in dispute in 1908 and that although the conveyance (Exhibit II) describes the land sold as survey No. 90B, his vendors intended to sell, and he intended to purchase, only survey No. 92B. He also alleged that he was put in possession of this latter number under the sale-deed.

The issue raised in the case was whether it was survey No. 90B or 92B that was sold to the defendant. The Munsif agreed with the defendant's contention and dismissed the suit. In appeal, the Subordinate Judge held that evidence to prove that what was actually sold was inadmissible under section 92 of the Evidence Act and decreed the plaintiff's claim.

We think the Subordinate Judge is wrong. The written statement clearly sets up a case of mistake in the description of the property sold. There can be no doubt that on the allegations contained in the written statement, the defendant would be entitled to claim rectification of his sale-deed under section 31 of the Specific Relief Act. Under section 92, clause (*a*), any fact may be proved which would entitle any person to

(1) 30 M. 397; 2 M. L. T. 336.
(2) 8 Ind. Cas. 390; 34 M. 51; 8 M. L. T. 289; (1911) 1 M. W. N. 36.
(3) 2 C. W. N. 260.
(4) 29 Ind. Cas. 201; (1915) M. W. N. 325.

any decree on the ground of "mistake of fact or law." Thus, it is clear that if he went to Court as plaintiff, the defendant could have claimed relief by way of injunction against the plaintiff from interfering with his possession and to have his sale-deed rectified. Does the fact that the defendant is resisting the plaintiff's claim disable him from setting up the plea which could have availed him as plaintiff. We think not. We find nothing in the language of section 92, clause (*a*), which indicates that its benefit can be invoked only by the plaintiff. In *Mahendra Nath Mukerjee* v. *Jogendra Nath Roy Chaudhry* (3), it was held that the defendant can protect himself by such a plea. See *Dagdu* v. *Bhana* (5). In this Court it was decided in *Karuppa Gounden* v. *Periathumbi Gounden* (1) and *Mahadeva Aiyar* v. *Gopala Aiyar* (2), that a plaintiff can sue to recover the right property notwithstanding misdescription in his document of title. Reliance was placed in these two cases on the proviso to section 92. None of these cases have been considered by the Subordinate Judge. It is true that section 94 has no application as pointed out by him, but the combined effect of section 92, clause (*a*), and of section 31 of the Specific Relief Act leaves no room for doubt that the defendant can resist the suit on the ground that what was sold to him was different from what the document described.

Mr. Narasimha Aiyangar contends that on the facts he will be able to show that there was no mistake. We must reverse the decree of the Subordinate Judge and remand the appeal for disposal on the merits. Costs to abide the result.

Appeal allowed; Suit remanded.

(5) 28 B. 420; 6 Bom. L. R. 126.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 470 OF 1913.

November 24, 1914.

Present:—Sir Henry Drake-Brockman, KT., J. C.

DINAJI—DEFENDANT—APPELLANT

versus

LAXMAN—PLAINTIFF—RESPONDENT.

Appeal—Amendment of decree—Material alteration—Civil Procedure Code (Act V of 1908), s. 152.

An appeal lies from an amended decree where the amendment has the effect of appreciably adding to the right of the decree-holder. [p. 591, col. 1.]

Second appeal against an order of the Divisional Judge, Nagpur Division, dated the 9th July 1913, confirming that of the Subordinate Judge, Wardha, dated the 7th November 1912.

Mr. *H. S. Gour*, for the Appellant.

Mr. *S. K. Barlinge*, for the Respondent.

JUDGMENT.—This is an appeal from the decision of the Divisional Judge, Nagpur Division, declining to interfere in appeal with an order for amendment of a decree passed by the junior Subordinate Judge, Wardha.

The decree in question was passed on the 27th October 1910. The facts leading up to that decree were stated by me in the order, dated the 30th April 1912, disposing of Civil Revision No. 70 of 1911, the parties to which were *Musammat* Lalita, widow of Ramchandra, as applicant and Laxman Rao, the present non-applicant. A brief *resume* will suffice for present purposes.

Laxman Rao sued Ramchandra and Dinaji and their father, Sheoram, on a bond which was executed during Dinaji's minority by Ramchandra and by Sheoram for himself and Dinaji. Ramchandra died between the 18th June 1910 and the 8th September following, and on the latter date Sheoram and Dinaji were substituted for him on the strength of being his legal representatives. Eventually Laxman Rao's claim was allowed in full. The decree aforesaid was then drawn up. It shows Dinaji and Sheoram as the sole defendants, without making any reference to the fact that either had been joined as legal representative of Ramchandra. Sheoram was directed to pay the sum found due on the bond with interest and costs, and the plaintiff was also authorised to realise the amount "from the joint property with the defendant Dinaji." The decree closed with a direction in the following terms:—

"This above amount will be recovered as far as possible from the property attached before judgment."

The property thus mentioned consists of a 5-annas 4-pies share in *khel* A of *Mauza* Dighi with a house, *kotha* and trees.

On the 23rd December 1910 a posthumous son was born of Ramchandra's widow, Lalita, and three months later Dinaji filed on this infant's behalf an objection to the continued attachment of Ramchandra's share (one half) in the aforesaid property, which is admittedly not "ancestral," having come to Ramchandra and Dinaji by gift from their maternal grandmother, Sattu. The Subordinate Judge declined to release what had been Ramchandra's share, on the ground that the decree made all his assets liable. In revision I held that the decree contained no words justifying execution against Ramchandra's separate estate and directed release of a 2-annas 8-pies share in *khel* A of *Mauza* Dighi.

Laxman Rao then moved the Subordinate Judge to amend both judgment and decree by adding a declaration that Ramchandra's estate is liable to satisfy the plaintiff's claim and that Sheoram and Dinaji are bound as Ramchandra's legal representatives to pay the sum due to the extent of Ramchandra's assets in their hands. This application was dealt with by the successor of the Subordinate Judge who passed the decree and in the end was granted, the following words being added to the decree as well as to the judgment:—

"The defendants shall also be liable to pay this amount from the assets of the deceased Ramchandra in their hands."

Sheoram and Dinaji appealed from this order for amendment. In the memorandum of appeal the claim is described as "appeal against the amendment of the decree." The Court-fee paid is Rs. 10, and no copy of the original judgment was filed with the memorandum of appeal, nor was the Court moved to dispense therewith. The learned Divisional Judge admitted the appeal provisionally and at the hearing intimated that if an appeal lay, Court-fee should be paid on the whole sum made payable by the decree. The appellant's Counsel who represents them here also declined to pay any additional Court-fee. The appeal was then dismissed on two grounds, namely:—

(1) an order amending a decree is an adjudication separate from the decree itself and is not appealable;

(2) the appeal could not be regarded as one from the original decree, inasmuch as no copy of the original judgment was filed, the Court-fee paid was insufficient and the Court was not in fact asked so to treat the appeal.

In second appeal the main contention is that the appeal to the Divisional Judge should have been treated as one from the amended decree. For the proposition that an appeal lies from an amended decree the authority of *Visvanathan Chetti* v. *Ramanathan Chetti* (1) is cited. The view there taken seems to be that inasmuch as an amended decree is itself a decree, an appeal lies therefrom under section 96, Civil Procedure Code. The learned Judges (Shephard and Bhashyam Ayyangar, JJ.) referred to *Nanda Rai* v. *Raghunandan Singh* (2) as authority for the opposite view and remarked that there Mr. Justice Mahmood overlooked the possibility of an appeal against the amended decree and for that reason came to the conclusion that revision, not appeal, was the only remedy available. Now the Allahabad case cited contains no reference to amendment of a decree, and I can only suppose that the one really dealt with was *Raghunath Das* v. *Raj Kumar* (3), in which Oldfield and Mahmood, JJ., differed and the Full Court later [*Raghunath Das* v. *Raj Kumar* (4)] on appeal under section 10 of the Letters Patent for the High Court, North-Western Provinces, concurred with Mahmood, J. A precisely similar pair of decisions will be found in *Surta* v. *Ganga* (5) and *Surta* v. *Ganga* (6).

The only reported decision I have been able to find which expressly negatives a right to appeal from the amended decree, as distinguished from the order of amendment, is *Hasan Shah* v. *Sheo Prasad* (7). There the decree as originally drawn did not expressly allow interest during the pendency of the suit and after decree till satisfaction, though the plaint asked for such interest. The

(1) 24 M. 646.
(2) 7 A. 282; A. W. N. (1885) 41.
(3) 7 A. 276; A. W. N. (1885) 13.
(4) 7 A. 876; A. W. N. (1885) 256 (F. B.).
(5) 7 A. 411; A. W. N. (1885) 88.
(6) 7 A. 875(F. B.); A. W. N. (1885) 256.
(7) 15 A. 121; A. W. N. (1893) 44.

Court of first instance cut down by more than half the claim for principal and interest calculated to the date of suit and its decree ordered payment of that reduced, sum but dismissed "the rest of the claim." The decree-holder obtained an amendment which ordered payment of interest from date of suit till satisfaction. The learned Judges (Tyrrell and Blair, JJ.) said:

"We are constrained to hold that this order is open to revision and not to hold that the petitioner had his remedy by way of appeal from the amended decree. The Full Bench ruling in *Raghunath Das* v. *Raj Kumar* (4) is authoritative on this point."

On the other hand in *Menat Ali* v. *Amdar Ali* (8) Ghose and Pargiter, JJ., remarked:

"Our attention has, however, been called to certain cases, in which it has been held that an appeal does not lie against an order under section 206, Civil Procedure Code, 1882. No doubt, such an order, not being an order specified in section 588 of the Code, is not appealable, but it does not follow from this that an appeal does not lie against the decree as amended. *That* would be a new decree in the suit, and as such would, we are disposed to think, be appealable."

And in *Amar Chandra Kundu* v. *Asad Ali Khan* (9) Ghose and Pratt, JJ., went so far as to hold that where obvious clerical errors in a decree were corrected, the period of limitation for appealing should be reckoned from the date when the correct decree was prepared. For my part I find great difficulty in understanding why the addition of a clause to both judgment and decree which has the effect of appreciably adding to the rights of the decree-holder should not be treated as reviving the right to appeal from a decree which, apart from the amendment, a judgment-debtor was willing to accept.

The decision of Mahmood, J., in *Raghunath Das* v. *Raj Kumar* (3) is based to some extent on the fact that the Code of 1882, in the proviso to the third paragraph of its 206th section, required reasonable notice of the proposed amendment to be given to the parties or their Pleaders. No such provision appears in section 152 of the present Code. The learned Judge also remarked as follows:

"If we were to hold that this order (of amendment) was not a separate adjudication, we should be deciding in effect that after several years had passed, and after the time provided for an appeal had long come to an end, the Court might take up its decree and so amend it as to seriously affect the rights of the parties whom it concerned."

This result, however, would occur as well in a case where under the 2nd paragraph of section 5, Indian Limitation Act, delay in appealing is excused, and it is difficult to imagine a stronger ground for not preferring an appeal than the fact that as originally framed, the decree is not objected to by the party who later feels his interests prejudiced by an amendment.

The respondent's learned Pleader contends that the appeal preferred to the Divisional Judge was in fact one from the order of amendment and not one from the amended decree. The circumstance that the appellants did not file copy of the judgment delivered on the 27th October 1910 or ask the Divisional Judge to dispense with it, supports this contention. On the other hand, a copy of the entire decree of that date with the amendment complained of was put in and a Court-fee of Rs. 10 paid, although a fee of eight annas would have sufficed under Article 11, Schedule II of the Court Fees Act, had the intention been to appeal from a mere order not having the force of a decree. That the order of amendment *per se* could not be regarded as having the force of a decree is, I think, clear from the terms of section 152, Civil Procedure Code, under which the Subordinate Judge professed to act: his view was that his predecessor had accidentally omitted to include the clause which the present appellants now object to. I would also observe that in the third ground of the memorandum of appeal the appellants contended that they are not in fact the legal representatives of the deceased Ramchandra, a point which raises a question beyond the technical one whether on the admitted facts section 152, Civil Procedure Code, admits of the amendment prayed for being made.

I hold that the appeal to the Divisional Judge should be regarded as made from the decree of the 27th October 1910 in its amended form and that such an appeal lies

(8) 9 C. W. N. 605.
(9) 32 C. 908.

The case is now remanded to the lower Appellate Court with directions to re-admit the appeal under its original number in the register and to determine it afresh on the merits. A refund of the Court-fee paid here will be granted: other costs will be costs in the cause.

If the Divisional Judge still considers that additional Court-fee ought to be paid, he should record his reasons for so thinking and give the appellants time to make good the deficiency.

Appeal allowed; Case remanded.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION NO. 39 OF 1912.

November 18, 1914.

Present:—Mr. Hayward, A. J. C. and Mr. Crouch, A. J. C.

LALBUX AND OTHERS—APPLICANTS

versus

CHOITHRAM KALIANDAS—OPPONENT.

Civil Procedure Code (Act V of 1908), ss. 141, 151, O. IX—Execution proceedings struck off through mistake of Court—Power to restore.

Section 141 of the Civil Procedure Code does not apply to execution proceedings and they cannot be restored under Order IX of the Code. [p. 592, col. 2.]

Even apart from section 151 a Court has an inherent power to rectify a mistake which has been inadvertently made by it. [p. 593, col. 1.]

Where, therefore, an execution application was fixed for hearing on the 6th January and was by mistake called up on the 5th and dismissed in the absence of the parties and the Court on the judgment-creditor's application set aside its order of dismissal:

Held, that the Court had an inherent power to rectify its own mistake and to restore the application to its file. [p. 593, col. 1.]

Application for revison against an order of the first Class, Sub-Judge, Hyderabad.

Mr. *Gopaldas Jhamatmal*, for the Applicants.

Mr. *Hirdaram Mewaram*, for the Opponent.

JUDGMENT.—In this case, an application filed by the judgment-creditor for execution of a decree awarding him a sum of over eight thousand rupees was dismissed by the Court, both sides being absent, on the 5th of January 1912. On the 8th of January 1914, the judgment-creditor applied for the restoration of his application for execution to the file on the ground that, at the previous hearing on the 14th December 1911, the 6th of January 1912 had been announced by the Court as the date of the next hearing and that date had, at the very time, been entered in the diary of the plaintiffs' Pleaders. The diary of the Court shows that the hearing had undoubtedly been fixed for the 6th January but that, subsequently, it had been altered to the 5th.

The Court apparently accepted the statements in this application; for on the 12th of January, it set aside the order of dismissal. The defendant on receiving notice of the further hearing of the application pleaded that the order of the 12th January was illegal; but the Court held that section 141 applied to execution proceedings and that it had jurisdiction to set aside the order. This view of the law, was in our opinion, erroneous. In *Thakur Prasad* v. *Fakirullah* (1) their Lordships of the Privy Council ruled that the Explanations to sections 647 of the old Code were not affected by Act VI of 1892, section 4, the effect of which was merely to express the true meaning of section 647 as it originally stood. And in *Hari Charan Ghosh* v. *Manmatha Nath Sen* (2) it was ruled that the purpose of the Legislature in omitting the Explanation from section 141 of the new Act was merely to do away with that which had been shown to be unnecessary by the Privy Council decision and to rely upon the terms of the section as interpreted by their Lordships. In our opinion, therefore, the Court erred in applying section 141 and it had no power to set aside the order under Order IX.

But Mr. Hirdaram relies on section 151 Civil Procedure Code, and urges that the Court had power to act under that section and should be deemed to have so acted. We consider that the case is one which is fairly covered by the maxim *actus curiæ neminem gravabit*—the act of the Court should not prejudice any one. The failure of the judgment-creditor to appear when the case was called on seems to have been due to the failure of the Court Officer to inform him of the altered date of the adjourned hearing. The mistake of the Court should not be used for purposes which are not consistent with justice.

(1) 17 A. 106; 22 I. A. 44; 5 M. L. J. 3; 6 Sar. P. C. J. 526.

(2) 19 Ind. Cas. 683; 41 C. 1; 18 C. W. N. 343.

In *Raja Debi Bakhsh Singh* v. *Habib Shah* (3), their Lordships of the Privy Council expressed the opinion that, even apart from section 151, a Court might rightly consider itself to possess an inherent power to rectify a mistake which had been inadvertently made by it.

The order of the lower Court, therefore, calls for no interference. We dismiss the application.

Each party to bear its own costs.

Application dismissed.

(3) 19 Ind. Cas. 526; 15 Bom. L. R. 640 at p. 645; 17 C. W. N. 829; 11 A. L. J. 625; 18 C. L. J. 9; 14 M. L. T. 33; (1913) M. W. N. 566; 25 M. L. J. 148; 35 A. 331; 16 O. C. 194; 40 I. A. 150.

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL No. 331 OF 1909.

April 13, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

KAMTA PRASAD—DECREE-HOLDER—APPELLANT

versus

INDOMATI AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Benamidar—*Right to execute decree.*

A *benamidar* transferee of a decree is entitled to execute it. [p. 594, col. 2.]

Yad Ram v. *Umrao Singh*, 21 A. 380; A. W. N. (1899) 130; *Nand Kishore Lal* v. *Ahmad Ata*, 18 A. 69; A. W. N. (1895) 160; *Bachcha Dat* v. *Gajadhar Lal*, 28 A. 44; A. W. N. (1905) 173; 2 A. L. J. 702; *Parmeshwar Dat* v. *Anardan Dat*, 26 Ind. Cas. 507; 37 A. 113; 13 A. L. J. 24, referred to.

Intikhab Husain v. *Rafi-un-nissa*, A. W. N. (1907) 39, applied.

Execution first appeal from an order of the Subordinate Judge of Mainpuri.

The Hon'ble Dr. *Sundar Lal* (with him Dr. *Satish Chandra Banerjee*), for the Appellant.

The Hon'ble. Dr. *Tej Bahdur Sapru* (with him Messrs. *Moti Lal Nehru*, *Gokul Prasad*, *Baldeo Ram Purushottam Das Tandon*, *Parmeshwor Dayal*, *Rama Kant Malaviya* and *Iqbal Ahmad*), for the Respondents.

JUDGMENT.—These are appeals against an order of the Subordinate Judge of Mainpuri, rejecting an application presented by the appellants for an order absolute under section 89 of the Transfer of Property Act. A decree *nisi* was passed in favour of two persons, Sheo Prasad and Tulshi Ram, on December 24th, 1900, and was confirmed on appeal by this Court with a slight modification on January 19th, 1914. That decree was passed against *Musammat* Indomati and others. The business of the decree-holders failed and their rights under the decree were put up for sale in execution of a decree held against them by Moti Lal and Fateh Lal. At the execution sale the share of the decree-holder, Sheo Prasad, was sold to one Ram Bharose and the appellants assert that on September 27th, 1905, the rights of Ram Bharose were transferred to Bisheshar Nath and that on May 3rd, 1906, Bisheshar Nath transferred his rights to Kamta Prasad, the appellant in Appeal No. 331. At the same execution sale the share of the decree-holder, Tulshi Ram, was sold to Ajudhia Prasad. Badlu Ram, the appellant in Appeal No. 332, says that on March 31st, 1905, Ajudhia Prasad transferred to him all his rights under the decree. The appellants, therefore, applied to the Court below for the passing of an order absolute in the capacity of transferees of the decree The application was resisted by the judgment-debtors on the ground that the applicants were *benamidars* and, therefore, could not maintain the application. The Court below on the question of fact has held that the appellants are no more than *benamidars* for the original decree-holders, Sheo Prasad and Tulshi Ram, who, it is supposed, have re-purchased their rights under the decree in the names of other persons in order to protect those rights from attachment and sale at the instance of their other creditors. The Court below has, in accordance with the decisions of the Calcutta High Court, held that the appellants as *benamidars* are not entitled to apply for an order absolute.

In appeal it is contended that the decision of the Court below on the question of fact is erroneous. We have been taken through the evidence regarding the purchases effected by the appellants, and we think it is sufficient to say that we agree with the Subordinate Judge that it is proved that the appellants are no more than *benamidars* for other persons.

Next, it is contended that even if the appellants are *benamidars* they are entitled

to maintain the application. All the reported cases upon the question whether a *benamidar* can execute a decree as the transferee thereof, seem to have been decided by the Calcutta High Court, and we have been referred in the course of the arguments to a number of them. The net result of the Calcutta cases seems to be that a *benamidar* is not entitled to take out execution of a decree as the transferee thereof, but if he succeeds in doing so his application for execution may in some cases be sufficient to save a subsequent application by the real decree-holder from the bar of limitation. The question whether a *benamidar* may take out execution of a decree as the transferee thereof does not seem to have been decided by any other High Court. But this Court, agreeing with the Bombay and Madras High Courts, and differing from the Calcutta High Court, has held that a *benamidar* may bring a suit of any kind in his own name, see *Yad Ram* v. *Umrao Singh* (1), which was a suit for possession; *Nand Kishore Lal* v. *Ahmad Ata* (2), which was a suit for possession; *Bachcha* v. *Gajadhar Lal* (3), which was a suit for partition, and a very recent case of *Parmeshwar Dat* v. *Anardan Dat* (4), which was a suit for sale on a mortgage. It was pointed out by Sir Arthur Strachey in the case of *Yad Ram* v. *Umrao Singh* (1), cited above, that in those cases which have affirmed the right of the *benamidar* to sue, the right has been based partly on the fact that he is the transferee named in the registered instrument consituting the transfer and on the principle that the contract can be enforced by the parties who have entered into it, and partly on the view that the *benamidar* must be presumed to be suing on behalf of the beneficial owner or, to put the same idea in other words, that the suit is really brought by the beneficial owner through and in the name of the *benamidar*. It is well-established in this Court that a *benamidar* is entitled to maintain a suit. It seems to us that the principle upon which a *benamidar* has been allowed to maintain a suit applies equally to the execution of a decree. It was contended that Order XXI, rule 16 shows that it is only the real transferee, that is the person beneficially interested in the transfer, who can apply for execution of a decree. We cannot accept this argument. It seems to us that the considerations which have led this Court to hold that a *benamidar* can maintain a suit apply with even greater force to an application for execution by a transferee who is a *benamidar*. The transfer is in favour of the person who applies for execution of the decree, and it seems unreasonable that the Court executing the decree should be required to enter into the question whether the ostensible transferee is the real transferee or not, and in this connection we may refer to what was said by the present Chief Justice in the case of *Intikhab Husain* v. *Rafi-un-nissa* (5). He observed that it might be urged with great force that whether the assignment was real or not was a matter with which the judgment-debtor was not concerned.

In the present case, there can be no doubt whatever that the application for the order absolute was put in with the full approval and consent of the persons for whom the appellants are said to be *benamidars*. In our opinion, the application should not have been dismissed on the ground that the appellants were *benamidars*. As between the appellants and Sheo Prasad and Tulshi Ram on the one hand and the judgment-debtors on the other, we hold that the application of the appellants is maintainable. We put it in this form, because we have been told that in consequence of the decison of the Court below one Gopal Das, who held a decree against Sheo Prasad and Tulshi Ram, has in execution of that decree attached, brought to sale and purchased himself the rights of Sheo Prasad and Tulshi Ram under the decree *nisi* of Jaunary 1904, and we have also been informed that the present appellants have brought a suit for a declaration of their rights as beneficial owners of the decree *nisi*. It will be for the Court below to consider and determine the effect of the alleged purchase by Gopal Das and of any decision that may be arrived at in the suit brought by the appellants for

(1) 21 A. 380; A. W. N. (1899) 130.
(2) 18 A. 69; A. W. N. (1895) 160.
(3) 28 A. 44; A. W. N. (1905) 173; 2 A. L. J. 702.
(4) 26 Ind. Cas. 507; 37 A. 113; 13 A. L. J. 24.
(5) A. W. N. (1907) 39.

a declaration of their rights. We would also point out that Gopi Narain and others resisted the application for an order absolute, on the ground that they are purchasers of two-thirds of a village called Pale Kalan, and they say that the suit was dismissed by the High Court against them and their property. This is a point which must be taken up and decided by the Court below.

We set aside the order of the Court below and sending the case back to that Court we direct that the appellants' application be restored to the pending file and disposed of according to law. Costs of this appeal will be costs in the cause.

Appeal decreed: Cause remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2499 OF 1912.

January 5, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

BANGARUSAMI REDDI *alias* PRASANNA CHIDAMBARA REDDI—DEFENDANT No. 2—APPELLANT

versus

KUPPANNA GOUNDEN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Madras Estates Land Act (I of 1908), ss. 42 (2), 112, applicability of—Survey and Boundaries Act (IV of 1897), s. 20 (3)—Contribution, recovery of.

Section 42 (2) of the Madras Estates Land Act applies to cases in which the area of a holding has been determined under the Survey and Boundaries Act.

Section 112 of the Madras Estates Land Act also applies to proceedings for the recovery of contribution of survey charges apportioned under section 20 of the Survey and Boundaries Act.

Second appeal against the decree of the District Court of Trichinopoly, in Appeal Suit No. 34 of 1912, preferred against that of the Court of the Deputy Collector of Namakkal Division, in Summary Suit No. 64 of 1910.

Messrs. *R. Shadagopachariar* and *Venkatachariar*, for the Appellants.

Mr. *G. Venkatramiah*, for the Respondents.

JUDGMENT.—Only two points are argued for the appellant: (1) whether section 42 (2) of the Madras Estates Land Act applies to cases in which the area of a

holding has been determined under the Survey and Boundaries Act; (2) whether the limitation imposed by section 112 of the Madras Estates Land Act in point of time applies to proceedings for the recovery of contribution of survey charges apportioned under section 20 of the Survey and Boundaries Act.

On both points the decision of the District Judge appears to be correct. Appellant's Vakil relies on section 12 (3) of the Survey and Boundaries Act as declaring the finality of the determination of actual area of holding by the Survey Department: but this does not preclude the possibility of a "dispute" as to the amount of rent which the landlord is entitled to demand after the survey: and section 42 (2) seems to require that in all cases of dispute an application to the Collector shall be necessary.

As regards the second point, section 20 (3) makes the apportioned amount of survey charges recoverable as if it were an arrear of rent. The procedure to be followed, if advantage is sought to be taken of this provision, is laid down in sections 111, 112 *et seq.* of the Madras Estates Land Act: and the last sentence of the first paragraph of section 112, which says, "such notice shall be sent to the Collector within one year from the end of the Revenue year for which the arrear is due", applies equally with the rest of the section.

The second appeal is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 393 OF 1913.

April 14, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

BISHRUP—PLAINTIFF—APPELLANT

versus

NIL KANTH—DEFENDANT—RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 11, O. XXXII, r. 15—Suit for possession—Plea of insanity—Decree—Suit for declaration that decree not binding—*Res judicata.

The defendant sued the plaintiff for the possession o certain property, the subject-matter of a sale-deed executed by the plaintiff. The plaintiff pleaded that he was of weak intellect and that advantage had been

taken of him and that he had not received the consideration. The Court found against the plaintiff and decreed the defendant's suit. The plaintiff then brought the present suit to have it declared that the decree in the former suit was not binding on him as he, being of unsound mind, had not been properly represented:

Held, that the plaintiff, not having been adjudged a person of unsound mind at the time of the previous suit, was a party to that litigation, and was bound by the result. [p. 596, col. 2.]

First appeal from a decree of the Additional Subordinate Judge of Cawnpore.

The Hon'ble Dr. *Tej Bahádur Sapru*, for the Appellant.

The Hon'ble Mr. *Madan Mohán Malaviya* (with him Mr. *Rama Kant Malaviya*), for the Respondent.

JUDGMENT.—This appeal arises out of a suit in which the plaintiff Bishrup by his guardian, Ram Sarup, seeks to set aside a sale-deed dated the 6th October 1906 and a decree which was subsequently obtained by the defendant for possession of the property, the subject-matter of the sale-deed. It is alleged in the plaint that Bishrup was at the time of the sale a person of unsound mind incapable of understanding what he was doing; that the defendant fraudulently took advantage of his infirmity and induced him to execute the sale-deed; that no consideration was given; that the property was worth Rs. 10,000, while the amount of consideration was only Rs. 5,500. Then follows paragraph 5 of the plaint, which contains allegations which under certain circumstances might have been of considerable importance. It is there alleged that the defendant brought a previous suit on the 4th of May 1909 against Bishrup as a person of sound mind, while he well knew that he was a person of unsound mind, that by fraudulent means he made a man of the name of Bhola Nath *pairokar* for Bishrup who did not put forward a proper defence on behalf of Bishrup. It appears that a suit was brought by the defendant against Bishrup on the 4th May 1909 seeking possession of the property, the subject-matter of the sale-deed. Bishrup put in a defence to that suit, alleging that he was of weak intellect and that advantage had been taken of him and that he had not received the consideration. The sale was challenged on the same grounds as in the present suit, save the ground which relates to the value of the property. The case was tried by the Subordinate Judge of Cawnpore who went into all the facts and held, *first*, that Bishrup was not of unsound mind, and *secondly*, that the full consideration had been paid. There was an appeal to the High Court by Bishrup in his own name. After considering the evidence the High Court confirmed the decision of the Court below granting the plaintiff a decree for possession of the property. The Court below in the present suit framed six issues. The first issue was whether the suit was barred by section 11 of the Code of Civil Procedure. There was no issue based upon the allegations contained in paragraph 5 of the plaint.

The learned Subordinate Judge decided that the previous litigation operated as *res judicata*. It is contended here that if Bishrup was in fact of unsound mind at the time the previous suit was instituted then the decision cannot possibly bind him. and it is then pointed out that since the previous litigation an enquiry has been held by the District Judge at Cawnpore and that Bishrup has been adjudged a person of unsound mind and his mother appointed guardian of his person and Ram Sarup guardian of his property. On behalf of the appellant we are asked to infer from the judgment of the District Judge that Bishrup must have been of unsound mind when the previous litigation was instituted. Sections 440 to 462 of Act XIV of 1882 (which was in force at the time of the previous litigation) provide how suits are to be brought by and against minors. Section 463 of the same Act enacts that the provisions contained in sections 440 to 462, both inclusive, shall *mutatis mutandis* apply in the case of persons of unsound mind *adjudged to be so under Act XXXV of* 1858 *or under any other Act for the time being in force*. In the present Code the provisions relating to suits by and against minors are applied not only to persons adjudged to be of unsound mind, but also to persons who are found by the Court on enquiry to be incapable of protecting their interests when suing or being sued, by reason of unsoundness of mind or mental infirmity, see Order XXXII, rule 15. Bishrup had not at that time been adjudged a person of unsound mind. He, therefore, was a party to the previous litigation and is *prima facie* bound by the result. In this view the finding of the Court below that the previous litigation operated as *res judicata* is correct.

It is said, however, that a decree obtained by fraud cannot operate as *res judicata* and that the Court ought to have taken evidence of the

allegations contained in paragraph 5 and that the case should be sent to the Court below for that purpose. There are two objections to this contention. In the *first* place, the plainiff's advisers do not appear to have asked the Court to frame any issue on the question of fraud in connection with the previous litigation. Even in the memorandum of appeal to this Court this ground is not taken. The reasonable inference to be drawn from this is that the advisers of the plaintiff in the Court below felt that it would be impossible to sustain the allegations in paragraph 5. The whole history of the previous litigation renders it extremely improbable that the plaintiff could have adduced evidence to support the allegation that the previous suit was not fairly fought out, far less that the plaintiff in that suit by fraud prevented it from being fairly fought out. Even granted that Bishrup was not a man of strong intellect, it is quite clear that every possible defence that could be put forward on his behalf was put forward. Witnesses were called as to the condition of his mind and evidence was given as to the giving back of parts of the consideration. Legal gentlemen were employed not only in the Court of first instance but also in the High Court.

Under these circumstances, we do not think that the omission by the plaintiff's advisers to ask the Court to frame an issue on the ground of fraud was an accident or that we ought now to allow any such matter to be gone into. We dismiss the appeal with costs.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL APPEAL NO. 3 OF 1913.

September 3, 1914.

Present:—Mr. Fawcett, J. C.

THE MUNICIPALITY OF TATTA—DEFENDANT—APPELLANT

versus

ASSANMAL CHANDOOMAL—PLAINTIFF—RESPONDENT.

Master and servant—Termination of contract of service—No special custom or stipulation—Reasonable notice—Bombay District Municipal Act (Bombay Act III of 1901), s. 167, whether applicable to suit on contract.

If no custom nor stipulation as to notice exists and if the contract of service is not one which can be regarded as a yearly hiring, the service is terminable by reasonable notice. [p. 600, col. 1.]

What is "reasonable notice" is a question which varies with the circumstances of the case. [p. 600, col. 1.]

Section 167 of the Bombay District Municipal Act, 1901, does not apply to an action brought on a contract. [p. 600, col. 2.]

Having regard to the standard generally adopted in England for "clerks in superior position" a Municipal Secretary in India is entitled to three months' notice. [p. 600, col. 1.]

Ranchordas Moorarji v. *Municipal Commissioner for the City of Bombay*, 25 B. 387 at p. 393; 3 Bom. L. R. 158; *Municipality of Faizpur* v. *Nanak Dulat Shet*, (1897) P. J. 140, followed.

Appeal against the decree of the Sub-Judge, Tatta.

Mr. *Hassaram Jashanmal*, for the Appellant.

Mr. *Kimatrai Bhojraj*, for the Respondent.

JUDGMENT.—Plaintiff was formerly Secretary of the Tatta Municipality (defendant). On the 28th August 1911 a proposal was brought before a general meeting of the Municipality by the acting *mukhtiarkar*, Mr. Chandumal, that, as the expenditure of the Municipality was high and its income little the post of Secretary should be abolished for the present, and this proposal was carried (Exhibit No. 18). Mr. Chandumal, as acting *mukhtiarkar*, was an *ex-officio* member of the Municipality (as is admitted by respondent's Pleader), but there is nothing to show that he had been elected as Vice-President in place of the permanent *mukhtiarkar* for whom he was acting, as should have been done under section 23 (8) of the Bombay District Municipal Act, 1901. There is, however, no reason to disbelieve Mr. Chandumal's evidence that, though he was not formally elected, yet he was tacitly accepted as Vice-President, it being understood that the *mukhtiarkar* for the time being is the Vice-President. This is corroborated by the extracts of resolutions which have been filed in this case, see in particular Exhibit 18, where Mr. Chandumal is referred to as the acting Vice-President. In the circumstances there was, I think, a tacit election of Mr. Chandumal as Vice-President, and the defect of there being no formal election is covered by section 28 (1) of the Act. However that may be (and for reasons I give subsequently it is not, in my opinion, a material point in this case), Mr. Chandumal

certainly performed the duties of Vice-President, and in that capacity on the 10th September 1911 wrote as follows to the plaintiff:—

"The Municipality having abolished temporarily the post of the Secretary, his services are no longer in requirement; Mr. Assanmal (plaintiff) is, therefore, directed to deliver over charge to the Assistant Secretary by to-morrow *i. e.*, Monday the 11th instant afternoon" (Exhibit No. 29). Accordingly on the 11th September, the services of the plaintiff were dispensed with, and he was paid his wages upto date. Plaintiff then applied to be given a post of clerk in the Municipality, on the grounds that he was being driven out without fault and he had given up a permanent post in order to take up the Municipality service, but this application was refused by the Municipality on 12th September 1912 (Exhibit No. 20). The plaintiff then complained to the Collector about his removal from the post of Secretary, and correspondence ensued thereon, in the course of which the validity of the resolution abolishing the post of Secretary appears to have been questioned by the Collector, on the ground that this was an appointment included in the authorised Municipal staff by rules under section 46 (*b*) (*ii*) of the Act, which could not be altered without the sanction of the Commissioner. A proposal was, therefore, made that in the circumstances some settlement should be come to with plaintiff, and the Municipality were asked to decide (1) whether they wanted to keep plaintiff in their service or not, and (2) whether the President should be authorized to effect a settlement with him, which it was suggested might take the form of his being given pay for the period intervening between his relinquishing charge on the 11th September 1911 and the date on which he is offered the settlement. This was discussed at a meeting held on 20th February 1912, and it was then resolved that Mr. Assanmal should not be kept in Municipal service, and that the authority mentioned should be conferred on the President, but that the final decision should be submitted to the Municipality for sanction (Exhibit No. 21). The minute of proceedings at the general meeting of 11th March 1912 (Exhibit No. 22) shows that the President proposed to plaintiff that he should tender his resignation to the Municipality and receive pay upto the 2nd March 1912, and that if he did not accept this within a week, he would be left to his remedy by suit and the Municipality would be free to appoint another Secretary. The Municipality resolved that this was sanctioned and applications should be invited by advertisement for the appointment of Secretary. There was some subsequent correspondence between the plaintiff and the Vice-President and President, which led to nothing, and on the 13th April 1912 he gave notice to the Municipality that he would file a suit. The suit was not, however, actually instituted till 10th October 1912.

In the plaint plaintiff says that on 11th September 1911 he was made to relinquish charge of his post of Secretary and finally on 11th April 1912 after a deal of correspondence, he was told that his services were dispensed with, without any charge being framed or his defence or explanation being taken. He asserted that the Municipality had no legal authority to dispense with his services and that he was entitled to recover his pay (Rs. 35 per mensem) from 12th September 1911 to 11th April 1912 and that after that to date of suit, he was entitled to damages at the same rate. He also claimed a further sum of Rs. 500 as damages for loss of reputation owing to defendant's illegal action. It may be at once said that this last claim was disallowed by the lower Court, and that plaintiff's Pleader does not press the cross-objection he has filed regarding it.

The defendant Municipality pleaded that the suit was barred by limitation and want of proper notice under section 167 of the Municipal Act, that plaintiff was not appointed permanently in such a way that his services could not be dispensed with, that the Municipality were justified in dismissing him, and that he had suffered no damages and was not entitled to recover any.

Among the issues raised were the following:—

3. Whether defendant was justified in dispensing with plaintiff's services on the

grounds alleged in paragraph 3 of the written statement?

4. When were plaintiff's services dispensed with?

The Sub-Judge on the merits of the case held that the defendant was not justified in dispensing with plaintiff's services. The grounds put forward in paragraph 3 of the written statement are, he holds, insufficient. The *first* of these was that plaintiff's services to the Municipality were not satisfactory. The Sub-Judge held this not proved, and appellant's Pleader does not contest this in this Court. The *second* was that the defendant had to abolish the post of Secretary as an exeprimental measure. This the Sub-Judge holds cannot be relied on, as the action of the Municipality was illegal without the sanction of the Commissioner in Sind. The *third* was that plaintiff's services elsewhere had been bad and he had concealed the fact that he had been dismissed from other services. This was rightly rejected by the Sub-Judge as giving no justification on the general rule stated in Halsbury's Laws of England, Volume XX, page 98, paragraph 189. The Sub-Judge also held that plaintiff's services were dispensed with on the 11th March 1912, when the Municipality passed the resolution, Exhibit No. 22, and that as plaintiff was entitled to the additional period of one month's notice under section 15 (2) of the Limitation Act, the suit was not time-barred under section 167 of the Municipal Act. He awarded him damages at Rs. 35 per month from 11th September 1911 to 10th October 1912, the date of suit, in all Rs. 455.

I have given the facts and pleadings at some length, because it is, I think, important to bear in mind the difference between (1) the power summarily to dismiss a servant without notice on some ground such as misconduct, which may justify this and (2) the power to terminate a contract of service by reasonable notice. Though the defendant Municipality has in its pleadings attempted to justify the removal of plaintiff from his post under the former power, yet the latter is also pleaded by the defendant in the written statement, which contended that plaintiff was not appointed permanently in such a way that his services could not be dispensed with. The 3rd and 4th issues also use the phrase "dispensed with" and not "dismissed". And as a matter of fact, it is clear that the plaintiff was not dismissed by the Municipality for any reason falling under a master's power of summary dismissal for misconduct, etc., but that his services were dispensed with on the ground that the Municipality did not want to employ a Secretary any longer (Exhibits Nos. 18 and 29). Plaintiff himself admits this in the application referred to in Exhibit No. 22, and the resolution, Exhibit No. 21, also speaks of plaintiff's removal from his post, and not his dismissal. The Sub-Judge has rejected the Municipality's plea as to dispensing with plaintiff's services, because the abolition of the post of Secretary, on which that dispensing with his services was based, was illegal under the Municipal Act. He says: "Now, if in the general interests the Municipality thought it advisable to abolish the post of Secretary and to dispense with plaintiff's services, their course was obvious. They could have obtained the Commissioner's sanction for the abolition of the post and then said that they wished to dispense with plaintiff's services and then could have given him a month's notice or a month's pay, plaintiff being a monthly servant. A master is, of course, justified at all times in reducing his establishment and the plaintiff would have had no cause for complaint. Instead of this, however, they dismissed him illegally on plainly inadequate grounds." But, in my opinion, this confuses the real point. The word "dismissed" in such a case is generally used with reference to a master's power of summary dismissal for misconduct, etc., and (as I have already shown) plaintiff was not dismissed in this sense. The case really falls under the other power of master to terminate the contract of hiring and service, and should be so treated. There was a "permanent" post of Secretary, but Mr. Hassaram was quite right in his contention that a man appointed to that post has no right to occupy it permanently unless he is dismissed for some reason justifying summary dismissal. The contract is one terminable on either side by reasonable notice, and just as plaintiff could have left the post, if he had wanted to, after reasonable notice, so also the Municipality could dispense with plaintiff's

services, after such notice. The circumstances are not such that plaintiff could be considered to be merely on a yearly hiring, as is the general presumption (See Halsbury's "Laws of England," Volume XX, page 92, paragraph 173), and the case falls under the rule stated in paragraph 187 at page 97 of that same work, *viz.* "if no custom nor stipulation as to notice exists, and if the contract of service is not one which can be regarded as a yearly hiring, the service is terminable by reasonable notice." Addison's Law of Contracts, 10th Edn., page 864, similarly states: "an indefinite hiring is determinable by a reasonable notice in the absence of any agreement or custom to the contrary." There is nothing that I can find in the Bombay District Municipal Act to the contrary. Clause (*e*) of section 46 clearly refers to "dismissal" in the nature of a punishment for misconduct, etc., and the Municipal Rule 102 can only refer to such a dismissal, for it speaks of the officer dismissed being heard in his defence and of the charge or charges brought against him. The general power of a master to get rid of a servant after reasonable notice remains entirely untouched by anything in that rule or section 46. Rule 108 that "pensions shall not be granted by the Municipality" also goes against any contract by the Municipality to allow the plaintiff to remain in service (if he wanted to) until any particular time.

It is clear, therefore, that what really gives the plaintiff a right to damages is not the fact that the Municipality's abolition of the Secretary's post was illegal, but that they did not give him reasonable notice. This does not of course make their removal of him legal, but it affects the question of damages. What is "reasonable notice" is a question which varies with the circumstances of the case. The Sub-Judge in the extract from his judgment given above puts it at a month, but I should be inclined to put it at three months, having regard to the standard generally adopted in England for "clerks in superior positions" [See note (*p*) at page 97 of Halsbury's Laws of England, Volume XX]. The ordinary measure of damages in such a case is the amount of wages which the servant has been prevented from earning by reason of his wrongful dismissal, after taking into consideration the probabilities of his obtaining employment elsewhere, and in this connection it is laid down that it is the servant's duty to use due diligence in endeavouring to obtain employment (Halsbury, *loc-cit*, pages 112,113). In this case the Municipality to a certain extent kept the plaintiff in doubt as to whether he might not be re-employed by them, and it was not till 11th March 1912 that it was definitely decided that he would not be employed again as Secretary. He was also offered his pay up to 2nd March 1912. In the circumstances, I think he is entitled to more than three months' wages as damages, *viz.*, to the wages for the period of six months from 11th September 1911 to 10th March 1912, intervening before he was definitely told he would not be employed. He is not, in my opinion, entitled to anything more, even if it be true that he seriously sought employment but failed to get any. The evidence on this point of plaintiff and his witnesses is not, however, of a reliable nature. The fact that plaintiff unnecessarily delayed bringing his suit till 10th October 1912 does not of course entitle him to damages up to that date.

As regards the plea that the suit is barred by section 167 of the Municipal Act, I hold that that section does not apply as this is an action brought on a contract, following the rulings in *Ranchordas Moorarji* v. *Municipal Commissioner for the City of Bombay* (1) and *Municipality of Faizpur* v. *Nanak Dulat Shet* (2). I do not agree with the Sub-Judge that plaintiff's dismissal or removal can be said to be something done, or purporting to have been done, in pursuance of the Municipal Act. It was not an act done under any power conferred on the Municipality by the Municipal Act, but under the general rule relating to contracts of service to which I have referred above.

It is unnecessary, therefore, to decide the point of limitation arising under this section 167. Nor does Article 2 of the Limitation Act apply to the case. In my opinion it falls under Article 115.

I agree with the Sub-Judge that if sec-

(1) 25 B. 387 at p. 393; 3 Bom. L. R. 158.
(2) (1897) P. J. 140.

tion 167 does apply the notice given was sufficient, and I am inclined to agree with him that plaintiff is entitled to the benefit of section 15 (2) of the Limitation Act, a point on which there is some variance of judicial opinion. I also think that, in the circumstances of this case, the Sub-Judge is justified in taking the 11th March 1912 as the date of the "act complained of" within the meaning of section 167. But, as I hold that that section does not apply, these questions do not arise.

For the reasons given I modify the lower Court's decree by awarding plaintiff damages at the rate of Rs. 35 per month for six months from 11th September 1911, instead of up to 10th October 1911, *i.e.*, for Rs. 210 instead of Rs. 455.

As each party has succeeded and failed to the extent of about half the amount in dispute in appeal, I order each party to bear half his opponent's costs of appeal, except that respondent must bear the whole of the costs of his cross-objections.

Decree modified.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2512 OF 1913.

November 6, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

RAJA BAHADUR NARASINGARJI GYANGIRJI, ZEMINDAR OF PAMUR TALUQ, REPRESENTED BY HIS ONLY DULY AUTHORIZED AGENT, RAMA CHANDRA AIYAR—PLAINTIFF—APPELLANT

versus

VADDAMARI MALAKONDAYYA NAIDU—DEFENDANT—RESPONDENT.

Madras Rent Recovery Act (VIII of 1865), s. 11 (3)—Madras Estates Land Act (I of 1908)—No retrospective effect.

No retrospective effect should be given either to section 11 (3) of the Madras Rent Recovery Act or to its corresponding provision of the Madras Estates Land Act.

Foulkes v. *Muthusami Goundan*, 21 M. 503; 8 M. L. J. 207, followed.

Second appeal against the decree of the District Court of Nellore, in Appeal Suit No. 97 of 1912, preferred against that of the Court of the Deputy Collector of Atmakur, in Rent Suit No. 66 of 1912.

Mr. *M. Patanjili Sastri*, for Mr. *A. Krishnasawmy Aiyar*, for the Appellant.

Mr. *T. V. Venkatarama Aiyar*, for the Respondent.

JUDGMENT.—The only point arguable in second appeal, with which we have been pressed, is whether section 11 (3) of Act VIII of 1865 and the corresponding provision of Act I of 1908 should be given retrospective effect. *Foulkes* v. *Muthusami Goundan* (1) is against this.

The second appeal is dismissed with costs.

Appeal dismissed.

(1) 21 M. 503; 8 M. L. J. 207.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 185 OF 1915.

April 21, 1914.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

MUHAMMAD INAM-UL-LAH KHAN—JUDGMENT-DEBTOR—APPELLANT

versus

NARAIN DAS—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXVIII, r. (5), O. XXXIX, r. (1)—Mortgage of right to receive certain dues—Decree for sale—Order of attachment and injunction, whether competent.

The appellant mortgaged to the respondent his right to receive *malikana* dues from a number of villages and a decree for sale was passed on the mortgage, but before the sale the decree-holder obtained an order restraining the judgment-debtor from receiving the *malikana* dues:

Held, that the Court had no power either to attach the *malikana* dues or to prevent the appellant from receiving them. [p. 602, col. 2.]

First appeal from an order of the Subordinate Judge of Agra.

The Hon'ble Mr. *Abdul Raoof*, for the Appellant.

Mr. *Shiam Krishna Dar*, for the Respondent.

JUDGMENT.—This appeal arises out of an order passed in the course of proceedings taken to execute a decree dated November 23rd, 1911. It appears that in August 1901, the appellant mortgaged to the respondent his right to receive what are described as *taluqdari malikana* dues from a number of villages. A decree *nisi* for sale of the

property was passed in favour of the respondent on November 23rd, 1911. There was an appeal to this Court which was dismissed in April 1913, and an order absolute for sale of the property was passed on February 10th, 1914. In March of the same year the respondent applied for sale of the property. Notice was issued to the appellant who put forward objections. Those objections were ultimately dismissed and an order was made that the property should be sold. On July 10th, 1914, the respondent applied to the Court to issue an injunction to the appellant restraining him from receiving the *malikana* dues. At first sight it seems to be an application under Order XXXIX, rule 1 of the Code of Civil Procedure, but from certain expressions used in the application it may have been an application under Order XXXVIII, rule 5 of the Code of Civil Procedure. The Court *ex parte* made an order as prayed and issued injunction. Objections were put forward which were dismissed and the *ex parte* order of the Court was maintained. This is an appeal against the last-mentioned order.

As the appellant has a right of appeal whether it was an order of attachment or an order for the issue of injunction, it is unnecessary to consider whether it was passed under Order XXXVIII, or under Order XXXIX, of the Code of Civil Procedure. In appeal it is contended that the Court had no power either to attach the *malikana* dues or to prevent the appellant by injunction from receiving them. It is contended that all that the respondent is entitled to do, under his decree, is to have the property sold. For the respondent it is contended that it is competent to a Court to attach property in a case of this kind, at all events where it is clear that, in the event of the mortgaged property not realizing sufficient to satisfy the decree, a decree can be passed under Order XXXIV, rule 6. We will assume, for the purposes of this appeal, that the property mortgaged will not realize sufficient to satisfy the decree. It appears to us clear that the case does not fall either within Order XXXVIII, rule 5 or within Order XXXIX, rule 1 of the Code of Civil Procedure. There is no suggestion that the appellant is about to dispose of the whole or any part of his property, or remove it from the jurisdiction of the Court, or that any property in dispute is in danger of being wasted, or that the appellant intends to remove his property with a view of defrauding his creditors. All that the appellant in the present case insists upon doing is receiving the income of the property until a sale takes place. In the last resort it is contended that the Court was justified in passing the order under appeal either under clause (*c*) or clause (*e*) of section 94 of the Code of Civil Procedure. It is a question whether the clauses referred to are intended to authorise a Court to grant injunctions or to make attachments in cases not provided for by the Orders or rules. We may assume that it was intended to give the Court powers outside the Orders and rules in exceptional cases. In the present case, we see no reason to take action of an extraordinary character. The order absolute for sale was not passed until February 1914, and it cannot be said that the appellant has for any great length of time prevented the respondent-decree-holder from enforcing his decree. Assuming, therefore, that section 94 can be construed in the way suggested by the respondent, we are not prepared to hold that the present case is covered by that section. It seems to us that the Court below was not justified in either attaching the *malikana* dues or restraining the appellant by injunction from receiving them. We allow the appeal and set aside the order of the Court below. The respondent will pay the appellant's costs of this appeal. The record should be sent back at once so that further execution may not be delayed.

Appeal allowed.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 21 OF 1914.

October 5, 1914.

Present:—Mr. Crouch, A. J. C.

SHAMDAS TEUMAL—PETITIONER

versus

KHIMANMAL CHANDUMAL AND OTHERS—RESPONDENTS.

Arbitration Act (IX of 1899), s. 11— ppointment

SHAMDAS TEUMAL *v.* KHIMANMAL.

of arbitrators, when complete—Reference to sole arbitrator—Subsequent insertion of additional arbitrator's name, effect of—Stamp Act (II of 1899), s. 14—Application to file award by one arbitrator only, validity of.

The appointment of a certain person as arbitrator is not complete until such person has accepted the reference and consented to act. [p. 604, col. 1.]

Where a dispute between the parties was referred to a sole arbitrator, but before he had accepted the reference the name of a co-arbitrator was added:

Held, that the addition, having been made before the reference was accepted by the first arbitrator, did not convert it into a second instrument within the meaning of section 14 of the Stamp Act and the two arbitrators were competent to make an award. [p. 604, col. 2.]

The filing of an award is a purely ministerial act and can be legally performed by any one of the arbitrators appointed. [p. 604, col. 2.]

Mr. *Mulchand Thavardas Asarpota*, for the Petitioner.

Mr. *Hirdaram Mewaram*, for Respondent No. 1.

Mr. *Kalumal Pahlumal*, for Respondent No. 2.

JUDGMENT.—This is an application to file an award under the Arbitration Act.

Khimanmal Chandumal (respondent No. 1) and Jethanand Harumal (respondent No. 2) had been carrying on business in partnership and had quarrelled. On the 29th June 1913, they signed a reference to arbitration in the following terms:—

"We Jethanand Harumal of the one part and Khimanmal Chandandas of the second part, carrying on business in the name and style of Harumal Pritamdas, do appoint Mr. Lalchand Kewalram the sole arbitrator, to hear our disputes and settle our accounts and divide the profits after hearing our arguments without recording anything."

What happened after this is told us by Lalchand. He states: "First there was a reference in my favour only. Both parties signed it. Jethanand then said he wanted another arbitrator also; then a letter was signed on a one-anna stamp paper; in that the names of both arbitrators were inserted; here it is (Exhibit B, dated 6th July)." It was agreed that as soon as Shamdas' name was inserted in the eight-anna agreement this was to be cancelled. Then the name of Shamdas was inserted in the original reference (Exhibit C) on the same day, the 6th July. Both parties initialled the alterations. The proceedings put in (Exhibit D) show that they commenced at 6-45 P. M. on the 6th July. Jethanand was examined at considerable length on that day. The second hearing was on the 18th July when again, Jethanand was examined at length. The third hearing was on the 19th July when Jethanand was questioned by Khimanmal. The fourth hearing was on the 23rd July when Jethanand was examined by Khimanmal. The final hearing was on the 28th July when Jethanand was again present and certain entries were seen and admitted by both parties. The award was given and published on the 4th October 1913. Jethanand has put in objections to the award on the following grounds:—

1. That there was no valid reference to the two arbitrators.
2. That the award is vague and indefinite.
3. That the arbitrators exceeded their authority in awarding Rs. 160-2-0 to charity.
4. That the arbitrators were guilty of misconduct in listening to respondent No. 1 in the absence of the objector and in other ways.
5. That the award was made after the expiry of the time allowed by law.

The reference was not entered on until 6-45 P. M. on the 6th July, so the award was made within the three months allowed by the third *proviso* of the first Schedule to the Arbitration Act.

The objector has not gone into the box to prove the alleged misconduct of the arbitrators. It is clear from the abstract of the proceedings above given that Jethanand was present at the hearings and had full opportunity to state his case. A balance-sheet was taken out by a Mehta in the presence of the parties; the Mehta was paid by Jethanand himself.

The arbitrator explains that, under the partnership agreement, one pice in every rupee of profit was to be given to charity. In awarding that Rs. 160-2-0 of charity was to be paid by Jethanand to the Karachi Panjrapole, the arbitrators did no more than settle one of the matters in dispute between the parties.

It is contended that the words "up to 1969" in paragraph 1 of the award leave it doubtful whether or not the year 1969 was included. The arbitrator explains that it meant up to the end of 1969. As Jethanand has seen the balance-sheet and knows for a certainty what the words mean, and

has not gone into the box to say that they present difficulty of construction to himself, it may be taken that both parties are well aware what the words mean, and that to them they are neither vague nor indefinite.

This disposes of all but the first objection, which I will now deal with. Mr. Kalumal contends that the reference of the 29th June as originally executed was one complete instrument, and that when the words "and Shamoomal Teoomal" and the letter "S" after the word "arbitrator" were inserted and initialled, a second instrument chargeable with duty within the provisions of section 14, Indian Stamp Act, was written, and that, accordingly, the reference to the two arbitrators must be deemed to be unstamped, and the arbitrators could not act on it as they had not been legally vested with authority.

It may be conceded that if parties write a reference on a piece of stamped paper on which another reference has already been written, then such second reference does not clothe the arbitrators therein named with any authority. But the question is whether in this case, the insertion of the name of the second arbitrator converted the old reference into a second instrument; I think not.

A reference to arbitration consists of two essential elements: there is, *firstly*, the appointment of the arbitrator, the conferring on a certain person authority to give a *quasi* judicial decision on certain matters in dispute and there is, *secondly*, an agreement of the parties to accept such decision as final. Now the appointment of a certain person as arbitrator is not complete until such person has accepted the reference, and consented to act. Until such acceptance, there is nothing more than an agreement to refer to him, and there can be no question of revoking or cancelling his authority, for he possesses none. Any agreement may by consent of the parties be rescinded or altered, or the parties may agree to substitute another agreement, see section 62, Indian Contract Act. Now, if the agreement be rescinded, or if an entirely new agreement be substituted, then certainly the original agreement ceases to have any effective existence. But a mere alteration in an agreement does not operate to rescind it. The agreement to carry out the alteration is undoubtedly a new agreement, but this new agreement is not the agreement which is written on the first instrument; all that is inscribed is an amendment which is the effect or result of the new agreement. Though the arbitrator originally named as sole arbitrator was put into the box, Mr. Kalumal did not attempt to elicit from him that he had accepted the reference before the amendment of 6th July, and there is nothing on record from which I can assume that he did. I hold it not proved that the reference had been accepted. The agreement or reference could, therefore, be altered by consent of parties, for it was still an agreement and nothing more; no cancellation or rescission took place. I hold that the insertion of the words above mentioned did not constitute the agreement a second instrument within the meaning of section 14 of the Stamp Act.

In the course of argument Mr. Kalumal drew attention to the fact that only one arbitrator had signed the petition to file award and suggested that the terms of section 11 had not been fulfilled; but in "causing the award to be filed" at the request of a party the arbitrators are not acting judicially, they are performing a purely ministerial act which can be legally performed by one of their number.

I disallow all the objections. Let the award be filed. Costs of these proceedings to be borne by the objector, Jethanand.

Award filed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 10 OF 1914-15 OF GHAZIPUR DISTRICT.

April 20, 1915.

Present:- Mr. Holms, S. M.

RAM PRASAD DUBE, *Sarbrakar Sri Thakur* SALIG RAMJI—APPELLANT

versus

MATHURA RAI HIMSELF AND GUARDIAN OF SITA RAM RAI, MINOR, HUKUM RAI, DIN DAYAL—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 95—Rent, suit for —Rent, determination of—Court, power of.

In a suit under section 95 of Act II of 1901, a Court can only ascertain what is the amount of rent

payable, but cannot fix the amount of rent when no rent has been fixed or agreed upon.

Second appeal from an order of the Commissioner, Benares Division, dated the 4th September 1914, reversing that of the Assistant Collector, Ghazipur District, in a case of determination of rent.

JUDGMENT.—In a proceeding under section 95 of the Tenancy Act, the Court has no power to fix the amount of rent when no rent has been fixed or agreed upon. The section only empowers a Court to ascertain what the amount of rent payable was. This view of the law has been, so far as I know, invariably followed by the Board. It is unnecessary to discuss the other points.

Appeal dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1221 OF 1912.

November 10, 1913.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Bakewell.

RAMACHARIAR—PLAINTIFF—APPELLANT

versus

DORASAMI PILLAI AND ANOTHER—DEFENDANTS—RESPONDENTS

Transfer of Property Act (IV of 1882), ss. 58, 100—Security bond executed in favour of Court—No transfer of interest—Document, whether creates charge or mortgage—Limitation Act (IX of 1908), s. 31 (2).

Where a security bond, after reciting an order of the Court made upon an application that the possession of certain immoveable property should not be delivered over to the plaintiff, stated that "we have, for a sum not exceeding Rs. 300, made the properties mentioned below security":

Held, (1) that the document did not transfer an interest in the property nor was there any existing or future debt or an engagement which might give rise to a pecuniary liability within the meaning of section 58 of the Transfer of Property Act; [p. 606, col. 1.]

(2) that it merely created a charge and did not fall within section 31 of the Limitation Act. [p. 606, col. 1.]

Second appeal against the decree of the Subordinate Judge of Nagapatam, in Appeal Suit No. 1040 of 1910, preferred against that of the Court of the District Munsif, Tiruvalur, in Original Suit No. 43 of 1910.

FACTS.—The plaintiff obtained a decree against the defendant for possession of certain immoveable property and in execution of the decree applied for delivery. The Court made an order that the defendant should, on his furnishing security for mesne profits, remain in possession. The suit bond was executed by the defendant in favour of the Court on 7th June 1894. The suit was finally disposed of by the High Court in 1898. In 1910 the plaintiff brought a suit on the security bond executed by the defendant for mesne profits. Both the lower Courts held that the instrument sued on merely created a "charge" and was not a "mortgage" and the plaintiff could not claim the benefit of section 31 (2) of the Limitation Act, and dismissed the suit as barred. The present appeal is against that decree.

Mr. *T. Narasimha Aiyangar*, for the Appellant:—This is a suit to enforce the suit bond given during delivery of possession. The questions are what is the period of limitation and whether the bond is a "mortgage" or a "charge".

The security bond dates from 7th June 1894, being executed in favour of the District Munsif's Court of Tiruvalur. Suits were disposed of on 8th July 1895. Plaintiff obtained possession in September 1895.

Second appeal was disposed of by the High Court in 1898 and the present suit filed in 1910.

The period of limitation is 30 years. The security bond is a mortgage under section 58 of the Transfer of Property Act.

[SANKARAN NAIR, J.—There is no transfer of interest.]

Mr. *T. Narasimha Aiyangar*.—It is a debt to be ascertained in future.

[SANKARAN NAIR, J.—There are no words transferring the interest.]

Mr. *T. Narasimha Aiyangar*.—The words are "we have as security given the following properties." The property is described as specific and is given as security.

[BAKEWELL, J.—What is the Tamil word for "furnished"? In *Girindra Nath Mukerjee* v. *Bejoy Gopal Mukerjee* (1), the question was whether a security bond is a mortgage.]

[SANKARAN NAIR, J.—Is there any printed form?]

Mr. *T. Narasimha Aiyangar*.—The document in *Girindra Nath Mukerjee* v. *Bejoy Gopal Mukerjee* (1) was intended to act as security bond. That is one of the ingredients.

(1) 26 C. 246; 3 C. W. N. 84.

There is the transfer of interest in favour of the Registrar. *Aliba* v. *Nanu* (2); *Nagaruru Sambayya* v. *Tangatur Subhayya* (3), *Tokhan Singh* v. *Girwar Singh* (4). The words are "put certain property as security."

Respondents were not called upon.

JUDGMENT.—The question in this case is whether the security bond, Exhibit C, is a mortgage within section 58 or a charge within section 100, of the Transfer of Property Act, 1882. The document recites an order of the Court made upon an application that the possession of certain immoveable property should not be delivered over to the plaintiff and that the defendant in this suit should give security, and states that "we have for a sum not exceeding Rs. 300 made the properties mentioned below security." We are of opinion that this document does not transfer an interest in the property nor is there any existing or future debt or an engagement which might give rise to a pecuniary liability within the meaning of section 58. There is surely an intention that if the defendant should be found entitled to any damages by the Court, the amount should be realized out of the specific property. We are of opinion, therefore, that the document, Exhibit C, merely creates a charge, and does not fall within section 31 of the Limitation Act. We are clearly of opinion that time began to run from the date of the first decree in the original Court and that the present suit was rightly held to be barred.

In the result this appeal fails and is dismissed with costs.

Appeal dismissed.

(2) 9 M. 218.
(3) 31 M. 330; 3 M. L. T. 317.
(4) 32 C. 494 at p. 496 ; 1 C. L. J. 118; 9 C. W. N. 372.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 674 OF 1913.

April 26, 1915.

Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Rafique.

JHANDU MAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

KARAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Suit on a lost bond—Admission of execution—Plea of payment—Burden of proof.

Where a suit was brought on a lost bond and the defendant admitted its execution but pleaded payment:

Held, that the question of loss of the document was not material and that it was for the defendant to prove payment. [p. 607, col. 1.]

Second appeal from a decree of the District Judge of Agra, confirming a decree of the Second Additional Subordinate Judge of Agra.

Mr. *Haribans Sahai*, for the Appellants.

Dr. *Satish Chandra Banerjee*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs-appellants to enforce a mortagage, dated the 10th of July 1884, alleged to have been executed by Randhir Singh and Partab Singh. Randhir Singh is dead and is represented by his son, Karan Singh, and his daughter-in-law, *Musammat* Radha, the widow, apparently, of a pre-deceased son. The share of Randhir Singh in the mortgaged property was sold to Chidammi Lal, whose minor sons, Daya Kishore and Jai Kishore, are the defendants Nos. 4 and 5. The defendant No. 2 is the mortgagor, Partab Singh, and defendant No. 3, Nahar Singh, is the son of Partab Singh. The case in our opinion was not properly tried. On the first date fixed for hearing the learned Subordinate Judge dismissed the suit for default of appearance of both parties. On the same date, *i.e.*, the 16th of September 1911, he restored the case to his file. On that date Partab Singh and Karan Singh filed a compromise and the learned Judge proceeded to hear the case *ex parte* against the other defendants and made a decree in the terms of the compromise. Subsequently an application was made on behalf of Nahar Singh and *Musammat* Radha to have the *ex parte* decree made against them set aside. This

application was granted and the case was re-heard. It is clear that *Musammat* Radha has no interest in the suit. Strictly speaking Karan Singh also has no interest in the suit, because the plaintiff cannot enforce the mortgage against any property other than the mortgaged property and Randhir Singh's share of the mortgaged property was sold to Chidammi and is in the possession of the minor defendants, Daya Kishore and Jai Kishore. Nahar Singh filed a written statement in which he said that his father, Partab Singh, was of unsound mind and was under the influence of the plaintiffs and that the bond had been discharged by Chidammi (the purchaser of Randhir Singh's property) and had been returned to him. He denied the allegation of loss of the bond made on behalf of the plaintiffs. Partab Singh and Karan Singh admitted the claim. *Musammat* Radha denied the bond and *Musammat* Chironji (the mother and guardian of the minor defendants) did not enter appearance. The Court proceeded to try the suit and held that the claim was time-barred. This finding on the question of limitation was, as the lower Appellate Court has held, erroneous in view of the rulings of this Court. The learned Subordinate Judge, however, also tried the other issues framed by him. He was of opinion that the loss of the bond was not proved and that the bond had been discharged. He accordingly dismissed the suit. Upon appeal the learned District Judge, as we have said above, disagreed with the learned Subordinate Judge on the question of limitation, but he held that the loss of the bond had not been proved and accordingly affirmed the decision of the first Court.

It is contended on behalf of the appellants that the question of the loss of the bond was immaterial. It is said that it was Nahar Singh who denied the loss, but as he admitted the bond and only pleaded payment, the question of loss was only material for the purpose of determining whether the bond had been discharged and returned. We think this contention is valid. Nahar Singh, however, also stated that his father was of unsound mind and was under the influence of the plaintiffs. That was a question which the Court of first instance ought to have tried but did not try. I was alleged that the bond had been admitted by *Musammat* Chironji, the mother of the minor defendants, who are the real parties interested in the portion of the mortgaged property which belonged to Randhir Singh. That question also was not tried by the Court of first instance. If she admitted the genuineness of the mortgage and the liability of the property for the mortgage debt, that would be a strong piece of evidence in favour of the plaintiff, but it would have to be proved that she made the admission. For all these reasons we think that the case has not been properly tried. We, accordingly, discharge the decrees of the Courts below and remand the case to the Court of first instance, with directions to re-admit the suit under its original number and try it *de novo* after framing proper issues. Costs here and hitherto will be costs in the cause

Appeal decreed ; Cause remanded.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 194 OF 1915.

March 5, 1915.

Present:—Mr. Saunders, A. J. C.

MI NGE MA—APPELLANT

versus

NGA TALOK PYU—RESPONDENT.

Evidence Act (I of 1872), ss. 32, 91—Statement not against pecuniary or proprietary interest of person making it, whether admissible—Plaintiff relying upon document—Other evidence of transaction, if admissible.

A statement by a plaintiff as a witness to the effect that her father told her that he had mortgaged the land in suit to the defendant is inadmissible under section 32 of the Evidence Act. [p. 608, col. 1.]

Where the plaintiff relies upon a mortgage-deed produced by her but not proved, she is precluded by section 91 of the Evidence Act from giving other evidence of the terms of the transaction. [p. 608, col. 2; p. 609, col. 1.]

Mr. *S. Mukerjee*, for the Appellant.

Mr. *J. N. Basu*, for the Respondent.

JUDGMENT.—This was a suit to recover land in the possession of the defendant-respondent on the ground that it had been mortgaged by the plaintiff-appellant's father. The Court of first instance gave the plaintiff a decree which was set aside upon appeal, and the plaintiff now comes to this

Court under section 13 of the Upper Burma Civil Courts Regulation.

The land had admittedly been in the possession of the defendant for a great many years, and as the mortgage was denied, the burden of proving it was on the plaintiff-appellant. So far the Court of first instance was correct, but in recording and dealing with the evidence, the Court appears to have overlooked not only the provisions of the Evidence Act, but the numerous rulings of this Court explaining those provisions.

The plaintiff offered herself as a witness and said that her father had told her that he had mortgaged the land. Her father was dead, and this evidence could only have been admitted if it was admissible under the provisions of section 32 of the Evidence Act. It was not a statement against the pecuniary or proprietary interest of the person making it, nor does it come under any of the provisions of that section, and this evidence was, therefore, inadmissible.

The next witness was U Kywe who said that he was present when the the original mortgage was concluded, and that it was recorded in a *parabaik* document. A *parabaik* document was produced in Court, and under section 91 of the Evidence Act no evidence of the terms of the mortgage was admissible except the document itself. The document was not shown to the witness nor was he asked to identify it, and his evidence was, therefore, inadmissible.

The next witness was a man who had been husband to the plaintiff. He deposed that he was present when a subsequent advance of Rs. 10 was taken by the mortgagor. His evidence was uncorroborated. He said that he did not know whether a document was written or not, that no one else was present, and his evidence was of very little value.

The next witness was Maung Hme who produced the Exhibit mortgage-deed, a *parabaik*. He says that he found it among the papers of one of the original mortgagees. Documents of this kind do not prove themselves, and unless they are admitted by the other side, it is necessary to prove them. This may be done by calling a witness who was present when the document was executed and testifies in Court that the document produced is that which was executed. This has not been done. It is also possible in certain cases to make certain presumptions with reference to ancient documents, that is to say, documents purporting or proved to be 30 years' old, under section 90 of the Evidence Act. The Court of first instance does not suggest that any presumption should be drawn in the case of the document produced. The necessity for caution in making presumptions as to ancient documents in Upper Burma has been insisted on repeatedly in the rulings of this Court, for instance, *Ma Lon* v. *Maung Myo* (1).

Maung Hme, the witness who produced the document, is admittedly on bad terms with the defendant-respondent.

The document which recites the transaction by which Rs. 50 is supposed to have been advanced upon the land, concludes with the words "total amount of the mortgage-money Rs. 60." It is not suggested that the amount of the mortgage-money was raised to Rs. 60 until the year 1252 B. E., that is less than 30 years ago, and if the whole document was written at that date, no presumption could be made with regard to it.

The very fact that these concluding words are in the document, apparently in the same handwriting and of the same date as the rest, shows how easy it is to alter or concoct these documents. The law does not require the Court to draw any presumption: on the contray as explained in the ruling of this Court, the presumption should not be drawn as a matter of course or without great caution. In the present case the document was produced in Court by a person who says he got it from proper custody, but who was shown to be on bad terms with the other side and whom it was not safe to believe. The document itself has either been wholly written or has had additions made to it at a date later than the date on which it purports to have been written. No presumption can clearly be drawn with regard to it and it has not been proved.

As the plaintiff relied upon a document produced by her but not proved, she was

(1) U. B. R. (1892—96), II, 350.

precluded by the terms of section 91 of the Evidence Act from giving other evidence of the transaction.

The admission deposed to by the 4th and last witness for the plaintiff was so vague as to be clearly valueless.

There is, therefore, no evidence worth the name upon which the plaintiff-appellant could possibly hope to succeed.

The defendants had admittedly been in possession for at least 34 or 35 years and there is a long series of rulings of this Court laying down that a long and peaceable possession should not be disturbed except upon substantial and satisfactory evidence.

It should not have been necessary to repeat these elementary rules of law. Cases, however, constantly come before this Court in which not merely the parties and Advocates but the Judges fail to distinguish between evidence which is admissible and that which is not. All that can be done is to repeat the more important of these rules, in the hope that they will sooner or later be learnt and understood.

The appeal is dismissed with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 81 OF 1914.

December 10, 1914.

Present:—Sir Henry Drake-Brockman, KT., J. C., and Mr. Prideaux, A. J. C.

WASUDEO AND OTHERS—APPELLANTS

versus

DAYARAM—RESPONDENT.

Court Fees Act (VII of 1870), s. 7 (i),(ix)—Foreclosure suit—Appeal for enhancement of mortgage-money—Court-fee to be ad valorem.

The appellants sued to obtain foreclosure of a mortgage and joined as one of the defendants a co-mortgagee who, they alleged, had parted with his rights to their predecessors-in-title. The co-mortgagee also filed a suit and admitting appellants' right to the extent of a half share, made them defendants as they refused to be co-plaintiffs with him. The suits were tried jointly and two different decrees were passed. The appellants filed an appeal for enhancement of the mortgage money payable to them:

Held, that they must pay *ad valorem* Court fees on the amount by which enhancement was sought. [p. 610, col. 1.]

First appeal against a decree of the Additional District Judge, Nagpur, dated the 30th April 1914.

Dr. *H. S. Gour*, Messrs. *G. L. Subhedar* and *K. V. Deoskar*, for the Appellants.

Mr. *M. B. Kinkhede*, for the Respondent.

JUDGMENT.—The question for determination at this stage is, whether the memorandum of appeal is sufficiently stamped.

The appellants sued on the 19th July 1910 to obtain foreclosure of a mortgage. They joined as one of the defendants a co-mortgagee named Chinba, whom they alleged to have parted with his rights to their predecessors-in-title. That suit bears No. 176 on the file of the Additional District Judge, Nagpur, and is the one out of which the present appeal arises.

Just 10 days earlier Chinba had instituted Suit No. 156 in the Additional District Judge's Court. He claimed on foot of the same mortgage as that which the appellants made the basis of their suit, but admitted their right to the extent of a half share and made them defendants as they refused to be co-plaintiffs with him.

A single trial was held in the two suits, but two decrees were drawn up. The Additional District Judge held that Chinba was still a co-mortgagee, his interest being one half. A certain payment proved by the mortgagors was credited against the present appellants' share only, and the decree in each suit directed payment to the plaintiff therein of the sum found due to him.

The total sum payable on the mortgage up to the 30th October 1914 was held to be Rs. 6,736-11-6. The decree in Suit No. 156 ordered payment of Rs. 4,409-13-0 to Chinba, while that in Suit No. 176 ordered the mortgagors to pay Rs. 2,326-14-6 to the appellants.

The object of this appeal is to obtain a decision that the entire sum payable under the mortgage belongs to the appellants, and that the said sum is Rs. 11,229-14-0, *i. e.*, more by Rs. 8,902-15-6 than the Additional District Judge decreed to them.

In the memorandum the relief claimed in appeal is described as a declaration, but in argument the appellants' learned Counsel contended that the Court-fee should be calculated on the principal sum secured by the mortgage, namely, Rs. 2,000. *Dhiraj*

Singh v. *Rajaram* (1) is relied on, the argument being that in a suit for foreclosure by a mortgagee the value for purposes of Court-fee is the same at all stages of the litigation, being that prescribed in clause (*ix*), section 7 of the Court Fees Act. For the respondent Chinba reliance is placed upon *Onkar* v. *Lakmichand* (2) and Court-fee is said to be payable on the amount by which the appellants seek to have the mortgage-money increased, namely, Rs. 8,902-15-6.

We are very clearly of opinion that the respondent's contention is correct. We have ascertained from our brother Stanyon, who decided *Dhiraj Singh* v. *Rajaram* (1), that he did not intend to lay down therein that Court-fee is payable on the principal sum secured even if the subject-matter of the dispute in appeal is merely the amount payable. On the contrary, he meant by the penultimate paragraph of the *placitum* to convey that where a mere enhancement or reduction of the mortgage-money is sought by the appellant, Court-fee must be paid *ad valorem* according to the sum so put in question. So far then as the matter before us is concerned, there is no difference between the view taken in *Onkar* v. *Lakmichand* (2) and that expressed *obiter* in *Dhiraj Singh* v. *Rajaram* (1). We are in complete agreement with the *ratio decidendi* in the former case and would further observe that the *obiter dictum* with which the judgment of Edge, Chief Judge, in *Pirbhu Narain* v. *Sita Ram* (3) concludes supports the respondent's contention. In that case the mortgagor had sued for redemption, alleging the debt to have been completely satisfied and had appealed against the amount the Court of first instance had ordered him to pay. The learned Chief Justice said :—

"If, on the other hand, the decree below had decreed redemption on payment of, say, Rs. 500, and the defendants-mortgagees were appealing on the ground that the amount due was Rs. 2,00,000, I am of opinion that the amount of Court-fee should be calculated on the difference between Rs. 500 and Rs. 2,00,000."

In the case before us the appellants not only seek enhancement of the mortgage-money, but also to appropriate the entire sum to themselves. We see no difference in respect of the principle to be applied between a claim like this and one by the mortgagor to obtain reduction of the mortgage-money. The appellants must, therefore, pay an additional Court-fee of Rs. 425, the full fee payable *ad valorem* on Rs. 8,902-15-6 being Rs. 435 and Rs. 10 only having so far been paid. Time till the 15th January 1915 is allowed for payment and on that date an order regarding the hearing of the appeal on the merits will be passed.

Appeal dismissed.

(1) 8 Ind. Cas. 1125; 6 N. L. R. 164.
(2) 3 Ind. Cas. 920; 5 N. L. R. 130.
(3) 13 A.; 94 A. W. N. (1890) 231.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION NO. 70 OF 1914.

March 10, 1915.

Present:—Mr. Saunders, A. J. C.

NGA TIN AND ANOTHER—APPLICANTS

versus

NGA SAW—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 22—Cross-objections, whether can be urged against co-respondents.

A respondent in an appeal is not ordinarily entitled to urge cross-objections except against the appellant. [p. 611, col. 1.]

Where a plaintiff had sued two defendants who had no common ground of defence, and was successful against one only and on that defendant appealing, the plaintiff filed a cross-objection in which he claimed a decree against the other defendant:

Held, that the plaintiff was not entitled to file a cross-objection against the second defendant and to prove his case against him. [p. 611, col. 2.]

Mr. *D. Dutt*, for the Applicants.

Mr. *J. C. Chatterjee*, for the Respondent.

JUDGMENT.—Plaintiff sued the two defendants to recover Rs. 124, the balance of a sum advanced for purchase of plantains, and obtained a decree against the 2nd defendant. The 2nd defendant appealed. The plaintiff in the lower Appellate Court filed a cross-objection in which he claimed a decree against the 1st defendant. The 2nd defendant's appeal was dismissed, and the lower Appellate Court gave plaintiff a decree against the 1st defendant. This application for revision states that the lower Appellate Court should not have given a decree against the 1st defendant in the absence of a separate appeal by the plaintiff.

It has been further argued that the present applicant was not a party to the appeal and he was not present, and that there was no evidence upon the record to justify the finding of the lower Appellate Court.

The provision of law which enables a respondent to take a cross-objection to a decree which has been appealed against, is contained in Order XLI, rule 22, of the Code of Civil Procedure. The first paragraph of this rule corresponds, with no material difference, with the first paragraph of section 561 of the old Code of Civil Procedure. There are a number of rulings under the old Code which lay down that a respondent in an appeal is not ordinarily entitled to urge cross-objections except against the appellant. The matter was considered at length in *Bishun Churn Roy Chowdhry* v. *Jogendra Nath Roy* (1), and the rule of law was there laid down that it was only by way of exception to the general rule that one respondent may urge cross-objections as against the other respondents, the exception holding good, among other cases, in those in which the appeal of some of the parties opens out questions which cannot be disposed of completely without matters being allowed to be opened up as between co-respondents. This has been quoted with approval in subsequent cases, *e.g.*, *Shabiuddin* v. *Deomoorat Koer* (2). The same view was taken by the Allahadad High Court in *Kallu* v. *Manni* (3) though in the latter case, the opinion appears to have been based partly upon the words contained in paragraph 3 of section 561 of the old Code, which required the respondent to show that the appellant or his Pleader had received a copy of the objection. These words do not appear in the present Code, the words "party who may be affected by such objection" being substituted for "appellant." In the case of *Shabiuddin* v. *Deomoorat Koer* (2), following the observations of the Judge in *Anwar Jan Bibee* v. *Azmut Ali* (4) which were quoted with approval, it was held that the cross-appeal cannot re-open any questions which have been decided between the co-respondents, but must have reference to the appellant and the points which are in dispute between the respondent who takes the cross-appeal and the appellant: "It is quite possible that there may be cases in which, when an appellant succeeds in his appeal, questions will be opened up as between the co-respondents which would otherwise have been decided; and it is also possible when interests are identical that a respondent succeeding in his cross-appeal may open up questions as between himself and his co-respondent." But that is not the case in this litigation. It seems clear that if it had been intended that Order XLI, rule 22, should give a respondent an opportunity to take a cross-objection to the decree not only as against the appellant but as against all the other respondents, this intention would have been expressed unequivocally. But in the present case the applicant was not even a respondent in the appeal. He had successfully contested plaintiff's claim in the first Court and had not been made a party to the appeal until the plaintiff attempted to make him a party by filing a cross-objection. It is clearly unreasonable in a case where a plaintiff had sued two defendants who had no common ground of defence and has been successful against one only, and where that defendant appeals, that the plaintiff should be heard in the same appeal to prove his case against the other defendant. This view has more recently been reaffirmed in the case of *Jadunandan Prosad Singha* v. *Koer Kallayan Singh* (5) and *Nursey Virji* v. *Alfred H. Harrison* (6).

I am of opinion that the plaintiff was not entitled to file a cross-objection in this appeal against the 2nd defendant, whose case was that he was not concerned in the transaction in question and who, the Court of first instance had found, had not in fact been a party to that transaction.

In this particular case, moreover, there appear to be other reasons why this Court should interfere in revision. The third paragraph of rule 22 requires that unless

(1) 26 C. 114.
(2) 30 C. 655.
(3) 23 A. 93; A. W. N. (1900) 212.
(4) 15 W. R. 26.
(5) 13 Ind. Cas. 653; 16 C. W. N. 612; 15 C. L. J. 61.
(6) 21 Ind. Cas. 7; 37 B. 511; 15 Bom. L. R. 781.

the respondent files with the objection a written acknowledgment from the party who may be affected by such objection of having received a copy thereof, the Appellate Court shall cause a copy to be served on him. The cross objection did not show that a copy had been served, and there is nothing on the record to show that this was done. Further, the record does not show that the present applicant was present. The objection, again, appears to have been filed on the 17th of February and the appeal came on for hearing on the 24th of February. It would appear that even if a copy was served on the applicant, the time allowed must have been entirely insufficient.

Again upon the merits, it does not appear that the lower Appellate Court had any clear conception of what the question in dispute was. It appears from the evidence that the plantains which were sold were the produce of the 2nd defendant's garden. Upon the pleadings, it was clearly a question whether, supposing the 1st defendant to have taken any part in the transaction, he was acting merely as an agent for the 2nd defendant or as a partner with him, and the judgment of the lower Appellate Court does not show that this point was considered or that the Judge considered it proved that he was a partner.

The application is allowed, and the decree of the lower Appellate Court, so far as it affects the 2nd applicant, is set aside with costs.

As far as 1st applicant, Maung Tin, is concerned, the application is dismissed.

Application partly dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE No. 401 OF 1914.

January 21, 1915.

Present:—Mr. Stanyon, A. J. C.

NATHU—PLAINTIFF—APPELLANT

versus

Musammat NAI BAHU—DEFENDANT—RESPONDENT.

Hindu Widows' Remarriage Act (*XV of* 1856), *s.* 2—*Alienation by widow of her deceased husband's property after her re-marriage—Suit by reversioner—Limitation Act* (*IX of* 1908), *Sch. I, Arts.* 141, 143.

The remarriage of a Hindu widow extinguishes her estate in the property of her deceased husband and the presumptive interest of the reversioners vests under section 2 of the Hindu Widows' Remarriage Act. [p. 612, col. 2.]

A suit by the reversioners to set aside an alienation by the widow of her deceased husband's property brought more than 12 years after her re-marriage is barred under Articles 141, 143 of the first Schedule of the Limitation Act. [p. 613, col. 1.]

Appeal against the decree of the District Judge, Saugor, dated the 10th March 1914, confirming that of the Subordinate Judge, Damoh, dated the 18th September 1913.

Mr. *M. Chuckerbutty*, for the Appellant.

JUDGMENT.—The facts found are these. One Bhairon Lohar, the first husband of the defendent, Nai Bahu, died some time before 1899, leaving the house in dispute, the said defendant as his immediate heir and the plaintiff as his nearest reversioner. Nai Bahu took possession of the house and retained it continuously till the 12th May 1913, when she sold it to the second defendant, Jhalkan, though in 1899, in accordance with a custom of her caste, she contracted a valid marriage with one Chhabile and is still his lawful wife. On the 26th June 1913 the plaintiff lodged the present suit, on the allegations (1) that Nai Bahu's re-marriage was completed by a caste dinner given in the month of February 1908 and entailed forfeiture of the estate of Bhairon, (2) that, therefore, she had no interest to sell to Jhalkan in May 1913, the estate having vested in the plaintiff, and (3) that in any case the sale was made without legal necessity. The plaintiff, therefore, claims (*a*) possession of Bhairon's house or, in the alternative, (*b*) a declaration that the sale did not affect his reversionary interest.

The Courts below having found that Nai Bahu's re-marriage took place in 899 have dismissed the suit as time-barred. The plaintiff has, therefore, made this appeal. In my opinion the suit has been correctly decided. The re-marriage of Nai Bahu in 1899 at once extinguished her widow's estate in the property of Bhairon, and the presumptive interest of the plaintiff, as the nearest reversioner, vested under section 2 of the Hindu Widows' Remarriage Act (XV of 1856). Time began to run against him for recovery of possession of the house which continued in the hand

of Nai Bahu. The proper Article of the Limitation Schedule applicable to the case seems to be 143: but if Article 141 can be technically employed, then I am clear that by her re-marriage Nai Bahu, *as the widow of Bhairon*, incurred civil death, and her subsequent possession of the house was that of another person in the eye of the law, namely, the wife of Chhabile. That the civil death of a Hindu widow has the same legal result as her natural death would have, has been held in several cases, *e. g.*, *Nobokishore Surma Roy* v. *Hari Nath Sarma Roy* (1) and *Hem Chunder Sanyal* v. *Sarnamoyi Debi* (2); and the *dictum* in *Bibi Sahodra* v. *Rai Jang Bahadur* (3) would not apply to such a case.

The appeal fails and is dismissed without notice to the other side.

Appeal dismissed.

(1) 10 C. 1102 at p. 1108.
(2) 22 C. 354 at p. 361.
(3) 8 C. 224; 8 I. A. 210; 4 Sar. P. C. J. 294; 6 Ind. Jur. 108.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 41 OF 1914.

December 21, 1914.

Present:—Mr. McColl, A. J. C.

U. TILAWKA—PLAINTIFF—APPELLANT

versus

NGA SHWE KAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Buddhist Law—Monk, whether can enter into valid contract.

A Buddhist monk is incapable of entering into a valid contract for his own personal benefit. [p. 614, col. 1.]

Where, therefore, a Buddhist monk, sued for redemption:

Held, that he was prohibited by his personal law from buying, selling or mortgaging land and was debarred from suing for redemption. [p. 616, col. 1.]

Mr. *A. C. Mukerjee*, for the Appellant.

Mr. *San Wa*, for the Respondents.

JUDGMENT.—The plaintiff-appellant, who, as I have already held, must be taken to be a *rahan*, sued to redeem some land which he alleged he, another *rahan* and a woman had jointly mortgaged in 1245. He further alleged that he had inherited a share of the land from his father. The woman (Ma Po) was dead and plaintiff-appellant was the sole plaintiff.

An objection was taken in the written statement that the plaintiff had been a monk for 40 years and that he could, therefore, have no claim to the land. The point was noticed in his judgment by the Township Judge, but it was not adequately dealt with. The Township Judge gave plaintiff a decree for redemption.

On appeal the lower Appellate Court held that the alleged mortgage had not been proved and dismissed the suit.

In this appeal the *first* question to be decided is whether the suit is not bad *ab initio*.

In *Ma Pwe* v. *Maung Myat Tha* (1) it was held that a Burman, on becoming a Buddhist monk, ceased to have any interest in the property of which he had up to then been the owner. The first Court held that this ruling did not apply, as the plaintiff-appellant was already as monk when he mortgaged the land.

The land in suit is alleged to have descended from the plaintiff-appellant's father, but there is no evidence as to when the latter died. The land is alleged to have been mortgaged by him, redeemed by the plaintiff-appellant and two others and re-mortgaged by them to the defendant-respondent's parents. There is also nothing to show when the plaintiff-appellant became a monk, except the allegation in the written statement that at the time the suit was brought he had been a monk for 40 years, a statement which has not been contradicted. If he became a monk after his father's death then the ruling cited above would apply, and it would be clear that the plaintiff-appellant had no right to redeem the land and that he had no interest which he could mortgage. If, however, at the time of his father's death he was already a monk, the question would arise as to whether a monk can inherit from a layman. This question was raised in *Ma Taik* v. *U Wisenda* (2) and was decided in the affirmative, but it is questionable whether that decision was not *obiter*, because in that case the plaintiff left the priesthood during the trial of the suit and it seems to have been

(1) U. B. R. (1897—1901) II, 54.
(2) II Chan Toon's L. C. 235.

held that that fact removed the legal difficulty.

Of course assuming that the plaintiff-appellant has no title, that fact would not necessarily disentitle him to a decree. If the mortgage were proved and it was shown that the defendants-respondents' predecessors were let into possession by him, the defendants-respondents would be estopped from denying his title. But the question is a broader one than a mere question of title or estoppel. The question is whether a Buddhist monk is capable of entering into a vaild contract such as a mortgage not on behalf of the *Sangha*, but for his personal profit. A further difficulty arises that the mortgage is said to have been effected in 1245 B.E. and consequently the Indian Contract Act is not applicable, and though the *Dhammathats* show that, as the late Mr. Burgess said, "In mordern times the Burman Buddhist monk's vows of poverty sit lightly on him" and provide rules for the distribution of property acquired by a monk by trade or usury, I have been unable to find anything to show that such contracts would have been given effect to by the Burmese Courts prior to the annexation or that they were recognized as valid by Burmese jurists. The existence of such property could not be ignored and consequently rules were framed for its disposal, and it was provided that it was to be inherited by the monk's lay relatives and not by members of the order, "because it is not property given him by others as a religious gift" (*Yazathat*, section 409, U Gaung's Digest, Volume I, a passage which clearly indicates that a monk was debarred by the rules of his order from possessing property other than that given as a religious gift, either to him, another monk, a *Gana* or the *Sangha* and that the jurists recognized this rule as of force in their legal system). The text from the *Kyannet* given in section 152 of U Gaung's Digest, Volume II, shows that in the compiler's opinion the ordinary law was subject to the rules of the order, and that though a layman might have a certain legal right, that right could not be enforced by a monk if it was opposed to the rules of the order.

There can be no question at all but that the idea of a Buddhist monk buying and selling or mortgaging land for his own benefit is totally opposed to the rules by which Buddhist monks profess to be governed. In the beginning they were ascetics who gave up the pleasures of the world in order to gain the peace of a soul that had no desires of any kind, and there can be no doubt but that even at the present day they profess to live on charity. That many of them, owing to the piety of laymen as a matter of fact live in greater comfort than they would have done had they not embraced the religious life, in no way affects the question. They are not supposed to ask for anything and I believe this rule is nearly always kept, but on the other hand they cannot ordinarily refuse to accept a gift because to do so would be to deprive the intending donor of merit in the next world.

When a dispute between two monks is referred at the present day to *Gaing Gyoks* or the *Thathanabaing*, it is decided as far as possible according to the rules contained in the *Vinaya* and it seems to me clear that the personal law of Buddhist monks is to be found there and nowhere else, and that it cannot be said to have been modified to any extent by custom, as custom does not form part of the rules of decision adopted by the Ecclesiastical authorities.

The fact that many monks have so far strayed from the rules originally laid down by the Buddha as to trade and buy and sell land, therefore, is no reason for holding that they are subject to the same law of contract as laymen, and I think it is clear that a monk is debarred by the rules of his order from mortgaging property descended from his ancestors, and indeed from owning such property. No doubt the *Dhammathats* recognize that the flesh is weak and that monks do not always conform to the rules laid down for their guidance, and they, therefore, lay down rules for the succession by lay relatives in such cases, but those rules do not affect the personal law of the monks at all. That their personal law forbids trading and mortgaging land and so on, I think, there can be absolutely no doubt. The late Mr. Burgess in *Ma Pwe* v. *Maung Myat Tha* (1) showed clearly enough that on becoming a monk a Buddhist severs himself from the world and forsakes riches to practise poverty, but I would supplement his remarks by citing the following texts :—

"Whatsoever *Bhikku* shall receive gold or silver or get some one to receive it for him or allow it to be kept in deposit for

him—that is a *Pakittiya* offence involving forfeiture".

"Whatsoever *Bhikku* shall engage in any one of the various transactions in which silver is used—that is a *Pakittiya* offence involving forfeiture".

"Whatsoever *Bhikku* shall engage in any one of the various kinds of buying and selling—that is a *Pakittiya* offence involving forfeiture" (*Patimokkha Nissagiya Pakittiya Dhamma*, sections 18, 19 and 20).

Thus a trading transaction was not only an offence requiring expiation, it was void, and the *Bhikku* was deprived of any profit he might have made. The translators of the *Vinaya*, Messrs. Rhys Davids and Oldenberg, describe the method of procedure on a breach of these rules. The guilty *Bhikku* had to give up the gold or silver to the *Sangha*, and a lay servant of the *Bhikkus* would either buy ghee or oil with it for the *Sangha* or would throw it away.

When dying the Buddha said that after his death the *Sangha* might, if it so wished, revoke all the lesser and minor precepts, and a certain number of *Bhikkus* wished that certain of the more irksome precepts might be done away with or altered, but a difficulty arose as to what were lesser or minor precepts, and so it was decided at the Council of *Ragagaha* that none of the precepts should be abolished or altered:

"Then the venerable *Maha Kassapa* laid a resolution before the *Sangha*, Let the venerable *Sangha* hear me. There are certain of our precepts which relate to matters in which the laity are concerned. Now the laity know of us that such and such things are proper for you *Samanas* who are *Sakya-puttiyas* and such and such things are not. If we were to revoke the lesser and minor precepts. it will be said to us 'a set of precepts was laid down for his disciples by the *Samana Gautama* to endure until the smoke should rise from his funeral pyre. So long as their teacher remained with these men, so long did they train themselves in the precepts. Since their teacher has passed away from them, no longer do they now train themselves in the precepts.'"

"If the time seems meet to the *Sangha* not ordaining what has not been ordained and not revoking what has been ordained, let it take upon itself and ever direct itself in the precepts according as they have been laid down. This is the resolution—whosoever of the venerable ones approves thereof let him keep silence. Whosoever approves not thereof let him speak. The *Sangha* has taken upon itself the precepts according as they were laid down. Therefore, does it keep silence. Thus do I understand". (*Kullavagga* Bk. XI., i., 9).

Then again at the Council of Vesali to which was submitted the question whether on ten points the rules laid down for the monkhood should be relaxed, it was decided that they should not. One of these was the rule against accepting gold and silver and another was as to whether a precedent could be taken as an excuse for not conforming to the rules. It was decided before 700 *Bhikkus* that the rule as to gold and silver should not be relaxed and that a precedent was no excuse for doing what was forbidden. (*Kullavagga*, XII, 2, 8.)

I am, of course, well aware that many monks in modern times disregard part of the 18th *Nissaggiya Pakittiya*, and though they do not actually handle gold and silver themselves, accept money through a '*Koppiya*' who keeps it for them, but as a precedent is to be no excuse and as such conduct does not appear to have been sanctioned by the *Sangha* as a whole, it must be held that monks who act thus break the rules of their order and are liable to have the money confiscated to the *Sangha*.

As showing to what length some monks are willing to go in disregard of their vows, I would mention that at the hearing of this appeal it was stated that some years ago, a Buddhist monk brought a suit in the District Court of Mandalay for restitution of conjugal rights, though sexual intercourse is the first of the four cardinal sins which a monk can commit. It is to be presumed that that monk was refused relief, and it must, I think, be held in the present case that the plaintiff-appellant is entitled to no relief. If the Contract Act had been in force at the time, the alleged mortgage would have been void so far as plaintiff-appellant is concerned under section 23 as defeating the plaintiff's personal law, and although the Contra Act cannot be applied, as the question f decision is one regarding religious usag the Buddhist Law must form the rul

decision, and I think it must be held that so far as the plaintiff-appellant is concerned the alleged mortgage was void, just as it would certainly be held that a Buddhist monk could not contract a valid marriage or sue for restitution of conjugal rights so long as he remained in the priesthood.

Further, assuming that the mortgage was valid because Ma Po was one of the mortgagors and that the plaintiff-appellant was entitled to inherit from his father because he became a monk before the latter's death—a point which I am not prepared to admit—he must still be debarred from suing for redemption as one having an interest in the mortgaged property, because a monetary transaction, such as a redemption, is forbidden by his personal law.

No doubt this decision may have very wide consequences, but a Buddhist monk, who has taken vows of poverty and who professes to have abandoned the pleasures of the world, bringing a suit for his own personal profit is not an edifying spectacle, and I do not think such monks have any cause for complaint if their vows are regarded by the Courts in a more serious light than they regard them themselves. I cannot conclude this judgment better than by quoting the late Mr. Burgess:

"But there can be no doubt that such relaxation of ancient austerity has to be confined within reasonable limits, and that it does not extend to the renunciation of the world involved in the formal adoption of the religious life. The service of God and Mammon cannot be combined. To retain the sensual enjoyments of the secular and at the same time to pretend to the sanctity of the sacred life would be to turn the whole thing into a sham and farce, and would be unquestionably offensive to popular sentiment."

I accordingly hold that the plaintiff-appellant cannot succeed in his suit and dismiss the appeal with all costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

RULE No. 685 OF 1914.

April 19, 1915.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Mullick.

LAKENATULLA AND OTHERS—JUDGMENT-DEBTORS—PETITIONERS

versus

ASMATULLA SARKAR—DECREE-HOLDER—OPPOSITE PARTY.

Execution sale—Occupancy holding not saleable—Sale held before application of objection heard—Irregularity—Proper procedure.

Where in an execution proceeding for the sale of an attached holding, the Munsif allowed the application of objection to the sale to stand over and in the meantime held the sale without making inquiries into the objection raised by the judgment-debtor:

Held, that the proceedings of the Munsif were wholly irregular. [p. 617, col. 1.]

that the proper procedure in such a case for the judgment-debtor was to appeal against the order refusing to postpone the sale or directing the sale to take place. [p. 617, col. 1.]

Rule against the order of the Court of the District Judge of Rungpur.

Babu *Hari Bhusan Mukherjee*, for the Petitioner.

JUDGMENT.—The petitioner before us was the judgment-debtor in an execution case, in the Court of the Munsif, in which the decree-holder had attached a holding for sale. He objected to the sale on the ground that the holding was an occupancy holding and, as such, was not saleable. This objection was raised by him on the 3rd November, the sale having been fixed for the 6th. The Munsif held that the application had been filed too late and that the sale, therefore, should not be postponed. At the same time, he directed the application to be put up on the 26th of November for hearing. The holding was sold on the 6th of November, and, on the 26th the application of the petitioner having been put up before the Munsif, he took evidence in the matter and came to the conclusion that the holding was not saleable, and accordingly set aside the sale. On appeal by the decree-holder, the learned District Judge set aside the order of the Munsif dated the 26th November, on the ground that the Munsif could not go into the qustion whether the holding was liable to sale or not, after the sale had already

been held. The petitioner thereupon obtained this Rule from this Court calling upon the opposite party to show cause why the order of the District Judge should not be set aside.

We are of opinion that the proceedings of the Munsif in allowing the application to stand over till the 26th November and at the same time holding the sale on the 6th November were wholly irregular. He ought not to have held the sale without making inquiries into the objection raised by the judgment-debtor on the ground that the property was not saleable. The proper procedure ought to have been for the judgment-debtor to appeal against the order refusing to postpone the sale or directing the sale to take place, notwithstanding the pendency of the application in which the question of the saleability of the holding was raised. But before the period for appeal against the order expired, the Munsif took up the application on the 26th November and set aside the sale. So, although the proceedings of the Munsif were irregular, the order ultimately passed by him appears to be right. Under the circumstances, we think that the order of the District Judge should be set aside and that of the Court of first instance dated the 26th November restored.

Order set aside.

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

May 5, 1915.

Present:—Lord Dunedin, Lord Atkinson, Sir George Farwell, and Sir John Edge.

PUTTU LAL AND OTHERS—PLAINTIFFS —APPELLANTS

versus

Musammat PARBATI KUNWAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

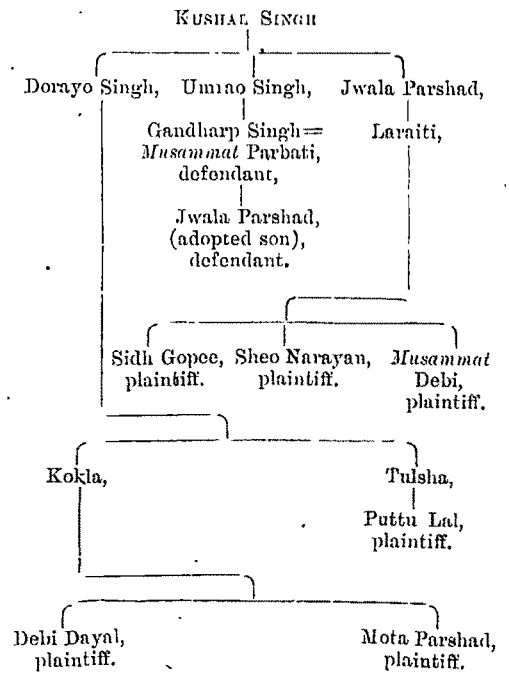
Hindu Law—Adoption—Widow, whether can validly adopt her brother's son to her deceased husband—Authority given by husband—Duty of lower Court to follow decision of High Court—Practice.

A widow who has the express authority of her deceased husband to adopt as a son to him her brother's son, can validly do so. [p. 621, col. 1.]

A subordinate Court is bound to follow the decision in law of a Bench of the High Court to which it is subordinate, unless the decision of the Bench has been overruled by a decision of a Full Bench of that Court or unless it has been overruled expressly or impliedly on an appeal to His Majesty in Council or unless the law has been altered by a subsequent Act of the Legislature. [p. 619, col. 2, p. 620, col. 1.]

Appeal from a judgment and decree of the High Court, Allahabad, dated December 15th, 1909, reversing a judgment and decree of the Subordinate Judge, Mainpuri, dated May 18th, 1908.

FACTS. The following pedigree will show the relationship of the parties in the suit:



Gandharp Singh was a Kulin Brahman He owned considerable *zemindari* and having no issue of his own wished to adopt to perpetuate his name. With the end in view he took upon himself that education of the boy Jwala Parshad, Parbati's brother's son, and performed the *kanchedan* (ear-boring) ceremony. While on his death-bed he directed his wife, Parbati, to adopt Jwala Parshad. Soon after his death in January 1899, Parbati applied for mutation of names on the authority given to her. In April 1899 she adopted Jwala Parshad with the necessary rites and ceremonies. In June 1902 she performed the *upanayana* (ceremony of investiture with the sacred thread) of Jwala Parshad and celebrated his marriage. In June 1907, the plaintiffs-appellants brought

the present suit in the Court of the Subordinate Judge of Mainpuri, who, in a very elaborate judgment, dissenting from the decision of the High Court in *Jai Singh Pal Singh* v. *Bijai Pal Singh* (1), decreed the claim. On appeal to the High Court the judgment of the lower Court was reversed and the decree set aside. The plaintiffs-appellants then obtained leave to appeal to His Majesty in Council.

Mr. *Lowndes*, for the Appellants, contended that Dattaka Mimansa, section II, 26, 33 and 34, laid down that a widow could not adopt her brother's son inasmuch as she could not be married to her own brother. The relationship must be of the nature that the adopter could marry the mother or father of the adoptee. The authority of Dattaka Mimansa was fully recognized by the Privy Council in two decisions of *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma and Radha Mohan* v. *Hardai Bibi* (2) and *Bhagwan Singh* v. *Bhagwan Singh* (3). Sir Thomas Strange's book on Hindu Law (6th edition), page 83, Chapter IV, paragraph 2 (on adoption), thought that the point under consideration had never arisen. The estate of the husband remained vested in the widow and she could not alienate without valid necessity. In *Musammat Battas Kuar* v. *Lachman Singh* (4) it was held that a woman could not adopt her brother's son and the authority of Nanda Pandita was quoted with approval. Sir F. Macnaughten in Hindu Law, paragraph 67, dealt with the subject at some length and held that a widow could not adopt her brother's son. So did West and Buhler, Volume II, page 1032. Nanda Pandita did not approve of the view that a widow in adopting was acting as agent of her husband. The reason why it was objected to was that the property should remain in the family and adoption by the widow of her brother's son would defeat that end. The decision in *Jai Singh Pal Singh* v. *Bijai Pal Singh* (1) was opposed to the text of Dattaka Mimansa. The only authority in favour of the adoption of the a nephew by a widow was *Bai Naini* v. *Chunilal* (5).

[LORD ATKINSON:—You contend that a widow can adopt her brother's son to the property of her husband.]

Reference was made to *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma* and *Radha Mohan* v. *Hardai Bibi* (2); *Bhagwan Singh* v. *Bhagwan Singh* (3); *Bai Naini* v. *Chunilal* (5); *Musammat Battas Kuar* v. *Lachman Singh* (4); *Sriramulu* v. *Ramayya* (6) and *Jai Singh Pal Singh* v. *Bijai Pal Singh* (1).

Mr. *De Gruyther*, *K. C.*, (with him Mr. *Dube*), for the Respondents, contended that if the widow adopted, the effect was that she was divested of the property in her possession. The Subordinate Judge had wrongly gone beyond the authority as laid down by the High Court. Dattaka Mimansa, paragraph 15, section 5, did not draw any distinction between adoption by man and woman. The whole test was whether the adoptee could become a son as understood in the Hindu Law. There were many kinds of son known to Hindus. The widow was competent to adopt Jwala Parshad as she was directed to adopt him. The authority given to the widow must be strictly followed and could neither be varied nor extended. If she was directed to adopt a boy, she could not adopt any other even though he should be unattainable. The judgment in *Tulshi Ram* v. *Behari Lal* (7) was very learned and laid down that a widow in order to adopt must have the authority of her husband. The Subordinate Judge was wrong in going behind it and challenging the law laid down therein.

Reference was made to Dattaka Mimansa, section 5, paragraphs 16 and 15, section 1, paragraph 27; Jolly's History of Law, pages 162 and 163; *Tulshi Ram* v. *Behari Lal* (7); *Surendro Keshub Roy* v. *Doorga Soondary Dossee* (8); Mayne's Hindu Law, section 114; *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (9) (wherein are authorities on Hindu Law).

Mr. *Lowndes*, in reply.

(1) 27 A. 417 at p. 433; A. W. N. (1905) 20; 2 A. L. J. 36.
(2) 26 I.A. 113; 21 A. 460; 22 M. 398; 3 C.W. N. 427; 9 M. L. J. 67.
(3) 26 I. A. 153; 21 A. 412; 3 C. W. N. 454; ; 1 Bom. L. R. 311.
(4) 7 N. W. P. H. C. R. 117.
(5) 22 B. 973 at p. 975.
(6) 3 M. 15.
(7) 12 A. 328 at p. 343.
(8) 19 I. A. 108 at p. 122; 19 C. 513.
(9) 12 M.I.A. 397; 10 W. R. (P.C.) 17; 1 B. L. R. (P. C.) 1; 2 Suth. P. C. J. 135; 2 Sar. P. C. J. 361; 20 E. R. 389.

PUTTU LAL *v.* PARBATI KUNWAR.

JUDGMENT.

SIR JOHN EDGE.—This is an appeal by the plaintiffs from a decree of the High Court of Judicature at Allahabad, dated the 15 December 1909, which reversed a decree of the Subordiate Judge of Mainpuri, and dismissed the suit with costs.

The plaintiffs brought their suit in the Court of the Subordinate Judge of Mainpuri on the 15th June 1907 to have it declared that Jwala Parshad, who is a defendant and one of the respondents, was not the adopted son of one Tiwari Gandharp Singh, deceased, who had been the husband of *Musammat* Parbati Kunwar, who is the other defendant and respondent. The adoption which is impugned was made by *Musammat* Parbati Kunwar in March 1899 to her deceased husband, Tiwari Gandharp Singh. who had died on the 9th November 1898 without issue surviving him, and had been a Brahman. Jwala Parshad was the son of a brother of *Musammat* Parbati Kunwar. The plaintiffs, who claimed as reversioners, denied that Jwala Parshad had been in fact adopted, and alleged that Tiwari Gandharp Singh had not given to *Musammat* Parbati Kunwar authority to adopt Jwala Parshad to him, and further alleged that Jwala Parshad, being a son of a brother of *Musammat* Parbati Kunwar, was in law ineligible for adoption by her as a son to her deceased husband.

The Subordinate Judge framed six issues; two only of the issues are now of importance. It was concurrently found by the Courts below that the adoption was in fact made. The two issues which have to be decided in this appeal are as framed by the Subordinate Judge:—

"(4) Did Gandharp Singh give permission to his wife to adopt Jwala Parshad?"

"(6) Is the adoption invalid, inasmuch as the boy is the son of the adoptive mother's brother?"

The authority to adopt Jwala Parshad was alleged to have been given to *Musammat* Parbati Kunwar by an oral Will of her husband, Tiwari Gandharp Singh, a few days before his death. The Subordinate Judge held that the evidence that the authority to adopt Jwala Parshad had been given was untrustworthy, and found that no authority to adopt Jwala Parshad was proved to have been given.

The High Court on appeal saw no reason whatever for doubting the trustworthiness of the evidence of the witnesses who had deposed to the fact that Tiwari Gandharp Singh had given permission to his wife to adopt Jwala Parshad as a son to him, and after a careful consideration of the evidence and the surrounding circumstances found as a fact that the permission to adopt Jwala Parshad had been given. In their Lordships' opinion the learned Judges of the High Court could have come to no other conclusion unless they had perversely disregarded the evidence and all the probabilities of the case. The direct evidence that the authority to adopt Jwala Parshad had been given by Tiwari Gandharp Singh to his wife was clear, and in their Lordships' opinion was unassailable, and other facts showed that it was probable that such an authority would be given. Tiwari Gandharp Singh was a man well advanced in years; he had been thrice married; he had no surviving issue; there was no *sagotra sapinda* in his family; he was the last male of the male line; he was a man of some considerable estate and position; and he had taken Jwala Parshad, when a child of four or five years of age, to live in his house with the object of adopting him as his son, should Jwala Parshad prove himself to be a boy worthy of adoption as his son. Their Lordships agree with the finding of the High Court that the authority to adopt Jwala Parshad had been given. That authority was not a general authority to *Musammat* Parbati Kunwar to adopt a son to Tiwari Gandharp Singh, it was a specific authority to her to adopt Jwala Parshad as the son to her husband.

Their remains to be considered the question of law raised by the sixth issue which had been framed by the Subordinate Judge. The Court of the Subordinate Judge of Mainpuri is a Court which is subordinate to the High Court at Allahabad, and the Subordinate Judge of Mainpuri is bound to follow the decision in law of a Bench of the High Court to which he is subordinate, unless the decision of the Bench has been overruled by a decision of a Full Bench of that Court or unless it has been overruled expressly or impliedly on an appeal to His Majesty in Council, or unless the law has

been altered by a subsequent Act of the Legislature. As the Subordinate Judge was well aware, it had been decided five years before this suit was instituted by a Bench of the High Court at Allahabad, composed of Sir John Stanley, the then Chief Justice, and Mr. Justice Banerji, in *Jai Singh Pal Singh* v *Bijai Pal Singh* (1), that an adoption by a Hindu widow, in virtue of an authority to adopt given to her by her deceased husband, of her brother's grandson or son is not, according to Hindu Law, an invalid adoption, as the adoption by the widow is not an adoption to herself but is an adoption to her deceased husband, and that the test of eligibility of the adopted son for adoption in such case must be the test which would have applied had the adoption been made by the husband himself in his life-time.

The Subordinate Judge of Mainpuri, Chhajju Mal, professing disapproval of that decision of the High Court, which he was bound to follow, entered upon a consideration of Sanskrit texts bearing more or less upon the subject, and decid·d that as *Musammat* Parbati Kunwar could not have married her brother, the father of Jwala Parshad, the adoption of Jwala Parshad was invalid. It is difficult to follow the arguments of the Subordinate Judge, but he does not appear to have kept clearly before his mind that the question in this case was whether a Hindu widow, acting on her husband's authority, could validly adopt as a son to him the son of her brother, and was not the question as to whether a Hindu female could validly adopt to herself a son of her brother. On appeal, Sir John Stanley, C.J., and Banerji, J., applied the decision in *Jai Singh Pal Singh* v. *Bijai Pal Singh* (1), which had not been overruled, and accordingly decided that the adoption of Jwala Parshad was a valid adoption, and by their decree dismissed the suit with costs. From that decree of the High Court this appeal has been brought.

The foundation of the decision of the Subordinate Judge on this question of Hindu Law is the commentary of Nanda Pandita, which is known as the "Dattaka Mimansa." The "Dattaka Mimansa" is undoubtedly a high authority on the law of Hindu adoption and is treated with respect. The authority of the "Dattaka Mimansa" was considered by this Board in *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma and Radha Mohan* v. *Hardai Bibi* (2) and *Bhagwan Singh* v. *Bhagwan Singh* (3), and the view of this Board was that the "Dattaka Mimansa" is a work which has had a high place in the estimation of Hindu Lawyers in all parts of India and has become embedded in Hindu Law, but that caution is required in accepting the glosses of Nanda Pandita in the "Dattaka Mimansa" where they deviate from or add to the *Smritis*. It was pointed out by Banerji, J., in *Jai Singh Pal Singh* v. *Bijai Pal Singh* (1) on this question, as to whether a widow can lawfully adopt to her deceased husband a son of her own brother, that Nanda Pandita in the "Dattaka Mimansa" extended to adoption by females the rule of Hindu Law that no one can be adopted as a son whose mother the adopter could not have legally married, an extension by Nanda Pandita which is not based upon the authority of any of the *Smritis* or Institutes of Sages.

As Banerji, J., further pointed out in the same case, the extension of the rule by Nanda Pandita is not supported by any text of the "Dattaka Chandrika," or by any of the texts of the Sages Sannaka and Sakala from which most of the rules of the "Dattaka Mimansa" were deduced. It has not been shown to their Lordships that the extension by Nanda Pandita to which they are referring has been accepted as the law in India, at least so far as adoptions by widows to their deceased husbands are concerned. It is true that in the case of *Musammat Battas Kuar* v. *Lachman Singh* (4) Pearson and Spankie, JJ., said: —

"No sufficient reason is shown why the doctrine of Nanda Pandita, that a woman may not affiliate a brother's son, should not be accepted as correct; and why it should not apply to the case of a woman adopting a son with the sanction and on behalf of her husband. Indeed, it does not appear that the Hindu Law contemplates or provides for the adoption by a widow of a son in her own right."

It was not necessary for these learned Judges to express any opinion on the subject, nor is it clear how the case came on appeal to the High Court, as the two Courts below had concurrently found that it was not proved that the husband had given his wife authority to adopt a son.

It is quite clear that Tiwari Gandharp Singh could, in his life-time, have legally adopted Jwala Parshad, the son of his wife's brother, and had he done so the adoption would have been a valid adoption, and their Lordships fail to see any reason why Jwala Parshad, who was legally eligible for adoption by Gandharp Singh, should have become ineligible by reason of the death of Gandharp Singh. It must be remembered that the adoption was not by the widow in her own right and to herself; the adoption was to her deceased husband and under the authority which he had given to her. In *Sriramulu* v. *Ramayya* (6), the adoption of a son of a wife's brother was held to be a valid adoption, and it was rightly pointed out that the rule of Hindu Law, that a legal marriage must have been possible between the adopter and the mother of the adopted boy, refers to their relationship prior to marriage. In *Bai Naini* v. *Chunilal* (5), it was held that the adoption by a Hindu widow of her brother's son was valid. Their Lordships have not thought it necessary to discuss the texts and authorities which have been referred to, and are relevant to this question, as they have been fully and exhaustively considered by Sir John Stanley, C. J., and Banerji, J., in their judgments in *Jai Singh Pal Singh* v. *Bijai Pal Singh* (1).

This appeal fails, and their Lordships will humbly advise His Majesty that it should be dismissed. The appellants must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the Appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondents: Messrs. *Barrow, Rogers and Nevill.*

CALCUTTA HIGH COURT.

CIVIL REFERENCE No. 1 OF 1915.

March 22, 1915.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Richardson.

SHAIK GALIM AND ANOTHER—PLAINTIFFS

versus

SADARIJAN BIBI AND ANOTHER—DEFENDANTS.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, cls. 15, 16—Suit for recovery of balance of mortgage-money, whether maintainable in Small Cause Court—Damages for breach of contract.

A suit by a mortgagor, for the recovery of the balance of the mortgage-money not paid to him, being a suit for the specific performance of so much of an agreement as has not already been performed, does not lie. [p. 622, col. 2.]

Such a suit or a suit for the rectification of the instrument is not cognizable by a Court of Small Causes. [p. 622, col. 2.]

It is, however, open in such circumstances to the plaintiff to sue in the Small Cause Court for damages for breach of contract provided the damages are within the pecuniary jurisdiction of the Court. [p. 622, col. 2.]

Reference under rule 1, Order XLVI of the Code of Civil Procedure, by the Munsif, Iswarganj, Mymensingh, exercising the powers of a Small Cause Court Judge, dated the 4th December 1914.

ORDER.—This is a reference by the Munsif of Iswarganj in a suit instituted before him as a Small Cause Court suit.

The plaintiffs allege that out of Rs. 150, the nominal consideration for a mortgage by conditional sale in favour of the defendants, the plaintiffs received only Rs. 104. The suit was brought to recover the balance together with interest and Rs. 11 as compensation. When the case came on for hearing, one of the defendants admitted that the plaintiffs had not received the full amount of the consideration but only Rs. 104.

The questions referred by the Munsif are :—

(1) Whether a mortgagor can sue for the recovery of the balance of the mortgage-money not paid to him.

(2) If so, whether such a suit is cognizable by a Court of Small Causes.

In regard to the *first* question it, is clear that the claim to which it refers can only be regarded as a claim for the specific performance of so much of an agreement to lend money as has not already been performed. Authority shows that such a claim is not maintainable.

In *Rogers* v. *Challis* (1) the defendant agreed to borrow the sum of £1,000 from the plaintiff on certain security. The defendant afterwards obtained better terms from a third person and refused to perform his agreement with the plaintiff. The plaintiff asked for specific performance which was refused. The Master of the Rolls (Sir John Romilly) said:

"It certainly is new to me, that this Court has ever entertained jurisdiction in a case where the only personal obligation created is that one person says, if you

(1) (1859) 27 Beav. 175; 29 L. J. Ch. 240; 6 Jur. (N. S.) 334; 54 E. R. 68; 7 W. R. 710; 122 R. R. 361.

will lend me the money I will re-pay it and give you good security, and the terms are settled between them. The Court has said that the reason for compelling a specific performance of a contract is because the remedy at law is inadequate or defective. But by what possibility can it be said that the remedy here is inadequate or defective? It is a simple money demand; the plaintiff says, I have sustained pecuniary loss by my money remaining idle, and by my not getting so good an investment for it as you contracted to give me. This is a mere matter of calculation and a Jury would easily assess the amount of the damage which the plaintiff has sustained. I express no opinion whether an action (that is, an action for damages) would or would not lie....."

In that case an attempt was made to compel a man to borrow money. In *Sichel* v. *Mosenthal* (2) an attempt, conversely, to compel a man to lend money was equally unsuccessful. The same learned Judge said:—

"It would be quite new to me to hear that this Court could specifically enforce a contract to lend money, and as to compelling a person to borrow money according to his agreement, that was the point which I decided in *Rogers* v. *Challis* (1)." He went on to suggest that the proper remedy was an action for damages.

These cases were cited and approved by the Privy Council in *Larios* v. *Gurety* (3), where the agreement which it was sought to enforce took the form of a conditional sale.

Their Lordships said:

"The parties throughout the negotiation which led up to the contract were stipulating for advances of money on one side, and security for those advances on the other; the pleadings state and admit an agreement of that nature; and it seems impossible to treat the cause of action in this case as anything more than the breach of a contract to honour the drafts of the respondent to the extent of the amount agreed to be advanced, and placed to his credit. And, upon a full consideration of the arguments and authorities, their Lordships are constraine to admit that the Court of Chancery would not have entertained a suit for the specific performance of such an agreement, but would have left the party aggrieved by the breach of it to seek his remedy, where he would find an adequate remedy, in a Court of Law."

The case of the *South African Territories* v. *Wallington* (4) in the House of Lords is to the same effect.

Upon the principle so exemplified it is clear that the present suit, regarded as a suit for specific performance of the contract between the parties, does not lie. Nor would such a suit or a suit for the rectification of the instrument be cognizable by a Court of Small Causes (Provincial Small Cause Courts Act, 1887, Schedule II, clauses 15 and 16). Both the questions referred must, therefore, be answered in the negative.

On the other hand, it is open to the plaintiff to sue in the Small Cause Court for damages for the breach of contract, provided the damages claimed are within the pecuniary jurisdiction of the Court.

If the plaintiff is prepared to confine himself to a claim for damages within the jurisdiction of the Court to award, he may be given an opportunity to make the necessary amendments in his plaint and the suit may then be proceeded with. Otherwise the plaint should be returned to him.

Reference answered.

(2) (1862) 30 Beav. 371; 31 L. J. Ch. 386; 8 Jur. (N. S.) 275; 5 L. T. 784; 10 W. R. 283; 54 E. R. 932; 132 R. R. 312.

(3) (1873) 5 P. C. 346; 61 L. J. Ch. 244.

(4) (1898) A. C. 309; 67 L. J. Q. B. 470; 78 L. T. 426; 46 W. R. 545; 14 T. L. R. 298.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 581 OF 1914.

June 1, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

Lala BISHESHAR DAS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Lala AMBIKA PERSHAD—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 73, O. XXI, rr. 52, 63, O. XXXVIII, rr. 5, 10—Attachment before judgment, effect of—Decree-holder, if obtains priority—Other creditors, right of—Declaratory suit, whether maintainable.

BISHESHAR DAS *v.* AMBIKA PERSHAD.

An attachment before judgment confers no right on the party who obtains the order of attachment. [p. 623, col. 2.]

Certain property of a perishable nature was attached before judgment by the defendant and the property was sold and the proceeds deposited in Court. The plaintiffs also obtained a decree against the same party and applied for execution by attachment of the money in Court and obtained an order of payment. On the defendant taking objection, the order was cancelled. The plaintiffs then sued for a declaration that they were entitled to the amount of their decree out of the proceeds deposited in Court:

Held, (1) that the priority of attachment gave no priority of title to the defendants who could not, therefore, object to the money being paid to the plaintiffs; [p. 624, col. 2.]

(2) that the plaintiffs were entitled to maintain the suit. [p. 624, col. 1; p. 625, col. 1.]

Second appeal from a decision of the Subordinate Judge of Allahabad, dated the 21st February 1914.

Mr. *Ladli Prasad Zutshi*, for the Appellants.

Mr. *Haribans Sahai* and Dr. *S. N. Sen*, for the Respondent.

JUDGMENT.

RICHARDS, C. J.—This appeal arises out of a suit in which the plaintiffs sought a declaration that they were entitled to Rs. 627-9-6 out of a sum which had been deposited in Court. The facts are as follows. Ambika Pershad brought a suit against Mahbub and others. Before judgment he attached property which belonged to Mahbub, under the provisions of Order XXXVIII of the Code of Civil Procedure. The property being of a perishable nature, it was sold and the proceeds were lodged in Court on the 29th of March 1911. It is out of this sum that the plaintiffs seek to be paid the amount of a decree. The plaintiffs obtained their decree on the 12th of September 1911. They made an application for execution by "attachment" of the money in Court on the 10th of January 1912. The Court made an order on the 21st of February 1912, in which it is stated that the property having been attached the money should be paid to the decree-holders upon application. An application for payment was made on the 23rd of February 1912. On the 26th of February 1912, Ambika made an objection to the money being paid to the decree-holders on the ground that he had attached it before judgment. The Court on this objection refused to allow the money to be paid out to the decree-holders, who are the plaintiffs in the present case. Ambika got his decree on the 10th of April 1912. It seems to me that we have to consider, what were the rights of the decree-holders on the 23rd of February 1912, that is to say, were they entitled by law to have their decree satisfied out of the money deposited in Court? If they were, they are entitled to a decree in the present suit provided that their remedy lay by suit. Order XXXVIII, rule 5, provides for attachment before judgment. Property can only be attached before judgment upon the Court being satisfied that the defendant, with intent to obstruct or delay the execution of any decree that may be given against him, is about to dispose of the whole or any part of his property, or that he is about to remove the whole or part of his property from the local limits of the jurisdiction of the Court. It seems to me absolutely clear that as it is only to prevent one or other or both of these things that attachment before judgment is allowed, such attachment confers no right in the property on the plaintiff who obtains the order. Everything remains as before the attachment, save that it has been taken out of the power of the defendant to dispose of the property attached or remove it out of the jurisdiction. If there was the least doubt about the matter, it is set at rest by the provisions of Order XXXVIII, rule 10, which is as follows:—"Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree." Supposing, therefore, that the property had not been of a perishable nature but had been simply attached before judgment, the plaintiffs would have been entitled to have attached the property, had it sold and obtained payment under their decree. Ambika would have had no right of any sort to object to the decree of the plaintiffs being discharged. Some attempt has been made to contend that the fact that the property has been turned into money altered the circumstances. I think that this is a most

unreasonable contention. In my opinion the money, which represented the property which had been attached before judgment, is to be treated in exactly the same way as the property would have been, with this difference only that of course there is no sale. Under these circumstances it seems to me that the plaintiffs were clearly entitled on the 32rd of February 1912 to have had their decree satisfied out of the money deposited in Court.

It is *next* argued that the dispute between the plaintiffs and Ambika had to be decided by the Court in which the money was deposited and that no suit lay. Order XXI, rule 52, provides that "where property which has been attached is in the custody of the Court, any question of title or priority arising between the decree-holder and any other person not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such Court." Order XXXVIII, rule 8, provides that "where any claim is preferred to property attached before judgment, such claim shall be investigated in the manner hereinbefore provided for the investigation of claims to property attached in execution of a decree for the payment of money." Order XXI, rule 63, provides "where a claim or an objection is preferred the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive." It seems to me that the effect of Order XXXVIII, rule 8, is to incorporate the provisions of Order XXI, and amongst them the provisions of rule 63. The Court accordingly having investigated the claim of the decree-holders, the plaintiffs in the present suit, and made an order against them, the effect of which was that they were not allowed to receive payment of their decree, they are entitled to institute a suit. I hold, therefore, that the present suit is maintainable. I would allow the appeal and decree the plaintiffs' claim.

BANERJI, J.—I have arrived at the same conclusion. The *first* question to be determined is, whether the Court below was justified in ordering a rateable distribution. It is clear from the provisions of the Code of Civil Procedure that priority of attachment gives no priority of title. Order XXXVIII, rule 10, clearly provides that where property has been attached before judgment, that circumstance does not preclude any other judgment-creditor of the judgment-debtor from attaching the same property and proceeding to the sale of it. It is obvious from the provisions of that rule that notwithstanding an attachment before judgment, any other creditor, who has obtained a decree, may proceed to execution and cause the property attached to be sold. The effect of the attachment before judgment is only to prevent the debtor from dealing with the property, but the property still continues to be his. Therefore, the plaintiffs in the present case were entitled to attach the money which was in Court, being the proceeds of the sale of the property attached before judgment. As the Court made an order on the 23rd of February 1912, directing the money attached to be paid over to the plaintiffs, the plaintiffs were entitled to receive that money and the Court or the defendant Ambika Prasad could not deprive them of their right to get the money. Had Ambika Prasad already obtained a decree on the date on which the money was ordered to be paid to the plaintiffs and had he applied for execution, different equities might arise. It may be that when several decree-holders have caused the same property to be attached, but to whose case section 73 of the Code of Civil Procedure does not strictly apply, they would be entitled to a rateable distribution on general principles of justice, equity and good conscience But that is not the case here. It is not necessary, therefore, to express any opinion on the point. In the present case, as I have said above, Ambika Prasad had not obtained his decree when the Court ordered the money in deposit, attached by the plaintiffs, to be paid over to them. Had the property not been of a perishable nature, and had it not been already sold, the plaintiffs would have been entitled to get it sold, and after the sale to have their decree satisfied out of the proceeds of the sale, and there is nothing in the Code to prevent their doing so merely because Ambika Prasad had caused the same property to be attached before judgment. He

had not obtained a decree and had not applied for execution. Section 73 of the Code of Civil Procedure would not apply to a case of this kind, because this was not a case in which several decree-holders had before the realisation of assets applied for execution of their decrees.

There remains the other question as to whether such a suit is maintainable. As has been pointed out by the learned Chief Justice rule 52 and the subsequent rules in Order XXI are, by reason of the provisions of Order XXXVIII, rule 8, applicable to cases of attachment before judgment. Under rule 52 of Order XXI the Court which holds the property is the Court which must decide all claims made in respect of it, whether arising from assignment or attachment or otherwise. The mode of investigation is provided for by rule 58 and the subsequent rules, but in all cases when an order is made, the defeated party is entitled to bring a suit to establish his right under rule 63. The language of that rule differs from that of section 283 of the old Code of Civil Procedure. Under that section a party was allowed to bring a suit when an order had been passed against him under sections 280, 281 and 282. There is no such limitation in Order LXIII and this alteration appears to have been deliberately made by the Legislature to include all cases of orders of this kind passed under Order XXI, including orders under rule 52. I find that under the old Code of Civil Procedure, it was held that where an order was made under section 272, which corresponds to the present rule 52, a suit would lie to set aside the order [*Tikum Singh* v. *Sheo Ram Singh* (1).] The present suit was, in my opinion, clearly maintainable. I also would allow the appeal.

BY THE COURT.—The order of the Court is that the appeal be allowed, the decree of the Court below set aside and the decree of the Court of first instance restored with costs in all Courts, including in this Court fees on the higher scale.

Appeal allowed.

(1) 19 C. 286.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 1161 OF 1914.

April 28, 1915.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Richardson.

LEDU, COACHMAN—PLAINTIFF—PETITIONER

versus

HIRA LAL BOSE—DEFENDANT—OPPOSITE PARTY.

Contract Act (*IX of* 1872), *ss.* 23, 65—*Contract to appoint any one to public office—Suit for recovery of money paid thereunder, whether maintainable—Contract void* ab initio.

Contracts which have for their object the influencing of appointments to public offices and the restricting of the discretion vested in public officers in the selection of persons are illegal and void. [p. 626, col. 1.]

A Court will not assist a party who has entered into a contract tainted by moral turpitude. [p. 628, col. 1.]

Where a contract is illegal because contrary to positive law or against public policy, an action cannot be maintained to enforce it directly or to recover the value of services rendered under it or money paid on it. [p. 627, col. 2.]

Section 65 of the Contract Act relates to the obligation of a person who has received an advantage under an agreement which is discovered to be void or under a contract which becomes void but not where the agreement is void *ab initio*. [p. 628, col. 1.]

Rule against the decision of the Small Cause Court Judge, Barisal, dated the 25th July, 1914.

Moulvi *A. K. Fazlul Huq*, for the Petitioner.

Babus *Mohendra Nath Ray*, *Manmatha Nath Ray* and *Sures Chandra Bose*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to set aside a decree of dismissal in a suit for recovery of money on the basis of a contract. The defendant is the Nazir of the Court of the District Judge of Barisal. The case for the plaintiff is that there was a contract between him and the defendant that if the latter provided his son with the post of a permanent peon within two years, the plaintiff would give the defendant Rs. 150, and that if the defendant failed to secure the appointment, he would return the money paid by the plaintiff. The plaintiff asserts that, in accordance with the terms of the contract, he has from time to time paid the defendant several sums aggregating Rs. 100, and that the defendant has failed to provide his son with the appointment, though the two years have elapsed. The plaintiff consequently sues to recover the money. The defendant denied the truth of the allegations of the plaintiff, and also pleaded

that the suit was not maintainable as it was based on an illegal and void contract. The Court below has not investigated the facts, but has dismissed the suit as not maintainable on the face of the allegations contained in the plaint. The question for determination is, whether the agreement was void as its object was opposed to public policy within the meaning of section 23 of the Indian Contract Act.

It is well settled that contracts which have for their object the influencing of appointments to public offices and the restricting of the discretion vested in public officers in the selection of persons to be appointed, are illegal and void. The principle is that an officer, who has the power of appointment, should make the best appointment possible, and it is contrary to public policy that such officer be deprived of this discretionary power by a contract previously made or an obligation previously assumed; in other words, public policy forbids that a public office be made the subject of contracts; for the contrary view would inevitably tend to official corruption. Illustrations of this doctrine will be found in cases of high authority: *Blachford* v. *Preston* (1); *Hartwell* v. *Hartwell* (2); *Thomson* v. *Thomson* (3); *Card* v. *Hope* (4); *Hopkins* v. *Preskott* (5); *Reg.* v. *Charrette* (6); *Parsons* v. *Thompson* (7); *Richardson* v. *Mellish* (8); *Gardner* v. *Grant* (9), which all affirm the rule that the sale of a recommendation, nomination or influence in procuring a public office is illegal and void. The question has frequently come up for judicial consideration in the Courts of the United States, which have emphatically condemned contracts of this nature. Mr. Justice Field, in delivering the unanimous opinion of the Supreme Court of the United States in *Providence Tool Company* v. *Norris* (10), observed as follows: "These offices are trusts, held solely for the public good, and should be conferred from considerations of the ability, integrity, fidelity and fitness for the position of the appointee. No other considerations can properly be regarded by the appointing power. Whatever introduces other elements to control this power, must necessarily lower the character of the appointments, to the great detriment of the public. Agreements for compensation for procuring these appointments tend directly and necessarily to introduce such elements. The law, therefore, from this tendency alone adjudges these agreements inconsistent with sound morals and public policy: *Gray* v. *Hooke* (11). Other agreements of an analogous character might be mentioned, which the Courts, for the same or similar reasons, refuse to uphold. It is unnecessary to state them particularly, it is sufficient to observe generally, that all agreements for pecuniary considerations to control the business operations of the Government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, *without reference to the question whether improper means are contemplated or used in their execution.* The law looks to the general tendency of such agreements: and it closes the door to temptation by refusing them recognition in any of the Courts of the country." Equally explicit is the condemnation of such contracts by Mr. Justice Swayne in *Meguire* v. *Corwine* (12): "Frauds of the class to which the one here disclosed belongs are an unmixed evil. Whether forbidden by a Statute or condemned by public policy, the result is the same. No legal right can spring from such a source. They are the sappers and miners of the public welfare and of free government as well. The latter depends for its vitality upon the virtue and good faith of those for whom it exists and of those by whom it is administered; corruption is always the forerunner of despotism." To the same effect are the decisions in *Marshall* v. *Baltimore and Ohio Railroad Company* (13); *Hall* v. *Coppell* (14) and *Trist*

(1) (1799) 8 T. R. 89; 4 R. R. 598; 101 E. R. 1282.
(2) (1799) 4 Ves. 810; 31 E. R. 420.
(3) (1802) 7 Ves, 470; 6 R. R. 151; 32 E. R. 190.
(4) (1824) 2 B. & C. 661; 4 D. & R. 164; 2 L. J. (o. s.) K. B. 96; 26 R. R. 503; 107 E. R. 529.
(5) (1847) 4 C. B. 578; 16 L. J. C. P. 259; 11 Jur. 562; 72 R. R. 647; 136 E. R. 634.
(6) (1849) 13 Q. B. 447; 116 E. R. 1333.
(7) (1790) 1 H. Bl. 322; 2 R. R. 773.
(8) (1824) 9 Moore, 435; 2 Bing. 229; 1 Car. & P. 241; Ry. & M. 66; 3 L. J. (o. s.) C. P. 265; 27 R. R. 603; 130 E. R. 294.
(9) (1885) 13 Shaw & Dunlop 662.
(10) (1865) 2 Wallace 45; 17 Law. Ed. 868.
(11) (1851) 4 N. Y. 449.
(12) (1879) 101 U. S. 108; 25 Law. Ed. 899.
(13) (1853) 16 Howard 314; 14 Law. Ed. 953.
(14) (1868) 7 Wallace 542; 19 Law. Ed. 244.

v. *Child* (15). But it is needless to multiply authorities on the subject of trafficking in offices, which will be found collected in Greenhood on Public Policy, pages 338-349. Our attention, however, has been drawn to the decision in *Pichakutty Mudali* v. *Narayanappa Aiyan* (16). There the defendant had agreed, in consideration of a sum of money received by him, to obtain a more favourable assessment upon certain villages in respect of waste and cultivable lands, and in case of failure to re-pay the amount received. In a suit to recover the amount paid to the defendant, Scotland, C. J., and Frere, J., held that the contract was not vitiated by illegality. The reason assigned in support of this view was that there was nothing to show an understanding between the parties that the defendant was to have recourse to corrupt or illegal means of any kind, or that he would use personal influence which he professed to possess with any public servant. The case was thus treated as one where the defendant undertook the task of preparing and presenting before the Revenue Authorities the case of the tenants and made his claim to remuneration contingent upon his success. The case is, consequently, distinguishable, though we are by no means convinced that the decision is based on sound principles. We affirm without hesitation the rule that any contract to appoint one to a public office or involving the sale of a public office or securing an office for the promisor or recommending him for such office, is opposed to public policy and is consequently void. It is plain, therefore, that the contract, which is the foundation of this suit, is based on an unlawful consideration, is opposed to public policy and is void. It follows that under such circumstances when the illegality of the contract has been made to appear, the law will not extend its aid to either of the parties, who will be left to abide the consequences of their own acts. We are not unmindful that there are exceptions to the general rule that money paid or personal property transferred in accordance with the terms of an illegal contract cannot be recovered, notwithstanding the other party refuses to affirm his part of the agreement. It is plain that although where money has been paid under an unlawful agreement, but nothing else done in performance of it, the money may be recovered back, yet this exception will not be allowed if the agreement is actually criminal or immoral; where the contract is illegal, because contrary to positive law or against public policy, an action cannot be maintained to enforce it directly or to recover the value of services rendered under it or money paid on it. Lord Alvanley, C. J., observed in *Tappenden* v. *Randall* (17) that where there is moral turpitude in the contract, the Court will not allow the party who has advanced money on such a contract to recover it back. In the case before us, the substance of the matter is that the plaintiff, if his allegation is true, offered a bribe to the defendant to secure an appointment for his son and made part payments which were accepted by the latter. The parties are clearly *in pari delicto* and the Court will not assist either of them. In *Collins* v. *Blantern* (18) where money had been paid for the purpose of stifling a prosecution for prejury, Wilmot, C. J., said: "Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of the Court to fetch it back again." To the same effect is the observation of Kenyon, C. J., in *Howson* v. *Hancock*(19), where money deposited upon an illegal wager had been paid over to the winner by the consent of the loser: "there is no case to be found where, when money has been actually paid by one of two parties to the other upon an illegal contract, both being *participes criminis*, an action has been maintained to recover it back again." The same principle is illustrated in *Taylor* v. *Chester* (20), where the consideration was immoral, and in *Kearley* v. *Thomson* (21), where the defendants were in substance bribed not to appear at the public examination of a bankrupt [see also *Harse* v. *Pearl Life Assurance Co. Ltd.* (22)]. The principle has been

(15) (1874) 21 Wallace 441; 22 Law. Ed. 623.
(16) 2 M. H. C. R. 243.
(17) (1801) 2 Bos. & P. 467; 5 R. R. 662; 126 E. R. 1388.
(18) (1765) 2 Wils. 341 at p. 350; 95 E. R. 847; 1 Sm. L. C. 369.
(19) (1800) 8 T. R. 575; 101 E. R. 1555.
(20) (1869) 10 B. & S. 237; 38 L. J. Q. B. 225; 4 Q. B. 309; 21 L. T. 359.
(21) (1890) 59 L. J. Q. B. 288; 24 Q. B. D. 742; 63 L. T. 150; 38 W. R. 614; 54 J. P. 804.
(22) (1904) 1 K. B. 558; 73 L. J. K. B. 373; 52 W. R. 457; 90 L. T. 245; 20 T. L. R. 264.

applied in this country in a case where money had been paid to a married woman to enable her to obtain a divorce and marry the plaintiff: *Bai Vijli* v. *Nansa Nagar* (23). The cases mentioned at the Bar related to marriage brokage contracts which, as is clear from the decisions in *Bakshi Das* v. *Nadu Das* (24) and *Gulabchand* v. *Fulbai Harichand* (25), stand on a special footing of their own and have no analogy to the case before us. The principle that the Court will not assist a party who has entered into a contract tainted by moral turpitude, should be strictly applied in the circumstances of the case now before the Court. If the Court were to assist the plaintiff to recover his money, bribery and corruption would be encouraged; every person in the position of the plaintiff will be tempted to say, "let me offer a bribe to get an appointment for my son, for I can do so with impunity and without risk of loss; if he secures the appointment, the end is achieved, if he does not, I can sue to recover back my money." No Court of Justice will tolerate such a position.

We may add that in the course of argument, reliance was to some extent placed on section 65 of the Indian Contract Act, but that section is of no real assistance to the plaintiff, as it relates to the obligation of a person who has received an advantage under an agreement which is *discovered* to be void or under a contract which *becomes* void. The case before us is, however, not that of an agreement "discovered" to be or "becoming" void. The agreement is void on the face of it, and it was void *ab initio*, while the words of the section can only be aptly applied in such cases as that of an agreement which is subsequently found to be void on account of some latent defect or of circumstances unknown at the date of the agreement, or of an agreement which is afterwards made void by circumstances which supervene.

The result is that the decree of the Small Cause Court Judge is affirmed and this Rule discharged with costs. We assess the hearing fee at one gold *mohur*.

Rule discharged.

(23) 10 B. 152.
(24) 1 C. L. J. 261.
(25) 3 Ind. Cas. 748; 11 Bom. L. R. 649 at 652; 33 B. 411.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 352 OF 1914.

June 1, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

Sheikh MAHMUD ALI AND OTHERS—DEFENDANTS—APPELLANTS

versus

Mirza YAWAR BEG—PLAINTIFF—RESPONDENT.

Specific Relief Act (I of 1877), ss. 15, 16—Contract to sell whole house—Vendor possessing only half share—Specific performance.

The defendant No. 1 on behalf of himself and as agent of the defendant No. 2 agreed to sell a house, in which each of the two defendants had one-half share, to the plaintiff. Defendant No. 1 had no authority to sell the half share of defendant No. 2. The plaintiff sued for specific performance of the contract:

Held, that the plaintiff was only entitled to a decree for specific performance for half the house on condition of paying the full price agreed upon for the entire house. [p. 629, col. 1.]

Second appeal from a decree of the District Judge of Benares, dated the 14th January 1914.

Messrs. *M. L. Agarwala* and *W. Wallach*, for the Appellants.

Dr. *S. M. Sulaiman*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for specific performance of a contract to sell a house. The house belonged to Sheikh Muhammad Ali and Sheikh Muksud Ali, the defendants Nos. 1 and 2. It is alleged that the defendant No. 1 on behalf of himself and as agent of defendant No. 2 agreed to sell the house to the plaintiff, that then in breach of the agreement the house was sold to defendant No. 3, the sale being taken fictitiously in the name of his wife, defendant No. 4.

The Court below has found that the contract was entered into but that defendant No. 1 had no authority to sell his brother's share of the house. The Court accordingly made a decree for specific performance in respect of the half of the house which belonged to defendant No. 1, at half the price agreed upon.

In second appeal it is contended on behalf of the defendants that the Court ought not to have decreed specific performance of half the house. Section 15 of the Specific Relief Act is relied upon, and it is contended that the plaintiff was only entitled to a decree for specific performance for half the house on condition of paying the full price agreed upon

for the entire house. On the other hand, the plaintiff relies on the provisions of section 16. The Court below considered that this section applied. The section is as follows: "When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the Court may direct specific performance of the former part."

It must be remembered that the contract as proved was a contract to sell the whole house for one lump sum as consideration. It can hardly be said that the contract consisted of "two parts, each standing on a separate and independent footing from the other," one part being to sell the share of defendant No. 1 and the other part to sell the share of defendant No. 2. This is illustrated by supposing for a moment that the suit had been by the defendant No. 1, against the plaintiff for specific performance of a contract to buy half the house. It seems quite clear that Mirza Yawar Beg could have pleaded that his contract was a contract to buy the whole house, and not half and that no Court would have forced him to take half the house In our judgment the decision of the Court below was wrong. As, however, in the course of the hearing the plaintiff has expressed his willingness to pay the full price, we think that he ought to have half the house on these terms.

We accordingly vary the decree of the Court below by giving the plaintiff a decree for specific performance for sale of half the house (the share of defendant No. 1) conditional upon his paying the entire price. The plaintiff will have his costs from the defendants other than the defendant No. 2. He will be entitled to set off his costs against the amount paid by him into Court. We allow him two months to pay the money into Court, but we direct that in the event of the money not being so paid within that time the suit will stand dismissed with costs in all Courts.

Decree varied.

CALCUTTA HIGH COURT.
FULL BENCH.

SECOND CIVIL APPEALS NOS. 617 AND 769 OF 1912.

May 11, 1915.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, Mr. Justice Woodroffe, Justice Sir Asutosh Mookerjee, KT., Mr. Justice Holmwood and Mr. Justice D. Chatterjee.

BIDYA PROSAD SINGH—PLAINTIFF—APPELLANT

versus

BHUPNARAIN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law (Mitakshara)—*Mortgage by father—Debt neither antecendent nor for family purposes, nor immoral—Suit against sons—Limitation Act* (*IX of* 1908), *Sch. I, Arts.* 120, 132.

The decision of the Full Bench in the case of *Luchmun Dass* v. *Giridhur Chowdhry*, 5 C. 855; 6 C. L. R. 473; 3 Shome L. R. 143, has not been overruled by the Privy Council, nor has it been superseded by subsequent legislation, inasmuch as, where the mortgage is not operative as such against the sons, no question can arise as to the effect of section 85 of the Transfer of Property Act (now re-placed by rule 1 of Order XXXIV of the Code of Civil Procedure, 1908). [p. 632, col. 2.]

A suit upon a mortgage effected by a father governed by the *Mitakshara* Law for a debt which is neither antecedent nor for family purposes and not proved to be immoral, brought after the death of the father against the sons, some of whom were adult and some minors, at the time of the mortgage, is governed by Article 120 of the first Schedule to the Indian Limitation Act, and not by Article 132, as there is no charge on immoveble property enforcible against the sons. [p. 633, col. 1.]

Reference to the Full Bench made by Mr. Justice D. Chatterjee and Mr. Justice Walmsley, two of the Judges of this Court, on the 31st of August 1914.

FACTS of the case appear from the following Order of Reference:—

D. CHATTERJEE, J.—These two appeals arise out of one suit on two mortgage-bonds executed by a father, who was the *karta* of a Hindu family governed by the *Mitakshara* Law and consisting of himself and his sons, adult and minor. In both these documents he mortgaged what he called "all my rights" in certain *mouzahs* in which he and his sons jointly owned 2-annas 8-pie share, and in respect of which he was registered in the Collectorate as the owner of 5-annas 4-pie share (including the half share of his brother). The bonds

were dated one in September 1901, and one in October 1901. The suits were brought on the 12th of August 1910. The mortgagee died in *Aughran* 1313—November 1905, and Hardeo Singh, the original mortgagor, died about eight years before suit (according to the defendants), *i.e.*, about 1902.

The main questions in the case, so far as the appeals are concerned, are (1) whether the mortgagor mortgaged the whole share belonging to himself and his sons, or only his individual share as a member of the joint family; (2) whether the claim or any portion of the same is barred by limitation.

The learned Subordinate Judge held that the mortgage was in respect of the individual share of the mortgagor and the suit was barred so far as it affected the shares of the sons.

The plaintiffs appealed to the District Judge, who agreed with the first Court as to the construction of the bond of September 1901, but as to the bond of October 1901, held that the mortgagor intended to mortgage the whole share belonging to himself and his sons. It is not quite clear whether the defendants pressed their plea of limitation before him, but he evidently agreed with the first Court on this point.

There are two appeals before us, one by the plaintiff which is numbered 769 of 1912. This appeal is confined at the hearing to a claim to hold the entire 2 annas 8 pies liable under both the bonds, the other, which is by the defendants and numbered 617 of 1912, is on the plea mainly that the claim against the shares of the sons was barred.

As regards the construction of the two bonds, I am unable to find any real difference between the terms of the two documents. The words "*Hakiat milkiat dakhli khud*" (=right and property which is my own) in the first document have been paraphrased in the second into "*Jo is wakt tak bila mosharakat ahde or bemodakhalat digre bakabz-dakhal mon mokir rahta chala aya hai*" (=which up to this time has been in my possession without any other person holding possession or share therein). If the mortgagor had been mortgaging his own individual share in the family property, he would have described the same as his *hissa* or share. I think the most reasonable construction would be to hold that he was mortgaging that of which he was in possession as the head of his own family, consisting of himself and his sons. The other construction would make the mortgage null and void as an alienation of an undivided share in a *Mitakshara* joint family estate, and it is not reasonable to hold that the mortgagor gave and the mortgagee took what could not be given and taken under the law.

On the *second* point, that of limitation, it has been contended that there is a considerable divergence of judicial opinion on the matter and there should be a reference to the Full Bench. In the case of *Surja Prasad* v *Golab Chand* (1) Ghose and Harington, JJ., held, on the authority of the Full Bench case of *Luchmun Dass* v. *Giridhur Chowdhry* (2), that when a *Mitakshara* father executes a mortgage for a debt which is neither antecedent nor immoral, the mortgage is not binding on the son, and a suit brought against the son after the death of the father more than six years after the due date, must be dismissed as barred by limitation. This case was dissented from by Brett and Sharfuddin, JJ., in the case of *Maheshwar Dutt Tewari* v. *Kishen Singh* (3), the learned Judges holding that the Full Bench case had been virtually overruled by the Privy Council in the cases of *Nanomi Babuasin* v. *Modhun Mohun* (4) and *Bhagbut Pershad Singh* v. *Girja Koer* (5). Then in the case of *Kishun Pershad Chowdhry* v. *Tipan Pershad Singh* (6) Mookerjee and Holmwood, JJ, dissented from the case of *Maheshwar Dult Tewari* v. *Kishen Singh*(3) and refrained from making a reference to the Full Bench only because that was a case in which the suit had been brought within six years from the due date. This divergence of opinion came under judicial discussion in two recent cases. In the case of *Bissonath Prosad Malita* v *Brindesri Prosad Singh* (7) Sir Lawrence Jenkins, C. J., and N. R. Chatterjea, J., held that the law as laid down by the Full

(1) 27 C. 762.
(2) 5 C. 855; 6 C. L. R. 473; 3 Shome L. R. 143.
(3) 34 C. 184; 5 C. L. J. 441; 11 C. W. N. 294.
(4) 13 C. 21; 13 I. A. 1; 10 Ind. Jur. 151; 4 Sar. P. C. J. 682.
(5) 15 C. 717; 15 I. A. 99; 12 Ind. Jur. 289; 5 Sar. P. C. J. 186.
(6) 34 C. 735; 5 C. L. J. 569; 11 C. W. N. 613.
(7) 17 Ind. Cas. 577; 17 C. W. N. 1025; 40 C. 342

Bench in the case of *Luchmun Dass* v. *Giridhur Chowdhry* (2) had been practically altered by the provisions of section 85 of the Transfer of Property Act, and the later provisions of the Civil Procedure Code, which were substituted for the same. In the subsequent case of *Sheo Narain Roy* v. *Mokshoda Das Mitra* (8) Coxe and N. R. Chatterjea, JJ, followed the above case. In the first of the latter two cases, however, the suit was brought in the life-time of the mortgaging father, and in the second also some of the mortgagors were parties. These cases are, therefore, distinguishable from the present case, in which the suit was brought more than six years after the death of the father and more than six years after the accrual of the cause of action. The debts are not antecedent debts, they are not proved to have been taken for the purpose of the family or spent for the benefit of the same, nor are they proved to be immoral. The father could not, therefore, make a valid mortgage of the interests of his sons. This can be fairly deduced from *Girdaree Lall* v. *Kantoo Lall*, *Muddun Thakoor* v. *Kantoo Lall* (9) and *Suraj Bunsi Koer* v. *Sheo Persad Singh* (10). Then followed the Full Bench case in which the previous decisions of the Privy Council were discussed. Then came the cases of *Gunga Prosad* v. *Ajudhia Pershad Singh* (11); *Khalilul Rahman* v. *Gobind Pershad* (12) and *Surja Prasad* v. *Golab Chand* (1), and these latter two cases were, after the Privy Council cases, relied on in *Maheshwar Dutt's* case (3) as having overruled the Full Bench. With great respect for the learned Judges, I do not see how the particular phase of the law laid down by the Full Bench was overruled by the cases of *Nanomi Babuasin* v. *Modhun Mohun* (4) and *Bhagbat Pershad Singh* v. *Girja Koer* (5). The only other way in which the Full Bench is said to have been superseded is the passing of the Transfer of Property Act, subsequent to it: with great respect for the learned Judges who hold the latter opinion, I cannot persuade myself to believe that the Legislature intended to alter any provision of Hindu Law by section 85 of the Transfer of Property Act, or the section of the Civil Procedure Code which now stands in its place. These are mere matters of procedure and could not have been intended to take away any vested rights. In any case the Full Bench made an effort to save the *Mitakshara* doctrine of equal rights of the father and the son from utter annihilation and was accepted as good law by a number of very learned Judges for a number of years; it is the last hope of the *Mitakshara* son and keeps up the last vestige of Vijnaneswara's cherished doctrine of equal rights, and I do not feel myself justified in holding that it has been taken away by implication, either by the Privy Council or by the Legislature, until there is an express and authoritative decision to that effect.

In view of the conflict of judicial opinion above referred to, I would refer the following questions to the Full Bench:

1. Whether the decision of the Full Bench in the case of *Luchmun Dass* v. *Giridhur Chowdhry* (2) has been overruled by the Privy Council or superseded by subsequent legislation?

2. Whether a suit upon a mortgage effected by a father governed by the *Mitakshara* law for a debt which is neither antecedent nor for family purposes and not proved to be immoral, brought after the death of the father against the sons some of whom were adult and some minors at the time of the mortgage, is governed by the 12 years' rule of limitation under Article 132 of the Schedule to the Limitation Act, so far as it claims to affect the shares of the sons?

WALMSLEY J.—I agree that there is such divergence of opinion expressed in the cases quoted that a reference is necessary.

BY THE COURT—Both the cases will be referred to the Full Bench.

Babus *Provas Chandra Mitter* and *Susil Madhab Mullick*, for the Appellant in No. 617 of 1912 and for the Respondents in No. 769 of 1912.

Babus *Umakali Mukerjee* and *Akshoy Kumar Banerji*, for the Respondents in No. 617 of 1912 and for the Appellant in No. 769 of No. 1912.

JUDGMENT OF THE FULL BENCH.

The questions referred for decision to a Full Bench have been framed in these terms:

(1) Whether the decision of the Full Bench in the case of *Luchmun Dass* v.

(8) 19 Ind. Cas. 878; 17 C. W. N. 1022.
(9) 14 B. L. R. 187; 22 W. R. 56; 1 I. A. 321.
(10) 5 C. 148 at p. 171; 6 I. A. 88; 4 C. L. R. 226; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 2 Shome L. R. 242.
(11) 8 C. 131; 9 C. L. R. 417; 6 Ind. Jur. 248; 4 Shome L. R. 199.
(12) 20 C. 328.

Giridhur Chowdhry (2) has been overruled by the Privy Council or superseded by subsequent legislation.

(2) Whether a suit upon a mortgage effected by a father governed by the *Mitakshara* Law for a debt which is neither antecedent nor for family purposes and not proved to be immoral, brought after the death of the father against the sons, some of whom were adult and some minors at the time of the mortgage, is governed by the twelve years' rule of limitation under Article 132 of the Schedule to the Limitation Act, so far as it claims to affect the shares of the sons.

We have been invited by the plaintiffs-respondents to answer the first branch of the first question in the affirmative; they rely upon the decision of the Judicial Committee in *Nanomi Babuasin* v. *Modhun Mohun* (4) and *Bhagbut Pershad Singh* v. *Girja Koer* (5) in support of their contention. The Rules of the Court (Chapter V, section 6) ordain that every decision of a Full Bench shall be treated as binding on all Division Courts and Judges sitting singly, upon any point of law or usage having the force of law, determined by the Full Bench, unless it is subsequently reversed by a Bench specially constituted consisting of such number of Judges as in each case shall have been fixed by the High Court or unless a contrary rule be laid down by the Judicial Committee of the Privy Council. The decision in *Luchmun Dass* v. *Giridhur Chowdhry* (2) has not yet been reversed by a Special Bench. A Special Bench was constituted in the case of *Balaram* v. *Mangta Das* (13) to consider the question; but the reference was disposed of on a preliminary ground. The only question, then, is, whether a contrary rule has been laid down by the Judicial Committee. The two cases mentioned do not expressly lay down any contrary rule; they do not even mention the Full Bench decision, which was not cited in argument before the Judicial Committee. It is said, however, that if the principles recognised in the two decisions of the Judicial Committee are logically developed, a result is reached which is contrary to the decision of the Full Bench. But it is important to observe that the decision of the Full Bench in *Luchmun Dass* v. *Giridhur Chowdhry* (2) was based upon an interpretation of the earlier decisions of the Judicial Committee in *Girdharee Lall* v. *Kantoo Lall*, *Muddun Thakoor* v. *Kantoo Lall* (9) and *Suraj Bansi Koer* v. *Sheo Persad Singh*(10). The two later decisions of the Judicial Committee in *Nanomi Babuasin* v. *Modhun Mohun* (4) and *Bhagbut Persad Singh* v. *Girja Koer* (5), so far as the question now before us is concerned, do not extend, though they possibly elucidate, the rule enunciated in the earlier Privy Council decisions interpreted by the Full Bench. The decisions by the Judicial Committee on the subject have in a large measure affected the strict doctrines of the *Mitakshara* Law, and the question now before us is essentially, to quote the language of Sir James Colvill in *Lakshman Dada Naik* v. *Ram Chandra Dada Naik* (14), "not so much whether an admitted principle of Hindu Law shall be carried out to its apparently logical consequences, as what are the limits of an exceptional doctrine established by modern jurisprudence." It is plain that the Full Bench decision is still binding on this Court, as no contrary rule has yet been laid down by the Judicial Committee of the Privy Council.

We have next been invited by the plaintiffs-respondents to answer the second branch of the first question in the affirmative, on the ground that the Full Bench decision was superseded by section 85 of the Transfer of Property Act (now replaced by rule 1 of Order XXXIV of the Civil Procedure Code of 1908). In support of this contention, reliance has been placed upon the cases of *Bisonath Prosad Malita* v. *Brindesri Prosad Singh* (7) and *Sheo Narain* v. *Mokshoda Das Mitra* (8); the former of which was based on *Lala Suraj Prosad* v. *Golab Chand* (15). But where in accordance with the ruling of the Full Bench in *Luchmun Dass* v. *Giridhur* (2), the mortgage is not operative as such against the sons, no question can arise as to the effect of section 85 of the Transfer of Property Act. The suit may have been framed as one to enforce the mortgage against the sons; but, if as laid down by the Full Bench, the mortgage as

(13) 34 C. 941 at p. 947; 6 C. L. J. 257; 11 C. W. N. 959.

(14) 7 I. A. 181 at p. 195; 5 B. 48; 7 C. L. R. 320.

(15) 28 C. 57; 5 C. W. N. 640.

such is not enforceable against them, it is plain that section 85 cannot touch the question. Consequently the decision of the Full Bench has not been superseded by subsequent legislation.

The *first* question, in each of its two branches, must be answered in the negative.

As regards the *second* question, it follows that Article 132 of the Schedule to the Indian Limitation Act has no application, as there is no charge on immoveable property enforceable against the sons. Consequently, Article 120 governs the case. The plaintiffs are thus entitled to sue within six years from the date when the right to sue accrues. Three alternatives have been suggested for this date: *first*, the date when the debt incurred by the father matures; *secondly*, the date when the creditor, after exhausting his remedies against the father, finds that the debt or a portion thereof is still unsatisfied; and *thirdly*, the date of the death of the father. The first of these dates was accepted as the starting point in *Surja Prasad* v. *Golab Chand* (1); but the question does not require decision in the present case, as more than six years have elapsed from each of the three possible points of time mentioned. While, therefore, we hold that Article 120 applies to cases of the description mentioned in the second question, we do not decide when the right to sue accrues for the purposes of that Article. The *second* question is answered in the negative and the rule of limitation applicable is held to be that embodied in Article 120.

The result of this view is that Appeal No. 617 of 1912 will be allowed with costs both here and before the Division Bench; the suit will stand dismissed as against the appellants in respect of the bond of the 27th October 1901, to which alone the appeal relates. The other Appeal, No. 769 of 1912, will stand dismissed with costs, here and before the Division Bench. Each party will pay his own costs in both the Courts below. A self-contained decree giving effect to these directions will be drawn up in this Court in supersession of the decree of the Court below.

Appeal No 617 *allowed*;
Appeal No. 769 *dismissed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 108 OF 1914.

February 5, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

AFZAL SHAH—DEFENDANT—APPELLANT

versus

MUHAMMAD ABDUL KARIM KHAN—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (*II of* 1901), *s.* 197—*Suit triable by Revenue Court—Appeal—Transfer of appeal by District Judge to Subordinate Judge—Subordinate Judge, whether can pass order of remand.*

Where a District Judge transfers an appeal to a Subordinate Judge the latter may exercise all the powers vested in an Appellate Court by section 197 of the Agra Tenancy Act.

Babu Nandan Prasad v. *Changur*, 16 A. 363 (F. B.); A. W. N. (1894) 113, followed.

First appeal from an order of the Additional Subordinate Judge of Aligarh, dated the 15th of April 1914.

Mr. *M. L. Agarwala*, for the Appellant.

Maulvi *Shafiuzzaman*, for the Respondent.

JUDGMENT.—This is an appeal against an order of the Additional Subordinate Judge of Aligarh, setting aside a decree passed by the Munsif of Bulandshahr and remanding the suit to the Munsif's Court to be disposed of according to law. The Munsif had held that the suit was not cognizable by a Civil Court and had on that ground dismissed it. The plaintiff appealed to the District Judge, who transferred the appeal to the first Additional Subordinate Judge for disposal. The latter officer was of opinion that the suit had been rightly instituted in the Civil Court and remanded the case to the Munsif for trial on the merits. In appeal to this Court it is contended that the suit was not cognizable by the Civil Court and that the Subordinate Judge had no power to make the order of remand. It is conceded that if the order of remand had been made by the District Judge, the case would have been covered by section 197 of the Tenancy Act and no objection could have been taken to the order; but it is contended that the Subordinate Judge had no power to act under that section. The case is covered by the decision in the case of *Babu Nandan Prasad* v. *Changur* (1). On the authority of that ruling we must hold that the Additional Subordinate Judge had power to make the order of remand. The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 16 A. 363 (F. B.); A. W. N. (1894) 113.

ARUNACHELLA AMBALAN *v.* R. G. ORR.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 77 OF 1909.

December 4, 1914.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

ARUNACHELLA AMBALAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

R. G. ORR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Jungly and uncultivated land—Presumption—Limitation Act (IX of 1908), s. 22, applicability of.

Where the land in a *zemindari* is waste land and uncultivated, the presumption is that the *zemindar* is the owner of both *melvaram* and *kudivaram* rights. In such a case the burden is on the *ryot* to show that he owns the *kudivaram* interest. [p. 634, col. 2.]

Per Seshagiri Aiyar, J.—Section 22 of the Limitation Act applies only to cases where the added or substituted plaintiff wants to litigate a right for himself independently of the right of the original plaintiff. Where, therefore, a plaintiff is added in consequence of the assignment of the rights of the original plaintiff, his right to a decree is not affected by section 22 of the Limitation Act. [p. 638, cols. 1 & 2.]

Abdul Rahman v. *Amir Ali*, 5 C. L. J. 486; 11 C. W. N. 511; 2 M. L. T. 312 (F.B.); 34 C. 612, distinguished.

Rai Charan Mandal v. *Biswanath Mandal*, 26 Ind. Cas. 410; 20 C. L. J. 107 at p. 109; *Subodini Debi* v. *Cumar Ganoda Kant Roy Bahadur*, 14 C. 400; *Chunni Lal* v. *Abdul Ali Khan*, 23 A. 331, followed.

Fatmabai v. *Pirbhai Virji*, 21 B. 580; *Subbaraya Iyer* v. *Vaithinatha Iyer*, 5 Ind. Cas. 931; 7 M. L. T. 185; 33 M. 115, referred to.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Madura in Original Suit No. 2 of 1908.

Messrs. *T. R. Ramachandra Aiyar* and *T. R. Krishnaswamy Aiyar*, for the Appellants.

Messrs. *C. S. Venkatachariar*, *T. R. Rangachariar*, *C. V. Ananthakrishna Aiyar* and *R. Narayanaswamy Aiyar*, for the Respondents.

JUDGMENT.

WALLIS, C. J.—We have already given judgment as to the boundary question which arose between the villages of Karakudi and Sekkalakattai and have now to deal with so much of the appeal as relates to the claim of the Kattaiyur *ryots* to the *kudivaram* rights in the Sekkalakottai village, in which we have decided the suit lands are situated.

It is admitted that the suit village is one of the villages of the Sivaganga *zemindari* and as such the *zemindar* is entitled to the *melvaram* rights in the village, and it is not now suggested that he has been dispossessed of these *melvaram* rights. It is said, however, that the onus is on him to show that he was in possession of the *kudivaram* rights within 12 years of suit. Now, as will abundantly appear from the Exhibits to which it will be necessary to refer, the suit land was waste land or jungle and mostly forest, and with regard the land of this character in a *zemindari*, the presumption is that the *zemindar* owns the *kudivaram* as well as the *melvaram* rights, and, therefore, the onus is on the *ryots* of the village to show, if they can, that the *kudivaram* right is vested in them.

Now applying these principles to the present case, we find the earliest document to which it is necessary to refer is Exhibit D, which is a decision by the Inam Commissioner in 1865 as to a dispute as to the boundary of the Sekkalakottai village between the Mahajanams as they are called, of the *inam* village of Kalanivasal on the one hand and the *zemindar* of Sivaganga and Ambalagars of the village of Sekkalakottai on the other. These Ambalagars, it was suggested, were only the peons of the village. On the other hand, for the respondents it is said, that they may be the descendants of peons but really they were *ryots* in Kottaiyur and it is in their right that the present suit has been defended. Now, that decision shows that in 1865 the suit lands were jungle lands. It is true that it is mentioned in Exhibit D that certain houses had been built by the inhabitants of Karaikudi a few years ago and a pond had been dug, but the evidence shows that what was there referred to was a certain Muthupattanam hamlet which, according to Exhibits Y and LL, and I think, the present Commissioner's plan, Exhibit XI, is clearly outside the bounds of the present suit land, to the north-west I think here. I may say in giving judgment in the other appeal, we relied upon the fact that the stone shown as No. 1 in Exhibit D was identical with the stone marked No. 19 in Exhibit XI. But this further evidence as to this hamlet of Muthupattanam, which is marked in Exhibit D. shows that the stone was not No. 19 but was a stone further east, probably the stone marked as No. 6 in Exhibit LL. The effect of the plan,

Exhibit Y, is to show that it is only in the present suit that a claim has been made to the land extending west as far as the stone No. 19 in the Commissioner's plan. Having regard to the other fact that in Exhibit D the stone E in the plan annexed thereto is mentioned as the boundary stone of Karaikudi and Sekkalakottai and the rest of the evidence, this error as to the identity of stone No. 1 with stone No. 19 in Exhibit XI in no way affects the conclusion we have arrived at.

To come back to the present case, the effect of Exhibit D is to show that this was forest land in 1865. Mr. T. R. Ramachandra Aiyar relies upon the fact that the Kottaiyur *ryots* took part with the *zemindar* in the dispute with the adjoining *inam* village as a sort of assertion of their ownership of their *kudivaram* in Sekkalakottai. We are unable to attach any weight to that fact from this point of view. Kottaiyur *ryots* had been taking lands on *patta* from the *zemindar* in the Sekkalakottai village and they may well have been interested in seeing that the village boundaries were preserved in which at that time they, at any rate some of them, appear to have been filling up the position of Ambalagars or peons of the *zemindar*.

The next thing we come to is that about 1875 there was a demarcation carried out by the Survey Department of the boundary between Sekkalakottai and Karaikudi, and that is only material for the present purpose because the suit to contest that boundary line was brought by the Karaikudi *ryots* against the Kottaiyur *ryots* and the judgment is Exhibit V, and it is strongly relied upon for the respondents. The *ryots* of the Karaikudi village claimed that the *kudivaram* right was vested in them, and the plaintiffs alleged the defendants Nos. 3 to 10 (*i.e*, the Kottaiyur *ryots*) were exercising rights of ownership over the said 500 *kurukkams* just as if they belonged to Sekkalakottai that they are sued.....also as agents to the other proprietors of Sekkalakottai. The *zemindar* contended that he was improperly made a party to the suit, and Mr. T. R. Ramachandra Aiyar relies upon the fact that though it was alleged by the plaintiffs that the defendants were exercising *kudivaram* rights over the suit land, the *zemindar* took no objection and asked to be dismissed from the suit. This contention is no doubt entitled to considerable weight, but on the other hand it must be remembered, as appears from the evidence in the case, that at the time the suit came on for hearing the *zemindarini*, who was originally made a defendant, had died and that there was a contest which gave rise to considerable litigation between the claimants to the estate, and it is perhaps not surprising that in these circumstances minor matters of this sort should not have attracted very much attention. However, nothing was decideed on this point, and the suit was eventually compromised on the terms that the defendants should swear that the boundaries settled by the Commissioner were correct which they did.

The next thing we have to deal with is Exhibit E, which is dated the 12th March 1881, a *cowle* by which the *zemindar* assigned the *melvaram* rights in the suit land and a much larger tract, amounting to 100 *kurukkams*, to one Ulagappa Chetty. It is said by Mr. T. R. Ramachandra Aiyar that this was not inconsistent with the existence of *kudivaram* rights in the Kottaiyur *ryots*. I should mention that shortly before Exhibit E the *zemindar's* rights were recognised by Exhibits W and W1, which were petitions by Kottaiyur *ryots* for permission to construct houses and to reside in the suit land and this is relied upon by the plaintiffs as an admission that they could not reside there without such permission. This evidence is entitled to very considerable weight.

Then we come to Exhibit VII dated 17th June 1884. Exhibit E of 1881, in favour of Ulagappa Chetti, is said to have been *benami* for Arunachellam Chetti purchasing from 8 Kottaiyur *ambalams* or *ryots* the *kudivaram*, rights in 30 *kurukkams* of the 100 *kurukkams* which he had leased from the *zemindar* by Exhibit E for a sum of Rs. 8,000. Now the evidence is that the land so purchased has always been left waste, and the explanation given in the evidence as to why this purchase was made, was that it was for the purpose of convenience which does not seem to be a very satisfactory explanation. However, it appears that those lands were waste until the present day. Mr. T. Rangachariar has made various suggestions that

the transaction is not what it seems on the face of it. But without going into that all that we think it necessary to say is we are not prepared to attach much weight to it as evidence of the rights claimed by the defendants in the suit lands.

Before coming to the facts which lead up to the present suit, I may refer to the oral evidence, which has been given of the possession of suit lands by the *zemindar*. There is evidence that the *zemindar* and his lessees had maintained watchmen and also had granted *pattas* for trees. Exhibits CC and EE are such *pattas* and Exhibit CC is shown to be for trees situated in the suit land. The granting of such *pattas* in forest land for trees only points rather to the *kudivaram* rights being in the *zemindar* than in the *ryot*. As I have said before the onus is on the *ryots* of a village in a case such as this to show that they have *kudivaram* rights in jungle lands of this nature. The suit land adjoins the village of Karaikudi where there are a number of wealthy Chettis; and that village having been built on the suit land formed a very eligible site for additional houses for this community and this, according to Mr. Rangachari, is the explanation of the dealing with it already mentioned. Our conclusion on the evidence is that down to 1890 it is not shown that there were any houses upon the suit land.

Now, Exhibit M is a report made to the Sivaganga lessees, who had just then entered on their lease, upon the Sivaganga *zemindar's* rights by their Plantation Superintendent. He reported that it was very necessary that watchman should be appointed for this forest situated near the houses of Karaikudi, that it was a suitable place for building houses and that the Chettis intended to build houses thereon and that the *zemindar* could derive an income therefrom. And the order on that is "of course it is necessary that *kavalgars*.....should be appointed". Exhibit M is another report much to the same effect on which the order is "*ameen* to be careful that Chettis make no encroachments in this jungle land". The next document Exhibit VIII of the 28th September 1891, is another document by which the Kottaiyur *ryots* purported to sell 7 and odd *kurukkams* in the Sekkalakottai village to the north of the suit lands for the price of Rs. 250. This again no doubt was an assertion of their title, but it was not part of the suit land. We do not know what was done upon it, and we are not prepared to regard this as an assertion of title by the Kottaiyur *ryots* as against the *zemindar*.

Then we come to Exhibit XII which has given rise to the present litigation. That is dated 18th January 1893 and purports to be a sale of what are practically the suit lands, though they are described as only 11 *kurukkams* whereas the suit lands are somewhat more. It simply recites that these 8 *ambalams*, as they describe themselves, have sold these 11 *kurukkams* of vacant land and trees in Kottaiyur village within the boundaries mentioned there for Rs. 2,500. Following on this we have Exhibit Q series; Exhibit Q is dated 20th May 1893. This shows that the estate servants reported that certain persons at Karaikudi were building on the plaint land. The order on that was Exhibit Q: "As it appears from the said *arzi* that the undermentioned persons construct buildings in the places appertaining the Sakkalakottai village, the head office also has been informed that what has been constructed up to date should be left alone and that the further construction of the said business should be stopped." Exhibit Q2 reports that accordingly they have been told to stop the work, and that they claimed under a *cowle* made to Ulagappa Chetty, that is to say Exhibit E of 1881. The supervisor reported that he thought the buildings were outside the limits of the grant to Ulagappa Chetty and he asked for a copy of the original in order to verify this, but no copy appears to have been sent to him. It afterwards turned out that these lands were really outside the boundaries of Ulagappa Chetty's grant. Mr. Rangachariar relies upon the fact that the persons building the houses relied upon this grant rather than upon the purchase under Exhibit XII from the Kottaiyur *ryots*, as showing that the latter was only a bogus title-deed. This building gave rise to litigation and two suits were filed: one Original Suit No. 18 of 1894 by the Karaikudi Chettis, that is to say, by the Chettis to whom the village of Karaikudi was leased by the *zemindar*, to establish that the plaint lands formed part of the

Karaikudi village; while the other suit, Original Suit No. 4 of 1894, was brought by the Karaikudi *ryots* for the cancellation of Exhibit XII on the ground that they too had share with the Kottaiyur *ryots* in the *kudivaram* rights in the village of Sakkalakottai. The *zemindar* and the Sivaganga lessees sought to be made parties to Original Suit No. 18 of 1894, but their application was rejected by the Subordinate Judge. The suit, Original Suit No. 18 of 1894, was compromised and the compromise was that the Chettis recognised the *khudivaram* rights of the Sakkalakottai *ryots* in the suit lands and other lands which are not the subject of dispute in this suit; and it is suggested on behalf of the plaintiffs that this compromise was a collusive one, at any rate, it is not in any way binding upon them. This compromise was in 1895. The present suit was filed by the Sivaganga lesssees in the year 1901 and there have been some comments on the delay; but is to be remembered that these Sivaganga lessees had only recently come into the possession of the *zemindari* and that there were a great many other things to attend to besides this suit. I do not think this circumstance weighs very much against them. We think the defendants have not succeeded in proving that the suit was out of time, because for the reasons I have already given, we are satisfied that it is shown that the *zemindar* was in possession of the suit lands until 12 years of suit: we think it is only in the year 1890 or 1892 that these buildings began to be erected on the suit lands. This is all the evidence to which it is necessary to refer in detail. On the whole, we have come to the conclusion that, on the evidence in this suit, as regards the suit lands the Kottaiyur *ryots* have not shown that they were possessed of the *kudivaram* rights. It is perfectly true that we find assertions of such rights by the *kudivaram ryots* from time to time after 1877 – assertions which they endeavoured to give effect to by the conveyances which I have mentioned. As I have already said, the suit lands were a very eligible site for the extension of the Karaikudi village and for building houses by the Chettis and it is very material that the Kottaiyur *ryots* should be anxious to establish their claim to valuable pieces of property. But we are satisfied that the possession both of the *melvaram* and the *kudivaram* rights of what was originally jungle land was originally in the *zemindari*. We are not satisfied that he was ever effectively dispossessed of them by the Kottaiyur *ryots*, although they no doubt made claims to the *kudivaram* from time to time. In the result we agree with the conclusion of the Subordinate Judge and dismiss this appeal with costs.

As regards the question raised by Mr. T. Rangachariar that the 5th plaintiff—to whom an assignment was made by the other plaintiffs in the course of this suit—that he ought to have been given a decree, I am unable to accept the respondent's contention that the suit, though instituted in time, is barred under section 22 of the Limitation Act as against the 5th plaintiff, the assignee from the other plaintiffs of their cause of action, who was allowed to continue the suit under section 372, Civil Procedure Code, because the period of twelve years had expired when he was brought on. The Limitation Act deals with the institution of suits; and section 22 should, in my opinion, be confined to cases in which the new plaintiff is added or substituted in his own right so that he may be considered to be instituting a suit, and not to cases in which a suit properly instituted is allowed to be continued by an assignee under section 372, Civil Procedure Code. That section was not like section 32 made subject to the provisions of the Limitation Act; to hold it to be so subject is, in my opinion, to defeat its object and bring about the undesirable situation which it was enacted to avoid. Both sections must be read consistently if possible, and I think section 22 very perfectly receives the restricted construction I have mentioned. The authorities in this Court which will be referred to by my learned brother do not preclude up from so holding.

As regards the memorandam of objections, the Subordinate Judge has found that the *zemindar* and his lessees are not entitled to recover possession of the buildings on the suit lands without compensation, on the ground that they encouraged the owners to build there. As I have mentioned already, the effect of the evidence is that in 1891 objection was taken when those who claimed under Ulagappa Chetty's grant built the building but they were not further interfered with. In these circumstances we are not

prepared to differ from the conclusion at which the Subordinate Judge has arrived.

For the reasons given the decree will be amended by giving the 5th plaintiff a decree and otherwise the appeal will be dismissed.

SESHAGIRI AIYAR, J.—I agree that the appeal should be dismissed. I would add a few words on the question of law argued by Mr. T. Rangachariar. He asks us under Order XLI, rule 33, of the Code of Civil Procedure, to amend the decree of the Subordinate Judge by giving a decree to the 5th plaintiff for possession along with plaintiffs Nos. 1 to 4. Plaintiffs Nos. 1 to 4 assigned their rights to the 5th plaintiff in June 1908, when the suit was pending. The decree was passed in December 1908: and as the new Limitation Act of 1908 came into force only in January 1909, this question has to be decided under the Act of 1877. Mr. C. S. Venkatachariar contends that under section 22 of that Act, the claim of the 5th plaintiff was barred by limitation, as he was added as plaintiff in the suit more than 12 years after the accrual of the cause of action in 1893. The language of the section covers on the face of it all cases of addition and substitution of parties. But as contended by Mr. T. Rangachariar, the proviso to the section shows the classes of cases contemplated by it. I think he is right in his contention that the section should be restricted only to cases where the substituted or added plaintiff asks that his own rights should be adjudicated upon in the suit. And the section would apply also to cases where the original plaintiffs were not entitled to all the reliefs claimed in the plaint in their own rights. This view is strengthened by the amendment of the Act which places the assignee in the same position as the legal representative of the plaintiff. To hold otherwise would be practically to ignore section 372 of the old Code of Civil Procedure. That section enables the Court to permit an assignee of the rights of the original plaintiff to continue the suit. It would be anomalous to hold that the assignee who has the right to continue the litigation is not entitled to obtain a decree in his favour. I am of opinion that section 22 of the Limitation Act applies only to cases where the added or substituted plaintiff wants to litigate a right for himself independently of the rights of the original plaintiff. Mr. C. S. Venkatachariar relied very strongly upon the Full Bench decision of the Calcutta High Court in *Abdul Rahman* v. *Amir Ali* (1). In that case the referring Judge and Mr. Justice Harrington were of opinion that the bar of section 22 will apply to the substitution of a plaintiff and not to the addition; and the only question referred for the opinion of the Full Bench was whether a case of substitution came within the mischief of section 22. I am unable to see how the case of addition can stand on a different footing from that of substitution. I must respectfully dissent from the Full Bench ruling, in so far as it lays down that where a new plaintiff is substituted under section 372 he will be affected by a period of limitation different from that which is applicable to the original plaintiff. The view of the learned Judges in *Rai Charan Mandal* v. *Biswanath Mandal* (2) lends support to the view I have taken. Mr. Justice Wilson in *Subodini Debi* v. *Cumar Ganoda Kant Roy Bahadur* (3) came to the same conclusion. *Chunni Lal* v. *Abdul Ali Khan* (4) is another authority for the same position. The decision in *Fatmabai* v. *Pirbhai Virji* (5) is not opposed to this view. Mr. Justice Miller in *Subbaraya Iyer* v. *Vaithinatha Iyer* (6) expresses a doubt regarding the correctness of the view taken by Mr. Justice Wilson in *Subodini Debi* v. *Cumar Gancda Kant Roy Bahadur* (3). Mr. Justice Sankaran Nair who took part in that case apparently does not share this doubt. On principle I am of opinion the right view is to hold that where a plaintiff is added in consequence of the assignment of rights from the original plaintiff his right to a decree is not affected by section 22 of the Limitation Act. The decree should be amended by giving the 5th plaintiff a decree for possession along with plaintiffs Nos. 1 to 4.

Appeal dismissed; Decree amended.

(1) 34 C. 612; 5 C. L. J. 486; 11 C. W. N. 511; 2 M. L. T. 312 (F. B.).
(2) 26 Ind. Cas. 410; 20 C. L. J. 107 at p. 109.
(3) 14 C. 400.
(4) 23 A. 331.
(5) 21 B. 580.
(6) 5 Ind. Cas. 931; 33 M. 115; 7 M. L. T. 185.

BAL GANGADHAR TILAK *v.* SHRI SHRINIWAS PANDIT.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

March 26, 1915.

Present:—Lord Shaw, Sir George Farwell, Sir John Edge, and Mr. Ameer Ali.

BAL GANGADHAR TILAK AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SHRI SHRINIWAS PANDIT AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Adoption—Datta homam *ceremony, when unnecessary—Same* gotra, *effect of—Pleadings—Fraud, coercion, misrepresentation and undue influence should be separately and specifically pleaded—General allegations insufficient—Evidence Act (I of 1872), ss.* 33, 145, 157—*Previous statements, when and how to be used—Civil suit—Procedure—Documents to contradict witnesses—Witness to be given opportunity to explain.*

Where the child to be adopted belongs to the same *gotra* as that of the adoptive father, the celebration of the ceremony of *datta homam* is not an essential to the legal validity of an adoption, that is to say, within the same *gotra* the ceremony is unnecessary. [p. 647, col. 1.]

Valubai v. *Govind Kashinath*, 24 B. 218; 1 Bom. L. R. 770, approved.

Allegations amounting to fraud, misrepresentation, coercion and undue influence should not be mixed together, as these are all separate and separable categories in law, though it is true that they may overlap or may be combined. [p. 647, col. 2; p. 648, col. 1.]

Fraud, misrepresentation, coercion and undue influence cannot be imported into a case by suggestions but must be specifically and distinctly pleaded. [p. 648, col. 1.]

With regard to fraud if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an avermeńt of fraud of which any Court ought to take notice. [p. 648, col. 1.]

Ganga Narain Gupta v. *Tiluckram Chowdhry*, 15 I. A. 119 at p. 121; 15 C. 533; 12 Ind. Jur. 254; 5 Sar. P. C. J. 168, relied upon.

A civil cause must be conducted in the ordinary and regular way and judged of by the evidence led therein. [p. 645, col 1.]

Unless it is proved that a "witness is dead or cannot be found, etc." the evidence given by such witness in a previous judicial proceeding is irrelevant for the purpose of proving in a subsequent proceeding the truth of the fact which it states, nor can it be used for the purpose of either contradicting or discounting the evidence of the witness in the subsequent proceeding unless the particular matter or point had been placed before the witness as one for explanation in view of its discrepancy with the evidence then being tendered. [p. 645, col. 1.]

If a witness is under cross-examination, he should be given the opportunity, if any documents are to be used against him, to tender his explanation and to clear up the particular point of ambiguity or dispute. This rule must be particularly enforced where a witness's reputation and character are at stake. [p 645, col. 2.]

Appeal from a judgment and decree of the High Court, Bombay, dated September 23rd, 1910, reversing the judgment and decree of the Subordinate Judge of Poona, dated July 31st, 1906.

FACTS.—The facts of the case appear sufficiently from the judgment of their Lordships.

Sir *E. Richards, K. C.*, Sir *W. Garth* and Mr. *Parikh*, instructed by Messrs. *Downer* and *Johnson*, for the Appellants:—The High Court had held that there was no adoption, as it was brought about by undue influence and the boy not taken on the lap. The dispute was as to what constituted the proper ceremony. There was no ceremony necessary excepting putting on the lap in case of *gotras*. The appellants (Tilak and Khaparde) had nothing to gain and, therefore, the question of undue influence must fail. There was no inducement as the widow had throughout animus to adopt a son. Discussion for adoption lasted for three years and the claim of every eligible boy was duly considered from her point of view alone. She had access to them all. No issue as to coercion was raised in the lower Court. In the widow's written statement there was no mention of coercion. It was for the first time raised in the High Court, which decided against appellants on that point. There was no cross-examination on that point. The Subordinate Judge decided that adoption had taken place, but the High Court decided against us by drawing inference from documents. Nagpurkar was at the bottom of all these proceedings, but he was not called as a witness. There was a deed of giving in adoption executed by the father of the boy and a letter given to him by Tai that his son would be adopted. These documents were explicit and the natural father of the boy had no right in him. Adoption was complete in law on June 28th and now the taking of the boy on the lap was challenged. It was until July 6th that she said that she had not rather adopted another boy. It was three months after that the point that the boy was never adopted, was at all urged. On

July 29th Tai took steps to revoke the trusteeship and on August 19th adopted Bala. There were further attacks on Tilak and proceedings were taken against him for perjury. The High Court dismissed the charge.

[Sir *Robert Finlay*:—The issue is different in the present case.]

[MR. AMEER ALI:—Section 43 of the Evidence Act is against you.]

Let us see what Justice Chandavarkar said on the point. There was no cross-examination and no issues framed on the question of undue influence. The charge of fraud must be specifically proved. The testator contemplated the adoption taking place after him. He expressly laid down the adoption of a minor, so that the debt on the estate might be paid off before the boy came of age and took in hand the property. A meeting was held on the question of adoption and all the acting trustees except Nagpurkar agreed upon the course to be followed.

[LORD SHAW:—Nagpurkar was not examined at all.]

Horoscopes of all the boys were examined, but that of Pandit was the best. The pedigree showed that Pandit belonged to the same *gotra*. Mere giving and taking were sufficient and no *datta homam* was necessary. The first constituted the real legal ceremony, while the latter was a religious one which was being weakened or relaxed wherever the influence of the Brahmins was removed.

Reference was made to *Emperor* v. *Bal Gangadhar Tilak*(1); *Bayabai* v. *Bala*(2); *Abdul Hossein Zenail Abdin* v. *Charles Agnew Turner* (3); *Gunga Narain Gupta* v. *Tiluckram Chowdhry* (4); *Ranee of Chillaree* v. *Government of India* (5); *Atmaram* v. *Madho Rao* (6); *Govindayyar* v. *Dorasami* (7); sections 146 and 149 of the Civil Procedure Code of 1882; Sarkar's Hindu Law (second Edition), page 67; Colebrooke's Digest.

Sir *Robert Finlay*, *K. C.*, Messrs. *De Gruyther*, *K. C.*, *Lowndes*, *Dunne* and Dr. *Majid*, instructed by Messrs. *T. L. Wilson & Co.* and Mr. *Edward Dalgado*, for the Respondents:—*Datta homam* was essential in the case of Brahmins. This was dispensed with in case of daughter's son and brother's son being adopted. The Subordinate Judge found that adoption took place on the 27th of June. As a matter of fact no Hindu adoption could took place in a Sikh temple. There are documents to show that no giving and taking on the lap took place with the intention of adoption. Mitakshara, Dattaka Mimansa and Dattaka Chandrika clearly laid down that *datta homam* was an essential ceremony. Adoption was a religious ceremony and the effect was that the adoptee was cut off from his natural family. No amount of seculiar proceedings could produce the religious result of removing a son from his father's family. The widow alone could adopt and the result was that she became owner on the death of her son.

[LORD SHAW:—You are entitled to say that in the absence of ceremonials proof of adoption must be clearly made out.]

She became owner of the property and, therefore, she was entitled to be supported in her wishes on the question of adoption. In adoption there must be free consent on the part of the adoptor. She repudiated her choice, if it was a choice at all, the first opportunity she got. The judgment of the Madras High Court was based on Jagannath's Digest and the view of Mr. Ellis and in Bengal it had not been followed. The case in *Bhyrubnath Tye* v. *Mohesh Chunder Bhadooree* (8) followed in *Sayamalal Dutt* v. *Saudamani Dasi* (9) expressly dissented from Sir T. Strange's view. In Bombay there was no authority dispensing with the important religious ceremony of *datta homam*.

[LORD SHAW :—We would like to hear what the Counsel in support of the daughter's

(1) 28 B. 479; 6 Bom. L. R. 324; 1 Cr. L. J. 305.
(2) 7 B. H C. R. App. 1.
(3) 14 I. A. 111 at p. 125; 11 B. 620.
(4) 15 I. A. 119 at p. 121; 15 C. 533; 12 Ind. Jur. 254; 5 Sar. P. C. J. 168.
(5) 4 I. A. 209; I. A. Sup. Vol. 237.
(6) 6 A. 276; A. W. N. (1884) 28.
(7) 11 M. 5.
(8) 4 B. L. R. 162; 13 W. R. 168.
(9) 5 B. L. R. 362; 1 Ind. Jur. (N. S.) 24.

claim have to say; but their argument will leave our consideration of the main issue unaffected]

The consent of all the trustees was not obtained. Nagpurkar dissociated himself from the other trustees as soon as he discovered the way in which things were conducted. One of the trustees had refused to act. It was laid down that such an injunction must be strictly followed. The Court had the power to determine a point on appeal if evidence on the record was sufficient and the case which it was set up to support was made out in the lower Court. It was equally so if the point in dispute was covered by the issues and evidence to decide them or the point appeared in the plaint or in the pleadings.

Reference was made to *Valubai* v. *Govind Kashinath* (10); West and Buhler, (Edition 1884), pages 1082, 1132; *Singamma* v. *Vinjamuri Venkatacharlu* (11); *Ranganayakamma* v. *Alwar Setti* (12); *Govindayyar* v. *Doraisami* (7); *Atmaram* v. *Madho Rao* (6); *Moniram Kolita* v. *Keri Kolitani* (13); *Sootrugun Sutputty* v. *Sabitra Dye* (14); *Bhyrubnath Tye* v. *Mohesh Chunder Bhadooree* (8); *Sayamalal Dutt* v. *Saudamani Dasi* (9); *New Fleming Spinning and Weaving Co. Ld.* v. *Kessowji Naik* (15); Strange's Hindu Law; *Queen* v. *Paul Read* (16); *Surendro Keshub Roy* v. *Doorgasoondery Dossee* (17).

Sir *E. Richards*, in reply.

JUDGMENT.

LORD SHAW.—This is an appeal from a decree of the High Court of Judicature at Bombay, dated 23rd September 1910, which reversed the decree of the first Class Subordinate Judge at Poona, dated 31st July 1906.

The main question to be determined on the appeal has reference to the validity of the adoption by the widow of the late Shri Vasudeo Harihar Pandit, *alias* Shri Baba Maharaj, of a son to her late husband. The appellant Jagannath claims to be the duly adopted son. This claim is resisted by the defendants and forms the issue in the case.

The adoption is challenged substantially upon three grounds—*first*, that it was never completed in fact. This in argument was reduced to the proposition that the whole transaction had been left at the stage of a proposal to be afterwards carried into effect. As to the adoption itself, it is maintained that there was never a complete giving and taking of the child, and in particular he was not taken upon the lap of the adoptive mother. *Secondly*, that the religious ceremony of *datta homam*, namely, the sacrificial burning of the clarified butter in accordance with the practice of the Hindu religion, was an essential requisite, and was not performed, and that on this ground also the adoption remained inchoate.

These grounds of challenge affect the completion and formalities of the ceremony itself. The *third* ground, however, is one of general law. There are difficulties on the pleadings and arguments in placing it within any definite category, and to this allusion will afterwards be made. But it may at least be said that almost every known ground of challenge is imported into the case by suggestion. Allegations amounting to or compounded of fraud, circumvention, coercion, and undue influence are all mixed together. The disentangling of these separate and separable grounds of action must undoubtedly have caused certain difficulties in the Court below. But the challenge appeared to their Lordships to preserve even at the Bar of the Board this mixed or jumbled character.

The facts of the case, briefly stated, are these : The late Baba Maharaj was a first class Sardar of the Deccan. He died at Poona on 7th August 1897, leaving a young widow, Tai Maharaj.

At the date of his death he made a Will appointing five gentlemen as his trustees. One of these, Ranh Sahib, declined to act; the other four obtained Probate of the Will on 2nd December 1897. These were Messrs. Tilak, Khaparde and Kumbhojkar the appellants. The fourth, Mr. Nagpurkar,

(10) 24 B. 218 at pp. 220, 222; 1 Bom. L. R. 770.
(11) 4 M H. C. R. 165.
(12) 13 M. 214.
(13) 7 I. A. 115 at p. 154; 6 C. L. R. 822; 5 C. 776; 4 Sar. P. C. J. 103; 3 Suth. P. C. J. 765; 4 Ind. Jur. 363; 3 Shome L. R. 198.
(14) 2 Knapp 290; 12 E. R. 489.
(15) 9 B. 373 at p. 393.
(16) 2 Ind. Jur. (N. S.) 224 at p. 226.
(17) 19 I. A. 108 at p. 122; 19 C. 513.

while remaining a trustee, after a time dissociated himself in action from his three colleagues, and was properly convened as a defendant in the suit. The suit itself was brought in defence of the validity of the adoption (the adopted child being, of course, one of the plaintiffs), and for the administration of the estate in terms of the Will.

In the Will the clause material to the questions of adoption and succession is as follows:—

"My wife, Saubhagyavati Shri Sakvarbai, is now pregnant. If she does not give birth to a son, or if the son after birth is short-lived, then, for the purpose of continuing the name of my family with the *Vichare* of the above-mentioned gentlemen, a boy should be given, as often as may be necessary, in adoption on the lap of my wife in accordance with the *Shastras*, and the above-mentioned *Panch* should, on behalf of that son, carry on the management of the immoveable and moveable estate until he attains majority."

On 18th January 1898 the widow gave birth to a son, but he died within two months thereafter, namely, on the 9th March. The circumstances for giving effect to the testator's intentions by his widow performing an act of adoption thus arose. And it is an admitted fact in the case that for a period of over three years she and the four acting trustees made frequent inquiries and numerous efforts towards the securing of a suitable boy. The circle of relations was considerable, but for various reasons, none of which bear upon the present case, a suitable adoptee could not be found in the Kolhapur or Poona branches of her husband's family.

On the 18th June 1901 a meeting of the trustees was held, at which Tai Maharaj was present, and the facts which were otherwise spoken to by the witnesses are recorded in the minute, the substance of which was that there were no boys available in the Kolhapur family, that of all those available in the Poona family none were approved. The minute in this particular is of importance, because it shows that an anxious search had been made, that deference was paid to the wishes of the widow, and that objection is made to certain suggested adoptees on the ground of their being too old, one boy, the youngest named, of eleven years, being, however, stated to be in point of age suitable, although delicate. The minute then proceeds:—

"The only family which remains, therefore, is that descended from the brother of Shri Siddeshwar Maharaj at Babre. It is not yet known whether there is a boy or not in that family. But if there is a boy of that family, fit in point of age, etc., for adoption, it is our unanimous opinion that one should not be taken from any other family. And Shri Tai Maharaj is of the same opinion.

"Shri Tai Maharaj suggests that Messrs. Bal Gangadhar Tilak and Ganesh Shrikrishna Khaparde should both go to Babre, select boys, and return after settling as regards that family.

"Shri Tai Maharaj should go, see boys, and approve."

It should be mentioned that the trustees were, and had been since the testator's death, duly administering the testator's estate.

What followed upon the proceedings of the 18th June was that Messrs. Tilak and Khaparde accompanied the widow to Aurangabad, where the widow remained; the two trustees proceeded to Nidhone, a place near the Babre village, and selected five boys within the circle of relationship, and they came back, accompanied by their parents, to Aurangabad. The boys stayed with the widow for several days, being entertained and kept under observation. Certain astrologers, including Durga Shastri, who was one of her suite who had accompanied her to Aurangabad, cast the horoscopes of the children. These proved favourable to the appellant, Jagannath; and her personal likings appeared to point in the same direction.

All this course of conduct pointed to the entire acquiescence on the part of the widow in the testator's wishes and directions, and so far there is no substantial suggestion to the contrary. As to what happened at Aurangabad it is sufficient to say that, in their Lordships' opinion, the sworn testimony is abundant, is clear, and is overwhelming. It amounts to this. The widow's desire, the arrangement of all parties, and

the horoscopes of the astrologers all pointing in one direction, on the 27th June a meeting of the Shastris and of other persons in Aurangabad was summoned. The father of the boy being present, it was announced by the trustees that the boy had been selected. The father was taken to the widow; in pursuance of the familiar procedure she asked him to give her his boy in adoption, and he ageeed. The fact of the arrangement was announced to the assembled guests, and there and then duplicate deeds of adoption were drawn up, the one being impressed with a *Mogali*, and the other with a British stamp, and both intended to be signed and attested by the widow. This deed was in due form and bore that the father gave the son in adoption. The second document was a letter from the widow addressed to the father and agreeing to take the boy in adoption. So far as giving and receiving of the child, these documents were prepared for and pointed to actual adoption in fact.

The preparation of the documents, however, occupied time, and the hour being late the proceedings were stopped, but were resumed early next morning. A gathering was accordingly again held early on the 28th. The deeds of adoption and the letter were duly executed, the boy was given in fact by its natural father to its adopted mother, he was received in fact by her on her lap in performance of the requisite essential in this caste of Hindus on occasion of adoption and—all being completed—the formal ceremonies and festivities were postponed, to take place afterwards at Poona, and the widow left Aurangabad.

The Subordinate Judge of Poona has gone into the circumstances with the utmost minuteness and detail, and he has weighed and considered every argument presented, and he comes to the conclusion that the adoption was in fact completed. Notwithstanding the judgment of the learned Judges of the High Court of Bombay, their Lordships have no hesitation whatever in entirely agreeing with the Judge of first instance. Reference in a little time will be made to the reasons assigned by the High Court for differing from him. But in the meantime it may be said that it appears to their Lordships that, viewed as a matter of evidence, no other conclusion was possible than that come to by the Subordinate Judge.

Their Lordships do not stop to examine the oral testimony in detail. It is really all one way. Upon the crucial question of whether the boy was received by being taken on the lap of the adoptive mother there can be no doubt. Witness after witness speaks of it. It would be very strange if it had not taken place, because it is conceded that it is among the very elements of the ceremonial of adoption, and entirely familiar. It is not only that Hindus of various classes were present and saw it, but it has to be borne in mind what the nature of the challenge of the transaction now is. It has come to be one in which the trustees, men of high postition, and some of them of learning and legal training, are accused of conspiring by fraud, duress, undue influence, and nearly everything that is improper, to have procured from the widow this act of adoption. It is not to be believed that if such a scheme were afoot, if deeds had been signed, horoscopes taken, and meetings gathered, the scheme would have failed because of the omission of that which was elementary to the knowledge of everybody, namely, the taking of the child upon the mother's lap.

It must, however, be borne in mind that against a body of evidence of 10 or 12 witnesses five witnesses are produced for the defendants. It is sufficient to say of this evidence that most of it was entirely irrelevant to any issue in the case, and such of it as was not was disbelieved by the Judge of first instance, a verdict with which the High Court saw no ground for interfering.

It may be added that when the party returned to Poona, Mr. Tilak wrote out a full account of the transaction, which was recorded in the minutes, and the trustees who had not taken part in the mission to Aurangabad were communicated with, to the effect that the adoption was complete. The sworn evidence is entirely in accordance with what has now been stated. Here and there, there are expressions in the letters out of which it may with ingenuity be possible to suggest a doubtful meaning; for instance, that the words "selected" and "decided" refer to something in the future. And it is also undoubtedly true that

both the minutes of the trustees, and the letters, date the adoption as the 27th, whereas in point of fact, as has been seen, it began upon the 27th and was concluded on the 28th. But so far as oral evidence goes, their Lordships see no reason to doubt that it represented the truth, and that the fact of adoption was by it proved.

The Subordinate Judge says:

"Here there was a clear direction of the husband to this wife to adopt, the wife after his death was anxious to carry out the direction. There is no evidence to prove that any effort or cajolery was practised upon her, or that there was any suppression or concealment of facts from her; the plaintiffs had no personal interest whatever."

In another passage of his judgment he remarks:

"The evidence clearly shows, and it is undisputed, that on the 27th there was selection and verbal gift, and acceptance, and preparation of necessary documents. On the 28th there was execution of documents under corporeal acts of giving and taking."

In their Lordships' view these conclusions are well justified.

It is an admitted fact in the case that neither the trustees nor any of the witnesses for the plaintiffs had any interest whatsoever in the subject-matter of the suit, and that no motive can be reasonably suggested for them maintaining or testifying that the adoption of the boy mentioned was made, except that this represented the actual truth which occurred.

It is in these circumstances that their Lordships have viewed with surprise the charge which is made not only against the trustees, but against the whole body of the plaintiffs' witnesses, 10 or 12 persons in all.

"The account unquestionably, to my mind," says Mr. Justice Chandavarkar, "given by the witnesses appears to be a true account of many of the series of events, and a false account of at least one, and that the most important"

This event is the taking of the child on the lap. Later on in his judgment he states:

"We are driven to believe that a considerable number of men of good position have conspired together to give false evidence."

The conclusion thus made is of the most serious character, amounting to a plain judicial finding of conspiracy and of perjury.

Their Lordships will presently refer to one or two circumstances accompanying such a verdict, but meantime they will only observe that they do not think that one word of it is justified by the evidence in the case. Referring to Messrs. Tilak and Khaparde, Mr. Justice Chandavarkar observes that "they were men of mature years, of exceptional education and mental qualities, lawyers and men of affairs of great repute and good standing, and both men of dominating personality."

Some of the witnesses who gave evidence for the plaintiffs are also persons of considerable standing. It is *a priori* difficult to understand how these men, with no object to gain and no interest to serve, could be supposed to have entered into the conspiracy and committed the perjury which the High Court judgment found. Their Lordships think the conclusion come to by the learned Judges to be entirely unwarranted on the facts.

Their Lordships find themselves constrained to observe upon certain procedure in the case, the result of which was to introduce into it large masses of irrelevant matter.

It should be mentioned that, subsequent to the adoption at Aurangabad, the widow, upon returning to Poona and after having been a party to certain communications naturally following the adoption which had been made, fell under other influences, and in the month of July expressed a change of mind. And on the 19th August she went through the form of another adoption, *viz.*, of Bala Maharaj—a married man older than herself—as her son. It is unnecessary to make any observations upon his claim. The widow, who, while she was a litigant, maintained that adoption, died on 30th September 1903. Her daughter who was, on her death, admitted to the suit as defendant, challenges not only the first adoption, but the second adoption also, her interest being to maintain that the provisions of the testator's Will with regard to adoption had failed, that the widow became the owner of the estate as heiress to her infant son who died, and that the property passes in this way to her heir.

It appears that the widow and Bala Maharaj left no stone unturned in the way of litigation. In July proceedings were begun to

revoke the Probate granted to the trustees, and subsequently criminal proceedings were instituted in respect of perjury. Their Lordships regret to observe that not only are the circumstances with regard to the criminal proceedings referred to in the present litigation by the parties, but that the depositions therein become matter apparently of materiality in the judgment of the learned Judges of the High Court.

In the opinion of the Board this was an irregularity of a somewhat serious character.

They refer particularly to the depositions in the criminal case, which seem to have been imported in bulk into the present. There is a risk by such procedure of justice being perverted. A civil cause must be conducted in the ordinary and regular way, and judged of by the evidence led therein. Under section 33 of the Indian Evidence Act, 1872, evidence given by a witness in a judicial proceeding in a criminal trial is relevant for the purpose of proving in a subsequent proceeding the truth of the fact which it states, but this only as the section proceeds—

"when the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way, etc."

Not one of these circumstances was proved in the present case, and the depositions could not have been used with propriety even to support the evidence of the plaintiffs, which they apppear to have done. But there appears to have been no warrant whatsoever for using them for the purpose of either contradicting or discounting the evidence of the witnesses given in this suit, unless the particular matter or point had been placed before the witness as one for explanation, in view of its discrepancy with the evidence then being tendered. It was stated to their Lordships that the prosecution for perjury had in the end completely failed. With that their Lordships have nothing to do. The judgment now given is pronounced irrespective of the result of the criminal suit. Successful or unsuccessful, the introduction and use in this civil action of these criminal proceedings as above described were illegitimate.

A further mischance in point of procedure must now be mentioned. As already stated, the testimony of the plaintiffs' witnesses is not contradicted orally, and is internally a consistent body of evidence. But various minutes and documents are the subject of minute analysis, observation, and comment by the learned Judges of the High Court with a view to rebutting it. Their Lordships think it right to observe that in view of the serious nature of the verdict of the High Court, they have considered it within their province themselves to peruse the documents. Having done so, they are of the opinion that, taken together, they completely confirm the case made in the witness-box, and that there is no ground, in fact, for the conclusion that they either contradict the testimony or cast any reasonable doubt upon it.

But they must also record their dissent from the view that the use made of these documents in this case was justified by law. On general principles it would appear to be sound that if a witness is under cross-examination on oath he should be given the opportunity, if documents are to be used against him, to tender his explanation and to clear up the particular point of ambiguity or dispute. This is a general, salutary, and intelligible rule, and where a witness's reputation and character are at stake, the duty of enforcing this rule would appear to be singularly clear.

Fortunately the law of India pronounces no uncertain sound upon the same matter. By section 145 of the Indian Evidence Act, 1872, it is provided that—

"A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, and relevant to the matters in question without such writing, being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

Their Lordships have observed with regret and with surprise that the general principle and the specific statutory provisions have not been followed. The verdict of the High Court is an inferential verdict—nonetheless sweeping on that account—but an inferential verdict actually of perjury. What are the premises upon which this inference proceeds? In no inconsiderable degree they consist of documents, statements, even turns of expression, which are used to confound the spoken

word. Had the safeguards set up by the law with respect to the use of documents been observed? Not at all. Not only have documents been used for the purpose of contradicting witnesses without obeying the injunctions prescribed by law, but the inference thus derived, and improperly derived, from these documents has resulted, as stated, in an inferential verdict of perjury.

Heaton, J., deals elaborately with this portion of the case, and one example taken from his judgment will suffice. One letter out of many is taken, passages are cited from it, and a minute argument proceeds as to the expressions used, and why this was mentioned and that other omitted. Mr. Tilak was for five days under cross-examination before the Subordinate Judge, but not one of these things was put to him; and he was not asked in the witness-box to give one single explanation with regard to any of those expressions or omissions which are now alleged to compromise him. On this point of the case no more need be said.

One other matter of procedure may be mentioned. One of the trustees, Mr. Nagpurkar, dissociated himself from his colleagues, and in July appears to have written a minute of doubt or dissent with regard to certain proceedings. A letter from him resiling from this position is also produced.

The learned Judges have come to a conclusion which would be in some respect in accord with the so-called dissent. It is a striking circumstance that Mr. Nagpurkar, a relevant witness, intimately acquainted with what had gone on, and with the position both of the trustees and widow as regards adoption, and a party in the case aware of the charges launched against his colleagues, does not appear as a witness to explain the one or to support the other.

In the result, their Lordships are unable to agree with the view taken by the High Court on this part of the case.

The next argument is that the adoption was void because it lacked the ceremonial of *datta homam*, which ceremonial is declared to be essential to its legal validity.

Datta homam is the service of the burning of clarified butter, which is offered as a sacrifice by fire by way of religious propitiation or oblation. It is admitted that in this case the ceremony was not performed, and it seems to be fairly clear that it was one of those things which it was intended afterwards to carry out at Poona as part of the general ceremonial and festivities which were to be carried through there.

In certain circumstances the point might be the subject of a prolonged and very conflicting argument, as the authorities, ancient and modern, are not in accord on the point as to whether this is a legal as well as a religious requisite. There is a danger, on the one hand, of not paying due respect to those religious rites which are observed and followed among large classes of Indian belief, while, on the other hand, the danger must also be avoided of carrying these—except when the law is clear—into the legal sphere, so as to affect or impair personal or patrimonial rights. The subject of the requisites for adoption has, in recent years, been the matter of not infrequent consideration by this Board, and their Lordships refer, in especial, to the elaborate examinations of the authorities made by Lord Hobhouse in *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma* (18), and by Mr. Ameer Ali in *Ramchandra Martand Waikar* v. *Vinayak Venkatesh Kothekar* (19).

The former case had reference to the validity of the adoption of an only son. From the religious point of view this is, in many writings of great authority, forbidden. There was, however, in India, considerable difference in the view as to whether the religious and legal injunctions on the subject were co-extensive. It must be admitted that if one has recourse to the ancient writings when Brahminical influence was most predominant, one finds the ceremonial part of adoption the subject of highly elaborate detail; and it is beyond all question that in the course of ages many of these details have disappeared as essentials within the legal sphere. As Lord Hobhouse observes:

"The further study of the subject necessary for the decision of these appeals has still more impressed them with the necessity of great caution in interpreting books of mixed religion, morality, and law, lest foreign lawyers, accustomed to treat as law what

(18) 26 I. A. 113 at p. 126; 22 M. 398; 3 C. W. N. 427; 21 A. 460; 9 M. L. J. 67.

(19) 25 Ind. Cas. 290; 41 I. A. 30; 18 C. W. N. 1154; 27 M. L. J. 333; 1 L. W. 831; 10 N. L. R. 112; 16 M. L. T. 447; 42 C. 384; (1914) M. W. N. 835; 16 Bom. L. R. 863; 12 A. L. J. 1281; 20 C. L. J. 573.

they found in authoritative books, and to administer a fixed legal system, should too hastily take for strict law precepts which are meant to appeal to the moral sense, and should thus fetter individual judgments in private affairs, should introduce restrictions into Hindu society, and impart to it an inflexible rigidity never contemplated by the original law-givers."

The case resulted in the decision that the adoption of an only son is not null and void under the Hindu Law.

The question whether the *datta homam* is a legal requisite in Bombay for adoption among the three twice-born classes does not, however, in the view of their Lordships, broadly arise in the present case. It is in no way necessary to canvas or call in question any *dicta* upon that general point, nor does the question arise whether, for instance, the principle extends to India at large of the decision of the Madras Full Bench in *Govindayyar* v. *Doraisami*(7) or of the Madras High Court in *Singamma* v. *Venkatacharlu* (11), both decisions being of value as containing a careful study of the authorities, and affirming that the ceremony of *datta homam* is not essential to a valid adoption among Brahmins in Southern India.

For, in the opinion of the Board, the necessity does not arise where the child to be adopted belongs to the same *gotra* as that of the adoptive father. It is an admitted fact that this was so in the present case. And their Lordships have come clearly to the conclusion that where this is so in fact, then the Law of India is that the celebration of the ceremony of *datta homam* is not an essential to the legal validity of an adoption. It is conceded in argument that certain exceptions to the alleged general rule do exist, but it is maintained that these exceptions are limited to the case of the adoption of a nephew, or of a daughter's son. In decided cases this may have been the relationship in fact, but the principle of all the decisions, and in their Lordships' opinion, of all the authorities, is that within the same *gotra* the ceremony is unnecessary. They agree with what, in their opinion, is the full and careful judgment of Chief Justice Jenkins in the case of *Valubai* v. *Govind Kashinath* (10), the decision being to the effect that among Brahmins in the Presidency of Bombay, the performance of the *datta homam* ceremony is not essential to the validity of the adoption of a brother's son. An examination of the judgment shows that it was not based upon the narrow particular degree of relationship but upon the broad ground of the identity of *gotra*.

Mr. Colebrook's annotation upon *Mitakshara*, 25, is as follows:

"*Gotraja* or persons belonging to the same general family (*gotra*) distinguished by a common name, these answer nearly to the gentiles of the Roman Law."

A good illustration of the point has reference to the law applicable to the *Sudra* caste. The use of the *datta homam* is not necessary for adoption within that caste, and why? The explanation is given in a sentence by Strange in his "Hindu Law," Volume 2, in which it is laid down that—

"Ceremonial adoption cannot be necessary in the case of a Sudra, since by the *datta homam* the adopted son is offered from the stock (*gotram*) of the natural to that of his adopted father; and Sudras have no *gotra*."

It may be added that in the treatment in the same Volume, page 104, of the celebration of the *upanayana* rite, or the investiture with the sacred thread, this is laid down:

"With respect to the non-eligibility of a person for adoption on whom the *upanayana* rites have been performed, it is much disputed. The more reasonable opinion would appear to be that he is eligible if of the same *gotra* (family); non-eligible if of a different *gotra* from the adopter; that if of the same *gotra* the *datta homam*, though proper, is not necessary."

Their Lordships do not pursue the investigation of the authorities further, adopting, as they do, the survey made in the last-mentioned judgment of the learned Chief Justice Jenkins.

In their opinion accordingly this part of the respondents' case also fails.

What remains is the attack which was made upon the transaction of the adoption itself, an attack in which the various grounds of rescission applicable to contracts in general were alluded to. Their Lordships hold that it is impossible to discover what it is that is really put forward by the defendants. Under the contract law of India, as well as by ordinary principles, coercion, undue influence, fraud, and misrepresentation, are

all separate and separable categories in law. It is true that they may overlap or may be combined. But in the present case it is impossible to discover what ground or grounds are really taken up. There is a well-known rule of pleading expressed in the frequently quoted language of Lord Selborne that—

"With regard to fraud if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice."

The law of India is in no way different from this, and it has been decided over and over again, *e. g.*, in *Gunga Narain Gupta* v. *Tiluckram Chowdhry* (4).

It is, in their Lordships' opinion, much to be regretted that the rule is not more strictly observed, and their Lordships are of opinion that in the present case much confusion and contention have been caused, together with much expense to the parties, in consequence of its neglect. No definite issue upon any one of the well-known categories of attack was settled for trial, the only issue on the subject being—Whether the plaintiff, No. 4, is a validly-adopted son of Bala Maharaj. From time to time, in the course of this case, it is clear that specific pleadings in Indian procedure have been abandoned altogether. In short, several of the careful prescriptions of the law and of the Legislature, all of which were intended to bring litigation within definite compass and to make articulate and clear the points of difference between the parties, have been lost sight of. Their Lordships, however, are unwilling, confused though the charges be, to dismiss this part of the case on such a ground.

The position upon the facts was this. The Will of the testator prescribing an adoption was clear; the wish of the widow and the trustees alike to follow it was clear; the trustees, so long as the testator's wishes were carried into effect, had no interest of any kind as to who the adoptee should be. It was also clear that the testator's Will indicated that a minor should be adopted, because express provision was made for the management of the estate till that minor should come of age. It was manifest that every consideration pointed to the advantage of keeping, if possible, within the *gotra*, and it was further clear that the trustees, in advising the widow, should pay due regard to her wishes, and that, so far as this could be accomplished, they and she should act together.

It is in these circumstances a strange situation that the adoption should be challenged upon the ground, nebulously stated as it is, of fraud. There is no evidence, says the Subordinate Judge, to prove that any fraud or cajolery was practised upon her, or that there was any suppression or concealment of facts from her. With this judgment it does not appear that the High Court differs, and their Lordships entirely agree with it. It was for some reason, however, held that the general issue above quoted did include allegations of coercion and undue influence. Coercion is by admission out of the case. There was nothing of the sort; and this is not now maintained. What remains accordingly is the judgment of the High Court to this effect that—

"The question here is difficult; she was indeed willing to adopt, but was she a free agent when she adopted the fourth plaintiff, assuming that she adopted him, or was she forced into it against her will by unconscientious means used by the first two plaintiffs, that is, Messrs. Tilak and Khaparde, and unfair advantage taken by them of her ignorance and youth, and of other fiduciary relations between them."

The citation just made is from the notes of Mr. Justice Chandavarkar. With much respect to the learned Judge, it is, notwithstanding the protracted argument before their Lordships, even now somewhat difficult to gather what are the legal categories under which the attack upon this transaction is made. Unconscientious means are mentioned and unfair advantage is mentioned. It is needless to ask whether this implies fraud, because their Lordships are of opinion that no sort of unconscientious means was employed by these trustees from beginning to end of the transaction, and that no unfair advantage was either taken or meant throughout their whole course. It is true that the adoptive mother was a young widow, probably easily guided, and that the trustees are admitted to have been men of great influence and strong

personality, but their Lordships are of opinion that these were used in no respect unduly, but with propriety and entirely in the interests of the proper administration of the estate. Their Lordships cannot approve of the idea that in India the law would make the possession of reputation or high standing an element of suspicion. If it were so, then the result in India would be to import *pro tanto* a disqualification and disability into the position of reputable men.

A reference is made in the Court of Appeal to the fiduciary relations in which the trustees stood to the widow, and in one part of the judgment impropriety of conduct upon the part of the trustees is alleged to lie in this, that they failed in their duty of informing her as to her rights. Upon inquiry as to what was meant by this, their Lordships were informed that the reference was to this effect, that if the widow had failed to adopt, then by doing so she would herself have come into the position of being heiress to her infant deceased child. The meaning of this is accordingly as follows:—Among Hindus the ceremony of adoption is held to be necessary not only for the continuation of the line of the childless father, but as part of the religious means whereby a son can be provided who will make those oblations and religious sacrifices which would permit of the soul of the deceased passing from Hades into Paradise.

The widow in the present case is said to have been injured because she had not been informed that she could win for herself his temporal estate, by violation of her husband's dying wishes, and at the price of sacrificing his soul's happiness. Their Lordships are not of opinion that it was any part of the duty of the trustees to suggest this infamous alternative to her mind. Their duty was to give effect to his wishes, and his wishes were in accord with the religious belief of Hindus in regard to adoption. It is to be recorded further that the widow herself did not put forward, during her life, any plea or suggestion of this sort; she was as anxious as the trustees that an adoption should be made.

Only a word need be said as to the argument put forward on behalf of the daughter, that neither the first nor the second adoption was valid. The only separate point put forward was to the effect that the trustees' consent had not been unanimous, one trustee out of five having declined to act. In their Lordships' opinion his consent in these circumstances was not required. Of the acting trustees it was said that one, Nagpurkar, dissented. Whether he did so or not, the question would remain as to the action of the majority of the trustees; but in their Lordships' opinion that question does not arise; because he did in fact not dissent, but consent. His dissent, or alleged dissent, was subsequently made under circumstances in which it is not necessary to inquire.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, the decree of the High Court set aside, and the decree of the Subordinate Judge restored. The appellants will have their costs here and in the Courts below.

Solicitors for the Appellants: Messrs. *Downer & Johnson.*

Solicitors for the Respondents: Messrs. *T. L. Wilson & Co.* and *Edward Dalgado.*

Appeal allowed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 21 OF 1912-13 OF JAUNPUR DISTRICT.

January 23, 1914.

Present:—Mr. Baillee, S. M.

JANG BAHADUR SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Khan Sahib M. MUHAMMAD YAHIA —DEFENDANT—RESPONDENT.

*Agra Tenancy Act (II of 1901), s. 22—Zemindar's right to create subordinate rights—*Thekadar, *meaning of.*

The word "*thekadar*" in section 22 of the Tenancy Act is intended to apply not only to a lessee of proprietary rights but to any person who holds a tenure created by the act of the *zemindar*. [p. 650, col. 1].

Obiter dicta.—A *zemindar* has a right to create subordinate rights of any character he chooses, *e. g.*, to fix a rent in perpetuity or to allow succession according to Hindu Law. [p. 650, col. 1.]

Application for revision from an order of the Commissioner, Benares Division, dated 28th June 1912, confirming that of the Assistant Collector, Jaunpur District, in a case of determination of tenure.

JUDGMENT.—The present order disposes of four cases in all of which revision is asked

of orders finding that the applicants have not got the rights of fixed-rate tenants. The applicants claim that they have these rights under an agreement in Court by which the respondents agreed that they should hold *misl sharah muayin*. The finding of the lower Courts, revision of which is asked for, is that succession under the rights thus created must be regulated by section 22 of the Tenancy Act. My own opinion is strongly against the correctness of this finding. A *zemindar* has a right to create subordinate rights of any character whatever that he chooses. He has a right to fix a rent in perpetuity. He has a right to allow succession according to Hindu Law, and when the *zemindar* declared that the rights of the applicants should be those of fixed-rate tenants, in my opinion he gave them a right of succession as provided in the law for a fixed-rate tenant. Section 22 of the Tenancy Act does not apply to *thekadars* and I consider that the word *thekadar* is intended to apply in this section not only to a lessee of proprietary rights but to any person who holds a tenure created by the act of the *zemindar*. I do not consider, therefore, that section 22 applies to the applicants.

The application, however, is for revision. A decision by Mr. Justice Banerji in the High Court [*Bachchi* alias *Bachchia* v. *Bachchi* (1)] has been brought to my notice and in that case Mr. Banerji has taken precisely the same view as the Commissioner has done in this case. It is clearly impossible for me in the face of Mr. Banerji's decision, even though I disagree with it, to declare that the error of law committed was so gross and palpable as to warrant revision. I am, therefore, obliged to hold that I cannot revise the Commissioner's decision on the ground that he has misinterpreted the rights of the applicants.

Another ground for revision is urged that the Commissioner overruled the previous decision of Mr. Darrah in which he held that the applicants were fixed-rate tenants. In this matter, I think, the reasoning of the Commissioner is correct. The only question in issue before Mr. Darrah was whether the *zemindar* had a power of enhancement. He was empowered to decide that issue and that issue only and his decision is, therefore, not *res judicata* as regards the right of succession to the tenancy. For these grounds I am obliged to dismiss these applications for revision. No costs.

Application rejected.

(1) 3 A. L. J. 513; A. W. N. (1906) 219; 28 A. 747.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 541 OF 1909.

March 25, 1915.

Present:—Sir Alfred Kensington, KT., Chief Judge, and Mr. Justice Rattigan.

GOPAL SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

PRABH DIYAL SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Succession—Pagwand *or* chundawand—Malkotra Rajputs, *Una Tahsil, Hoshiarpur District—Difference between the plains and hilly districts.*

Among the *Malkotra Rajputs* of the village Panjawar of Tahsil Una in the Hoshiarpur District, the rule of succession is *chundawand*, and not *pagwand*. [p. 651, col. 1.]

In the Punjab plains the custom of *chundawand* is slowly giving place to *pagwand* even where it may have been prevalent at one time, but there is no such certainty as regards the hilly tracts of the Province. [p. 651, col. 1.]

Second appeal from a decree of the Divisional Judge, Hoshiarpur Division, dated the 13th February 1909.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Appellants.

Mr. *Tek Chand*, for the Respondents.

JUDGMENT.—The parties are the descendants of Khazana, a *Malkotra Rajput* of the village Panjawar of Tahsil Una in the Hoshiarpur District. The plaintiffs are his four sons by one wife and the defendants represent his two sons by another wife. On Khazana's death in 1906 there was a prolonged dispute in mutation proceedings over the question whether the land left by him should pass to his sons in equal shares (*pagwand*) or unequally (*chundawand*). The Revenue Assistant and the Collector eventually concurred in ordinary mutation by *chundawand* on the strength of the *riwaj-i-am* of 1869, with the result that plaintiffs became the recorded owners of half the land.

Plaintiffs assert that they are nevertheless in possession of two-thirds under the *pagwand* rule of succession, and on a further dispute in partition proceedings they were referred to the Civil Courts. They accordingly in November 1907 instituted the present suit for a declaration that they are entitled as owners to two-thirds of Khazana's estate of some 652 *kanals*.

The lower Courts have differed. The first Court dismissed the suit, but the learned Divisional Judge decreed in plaintiffs' favour, and the case is before us on further appeal by the defendants under the old Punjab Courts Act.

We have great respect for the views of the Divisional Judge on a matter of this kind, but we think that he has been misled by the general tendency of a series of rulings which are only applicable directly to the plains districts of the Province. It is doubtless correct to say that in the Punjab plains the custom of *chundawand* is slowly giving place to *pagwand*, even where it may have been prevalent at one time. We do not think that there is any such certainty as regards the hilly tracts of the Province. Mr. Lyall's Settlement Report for Kangra, quoted in *Musammat Kundo* v. *Shib Dial* (1) where this Court decided a Kangra case in favour of *chundawand*, is a notable authority to the contrary, and we can see no reason why there should be any broad distinction between the Kangra District and the adjoining Una Tahsil of Hoshiarpur.

The *riwaj-i-am* of 1869 is quite explicit in support of *chundawand* among Rajputs, and we cannot attach much importance to the fact that few instances could be quoted in proof of the reality of the custom stated so positively. It is notorious that custom changes very slowly in the hills, and we believe the real reason for paucity of instances to be connected with the peculiar conditions of life therein. Second marriages are uncommon for the reason that polyandry still prevails to a considerable extent. The question is discussed at pages 96 and 97 of Volume II of Tupper's Customary Law, and there is much force in the author's suggested explanation that *chundawand* is a relic of society which has begun to be polygamous without having entirely disused polyandry.

(1) 22 P. R. 1902; 17 P. L. R. 1902.

In the present case there is practically no proof that the *riwaj-i-am* entry is wrong or that the Revenue authorities went astray in following it. The plaintiffs' Pleader had to admit that no instance could be quoted of *pagwand* being followed among the *Malkotra Rajputs* concerned, while there is at least one genuine instance to the contrary. The plaintiffs did not start with any strong presumption in their favour and they have failed to establish anything like a conclusive case for interference with the existing entries in the record.

The appeal is accordingly accepted. The decree of the lower Appellate Court is set aside and that of the first Court dismissing plaintiffs' suit is restored with costs throughout to the defendants. Counsel's fee Rs 50.

Appeal accepted.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 5 OF 1913-14 OF BARA BANKI DISTRICT.

January 31, 1915.

Present:—Mr. Holms, S. M., and Mr. Campbell, J. M.

Thakur SITLA BUX SINGH—APPELLANT

versus

Thakur GAJRAJ SINGH—RESPONDENT.

Mutation—Oudh taluqa—*Law of primogeniture—History of estate—Will of doubtful validity—Stranger—Male collateral.*

An Oudh *taluqa* had always descended, until the death of one *S*, strictly according to the law of primogeniture, to the nearest male relative. Under a Will of *S*, at first his mother and upon his mother's death his daughter succeeded to the *taluqa*. Upon the daughter's death her husband claimed the estate under an alleged Will of his deceased wife:

Held, that having regard to the past history of the estate it should not be mutated in favour of an utter stranger on the basis of an alleged Will, until its validity was established in a Civil Court but should be mutated in favour of the nearest male collateral of *S*, who appeared to be the person best entitled to the property. [p. 652, col. 2.]

Third appeal from an order of the Commissioner, Fyzabad Division, dated 10th March 1914, confirming that of the Collector, Bara Banki District, who reversed the order

of the Assistant Collector of Bara Banki, in a case of mutation of names.

JUDGMENT.

CAMPBELL, J. M.—(*January 11th*, 1915.)—I am unable to agree with the Commissioner's decision in this case. The dispute cannot be decided upon the basis of possession, as the estate is held by the Deputy Commissioner. It is, therefore, necessary to decide under section 40(*b*) by summary inquiry who is the person best entitled to the property. The property in dispute is an Oudh *taluqa*, which until the death of Sher Bahadur Singh had always descended strictly according to the laws of primogeniture to the nearest male relative. Sher Bahadur Singh died without any direct male descendant, and consequently made a Will leaving the property in turn to

(*a*) His wife, who pre-deceased him;
(*b*) his mother, *Mus:mmat* Dilraj Kuar, and
(*c*) his two daughters, with only one of whom, *Musammat* Sheoraj Kuar, we are now concerned.

It is quite clear, from the wording of Sher Bahadur Singh's Will, that he was most anxious that the property should not go out of his family, though he gave preference to his own female relatives rather than to male collaterals. His mother, *Musammat* Dilraj Kuar, succeeded to the property on Sher Bahadur Singh's death; and on her death she left it by Will to *Musammat* Sheoraj Kuar, Sher Bahadur Singh's surviving daughter. This lady held the property, and has now died, leaving no issue. Her husband, however, claims the property on the basis of a Will, said to have been executed in his favour by his wife. While *Musammat* Sheoraj Kuar was still alive, civil suits were instituted against her by Sitla Bux Singh (the present appellant) and Kirat Singh, who claimed the *taluqa* as the nearest male relatives of Sher Bahadur Singh, and who asserted that *Musammat* Sheoraj's title to the property was invalid, whether as daughter of Sher Bahadur Singh or as legatee of *Musammat* Dilraj Kuar.

These suits had not been decided when *Musammat* Sheoraj Kuar died. None was substituted as defendant in her place. Gajraj Singh (the present respondent) took no action, though he claims to be his wife's heir. And there were obvious reasons why plaintiffs should not cite him as the lady's heir and thereby confer on him a title which they were anxious to dispute.

The suit was decided by the learned Subordinate Court, but his judgment does not, of course, act as *res judicata* against Gajraj Singh.

It does, however, decide as between Sitla Bux Singh and Kirat Singh that the former is the nearest male collateral relative of Sher Bahadur Singh.

I think I am also justified in deducing from the Subordinate Judge's decision that there are very serious doubts as to the validity of *Musammat* Dilraj Kuar's and *Musammat* Sheoraj Kuar's Wills, which form the basis of Gajraj Singh's claim to the property.

The Commissioner has ordered mutation in Gajraj Singh's favour upon the basis of these Wills. But this means that the *taluqa* will pass to an entirely new family: and considering the history of the estate I do not think that this should be allowed, until the claimant has established his title in the Civil Courts. I think that *prima facie* the nearest male relative of Sher Bahadur Singh has a much stronger title.

I would, therefore, set aside the Commissioner's order and restore the order of the Court of first instance, leaving each party to bear their own costs. I pass no orders as to the handing over of possession of the property until the record has been considered by the Senior Member.

HOLMS, S. M.—The case turns to a great extent on the point of view, adopted as to *Musammat* Dilraj Kuar's Will, whether it should be treated as valid until impugned in the Civil Court by a suit to which Gajraj Singh is a party or whether there are sufficient reasons to treat it as invalid for the purposes of this mutation case. In view of the history of the estate I am not prepared to dissent from the view taken by my colleague and I agree to the order proposed to be passed.

Appeal allowed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 14 OF 1914-15 OF RAI BARELI DISTRICT.

February 21, 1915.

Present:—Mr. Holms, S. M., and Mr. Campbell, J. M.

RAM DIAL—DEFENDANT—APPELLANT

versus

Thakur BISHNATH SINGH—PLAINTIFF—RESPONDENT.

Oudh Rent Act (XXII of 1886), s. 5—'Qabzadari', *meaning of—Right of occupancy.*

The word "*qabzadari*" in a decree made at the last Settlement is not to be invariably construed to mean *right of occupancy.* The meaning to be attached to the term must be ascertained from a careful consideration of the claim made before, and the judgment recorded by the Settlement Officer.

Where, therefore, the Settlement Officer's finding was that the appellant's ancestors were never the proprietors of the village but had been treated as proprietors on the strength of many years' possession of the village as lessees:

Held, that the appellant could not be deemed to possess a right of occupancy under section 5 of Oudh Rent Act.

Second appeal from an order of the Commissioner, Lucknow Division, dated the 4th September 1914, confirming that of the Assistant Collector of Rai Bareli District, in a case of enhancement of rent.

JUDGMENT.

CAMPBELL, J. M.—(*February 6th*, 1915.)—The only point raised on behalf of appellant is that he is not an occupancy tenant as defined in section 5, Oudh Rent Act, and that, therefore, his rent cannot be enhanced under section 33. The lower Courts have found that he is an occupancy tenant; but in this I am afraid I am unable to agree with them.

Appellant holds his land under a Settlement Order of August 31st, 1870, by which he (and others) were decreed "*kabzadari dawami kabil wirasat na-kabil intikkal*". But the word "*kabzadari*" was so loosely used at that time that [as laid down in *Baldeo Bakhsh Singh* v. *Chaudhrain Sahib-un-nissa* (1)] it is necessary to examine the Settlement Officer's order to ascertain whether there is any reason to believe that the word "*kabzadari*" was not intended to mean occupancy rights.

When we do so, we find that the Settlement Officer's finding is that appellant's ancestors were never the proprietors of the village. Consequently they could not be deemed to possess a right of occupancy under section 5, Oudh Rent Act.

(1) Selected Decision No. 11 of 1912.

The Settlement Officer, however, goes on to say that appellant's ancestors had been treated as proprietors, on the strength of many years' possession of the village as lessees. He, therefore, treated them as *quasi*-proprietors (as an act of grace) and gave them "*kabzadari dawami*" in the land actually in their cultivation. We are thus faced with the anamolous position that appellant has not a stronger, but a weaker, status than the occupancy tenant, as defined in the Act: and yet he is in a far stronger position in reality than the latter, for on a strict interpretation of the law he cannot have his rent enhanced under section 33, but can only have it enhanced at the time of Settlement under section 79, Revenue Act, as the holder of a heritable, non-transferable lease holding under a judicial decision.

For the above reasons I see no option but to set aside the orders of the lower Courts, and to dismiss respondent's suit. I would make parties bear their own costs.

HOLMS, S. M.—I agree.

Appeal allowed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 9 OF 1914-15 OF SULTANPUR DISTRICT.

March 18, 1915.

Present:—Mr. Holms, S. M., and Mr. Campbell, J. M.

BABOO RAM TEWARI—APPELLANT

versus

Raja BHAGWAN BUX SINGH—RESPONDENT.

Oudh Rent Act (XXII of 1886), *s. 5, occupancy rights, claim of, under—Proprietary rights—Inconsistent claims—Relinquishment of under-proprietary rights, effect of—Portion added to holding not insignificant part of holding, effect of.*

Occupancy rights cannot be decreed under section 5 of the Oudh Rent Act in favour of persons in whose favour is also decreed a *prima facie* claim to under-proprietary rights. [p. 654, col. 1.]

The mere fact that sub-settlement was refused with the ancestors of the appellants, does not affect their under-proprietary rights in the land held as

sir or *nankar* but if they made a petition relinquishing all claims to the village and to *sir* and *nankar* the petition is fatal to the appellants' claim as under-proprietors but it cannot affect their claim to occupancy rights in land in which those rights have been established. [p. 654, cols. 1 & 2.]

Selected Decision No. 2 of 1912 does not apply to cases where the portion added to a holding is not an insignificant part of the total, and when there is nothing to show that there has not been any alteration in the rent after it came under cultivation. [p. 654, col. 2.]

Second appeal from an order of the Commissioner, Fyzabad Division, dated the 2nd September 1914, in a case of ejectment.

JUDGMENT.

HOLMS, S. M.—(*March 8th*, 1915.)—The Assistant Collector has certainly gone wrong in neglecting the proviso to section 5 of the Rent Act and decreeing rights of occupancy when he also decrees a *prima facie* claim to under-proprietary rights. I cannot accept the Commissioner's view of the decision of 20th January 1866. Mr. H. S. Reid, the then Commissioner, found that the respondents in the appeal before him, the ancestors of the present appellant, were the old *zemindars*, but their tenure of a lease continuously under the Raja during the twelve years which preceded annexation was not proved: that is to say, the lands were not held "with some degree of continuousness" under rules 2 and 3 of the Oudh Sub-Settlement Act, 1866. He, therefore, refused sub-settlement. There was no reason, however, why under-proprietary rights in the land held by the former proprietors as *sir* or *nankar* under rule 10 should be affected by this decision. I am inclined, however, to agree with the Commissioner that the petition dated 31st January 1867, relinquishing all claims to the village and to *sir* and *nankar*, is fatal to the appellant's claim to hold as under-proprietor. Objection is taken to the admissibility of this in evidence, because it is alleged it should have been stamped as a conveyance under the former Stamp Act, III of 1862. This objection is not taken clearly in the grounds of appeal before me, and evidently was not raised before either of the lower Courts or it would have been mentioned in their judgment. The document appears to me to be of the nature of a release rather than that of conveyance and put forward at the time it is, I do not think the objection can have weight. As I have said above, I cannot accept the Commissioner's view that the effect of the petition is to show that the petitioner never possessed a proprietary right in the land in suit. All that he gave up was his claim to the village and to *sir* and *nankar*. There is no reason why it should affect his claim to occupancy rights, which from the Commissioner's judgment of 1866 seem to be established with regard to the lands which were cultivated or held by the appellant's predecessors from the time of the first Regular Settlement. Appellant urges that to the list of these lands should be added a number of plots which were shown as *Usar* at the first Regular Settlement. They constitute a considerable portion of the 27 *bighas*, and he argues that, under Selected Decision No. 2 of 1912, they should be treated as an integral part of the occupancy holding. The facts are very different. They are not an insignificant part of the total, and there is nothing to show that there has not been any alteration in the rent after they came under cultivation. He further argues that as plots Nos. 258 and 259 were cultivated at the time of the first Regular Settlement by Sheobhikh Dube, who was also a former *zemindar*, the appellant has occupancy rights in them. He urges that he obtained them by transfer from Sheobhikh; but of this there is no evidence.

I would, therefore, set aside the orders of the lower Courts and decree the suit and cancel the notice of ejectment in the following plots, in which occupancy rights under section 5 have been established:—

Numbers 17, 133, 276, 284, 19, 20, 23/1 and 23/2, 26/4, 24, 115/1 and 115/2, 134 and 552, and dismiss the suit in respect of the remaining plots. As neither party is wholly successful, they will bear their own costs throughout.

CAMPBELL, J. M.—I agree.

Appeal partly accepted.

SHAMIR KHAN v. GHULAM FATIMA.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 651 OF 1913.

February 9, 1915.

Present:—Justice Sir Donald Johnstone, KT.

SHAMIR KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat GHULAM FATIMA AND OTHERS—DEFENDANTS—RESPONDENTS.

Jurisdiction—Civil or Revenue Court—Suit for joint possession—Shamilat *land*—Muafi—Ala lambardar—*Occupancy rights not in question—Pleadings—Adverse possession and tenancy inconsistent.*

A suit for joint possession of *shamilat* land made over to the defendant as *ala lambardar* and in *muafi*, the *ala lambardari* and *muafi* having come to an end without touching the question of defendant's title to occupancy rights, is cognisable by the Civil Courts. [p. 655, col. 2.]

Hira Singh v. *Gurmukh Singh*, 101 P. R. 1901 (F. B.); 15 P. L. R. 1901, distinguished.

All questions of title to occupancy rights in the land are quite outside the case so framed. [p. 655, col. 2.]

A man cannot be allowed to plead in the same case that he is an owner by adverse possession against a plaintiff and that he is a tenant by contract under that plaintiff. [p. 655, col. 2; p. 656, col. 1.]

Second appeal from an order of the Divisional Judge, Gujranwala Division, dated the 12th January 1913.

Messrs. *Gokal Chand Narang* and *Deo Raj Sawhny*, for the Appellants.

Mr. *Noor-ud-Din*, for the Respondents.

JUDGMENT.—Briefly stated the history of this case is as follows: The plaintiffs claimed in Revenue Court partition of a certain area of *shamilat*.—That Court, observing that plaintiffs were not in possession, ruled that the plaintiffs must go to a Civil Court and obtain possession before they could ask a Revenue Court to effect the partition. Plaintiffs, therefore, brought the present suit in the Court of the Munsif, Gujranwala, for "possession by partition" of 120 *kanals* of land, the plaintiffs' share out of 581 *kanals*, etc., etc. The Munsif, after framing issues, gave plaintiffs a decree for joint possession to the extent of 120 *kanals* out of 581 *kanals*. He went on to note that partition could not be effected by a Civil Court, which was quite correct. Two of the defendants, however, Sarang Khan and Shahabal Khan, who were in actual possession of the greater part of the land in suit, appealed to the Divisional Judge, who accepted the appeal and returned the plaint to the plaintiffs for presentation in the Court of the Collector or an Assistant Collector of the first grade, on the ground that the suit was not one cognisable by a Civil Court. The plaintiffs have now come up to this Court with this appeal.

In my opinion the lower Appellate Court has wholy misunderstood the nature of this litigation. The order of the Revenue Court to the plaintiffs was an inconvenient order, to say the least of it. It would have been better if the Revenue Court had directed the plaintiffs to sue for a declaration of title and not for possession, and if it had done so, much trouble would have been avoided. The plaintiffs were misled by it into suing for possession by partition, but the Munsif quite fairly avoided the difficulty by giving a decree for *joint* possession, on the basis of which the plaintiffs could proceed to the Revenue Court, and ask for partition.

Mr. Agnew in his judgment purports to follow *Hira Singh* v. *Gurmukh Singh* (1), but he overlooks the fact that that case is quite different from the present one. No doubt in both cases it was a question of land made over to an individual as *ala lambardar* and in *muafi*, the *ala lambardari* and *muafi* afterwards coming to an end. But here the similarity of the two cases ends. In the case in the *Punjab Record* the plaintiff sued for *dispossession* of the defendant, not for joint possession, and, as the defendant pleaded that he was a tenant and it was apparently obvious from the plaint itself that he *had been* a tenant, it was natural for the Court to hold that the suit was one for a Revenue Court, and not for a Civil Court.

But here the plaintiffs by their suit do not wish to disturb any occupancy rights. They only wish for a formal decree for joint possession as owners along with the defendants, that is to say, something hardly distinguishable from a mere declaration of title. All questions of title to occupancy rights in portions of the land seem to me to be quite outside the present case.

Again, a fatal objection to the defendants being allowed to plead their occupancy rights in the present suit is this, that their original defence was that they held adverse possession as owners, and it is obviously impossible to allow a man to plead in the same case that he

(1) 101 P. R. 1901 (F. B); 15 P. L. R. 1901.

is an owner by adverse possession against a plaintiff and that he is a tenant by contract under the plaintiff.

Mr. Agnew also takes exception to the Munsif's order that on partition a portion of land which was planted with trees should be allotted to the defendant who planted the trees. This, no doubt, is correct; but it is a minor matter and I must, therefore, accept this appeal, set aside the order of the learned Divisional Judge and direct him to re-hear the appeal with reference to the above remarks. Stamp in this appeal will be refunded and other costs will be costs in the case.

Appeal accepted.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 3 OF 1913-1914 OF BANDA DISTRICT.

February 26, 1915.

Present:—Mr. Holms, S. M.

YUSUFUZZAMAN—PLAINTIFF—APPELLANT

versus

BODHAN—DEFENDANT—RESPONDENT.

Estoppel—Agreement not to eject tenant so long as rent was duly paid—Such agreement whether to be in writing.

A *zemindar* agreed not to eject his tenant so long as he paid rent in consideration of the receipt of the large amount of arrears due from a previous tenant:

Held, that the *zemindar* was estopped from ejecting the tenant so long as he paid rent.

That there was no reason for holding that such an agreement should be in writing.

Second appeal from an order of the Commissioner, Jhansi Division, dated the 25th March 1914, reversing that of the Assistant Collector, Banda District, in a case of ejectment.

JUDGMENT.—The Commissioner has found, as a matter of fact, that the appellant agreed not to eject the respondent so long as he paid rent, in consideration of the receipt of the large amount of arrears due from a previous tenant, and it is not alleged that there is no evidence to support this finding. This being so, I think that the conclusion come to is perfectly correct, that the appellant is estopped from ejecting the tenant so long as he pays the present rent or possibly an enhanced rent in the future. It is urged that such an agreement must be in writing, but no reason is given for this contention.

Appeal dismissed with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 168 OF 1914-15 OF SULTANPUR DISTRICT.

March 16, 1915.

Present:—Mr. Baillie, S. M.

UDIT MISIR—DEFENDANT—APPELLANT

versus

Raja MUHAMMAD MEHDI ALI KHAN—PLAINTIFF—RESPONDENT.

Oudh Rent Act (XXII of 1886), s. 55—Notice of ejectment—Proper rent not specified—Court-fee paid sufficient—Land from which ejectment sought, not specified—Notice, if defective.

Where a notice of ejectment issued under section 55, Oudh Rent Act, 1886, did not specify the proper rent payable for the holding, but the Court-fee paid in respect thereof was sufficient to cover the proper and actual rent:

Held, that the notice was not defective, inasmuch as section 55 only requires that the notice shall specify the land from which the tenant is to be ejected.

Second appeal from an order of the Additional Commissioner of Fyzabad Division, dated 12th November 1914, reversing that of the Collector of the Shahpur District in a case of ejectment.

JUDGMENT.—The only point raised in appeal is that the proper rent was not specified in the notice. However, the Court-fee was more than adequate to cover the rent which had been agreed on, and section 55 only says that the notice shall specify the land from which the tenant is to be ejected.

Appeal dismissed with costs.

Appeal dismissed

PUBLIC PROSECUTOR *v.* NARAYANA NAYUDU.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 649 OF 1914.

April 20, 1915.

Present:—Mr. Justice Kumaraswami Sastri.

THE PUBLIC PROSECUTOR—APPELLANT

versus

NARAYANA NAYUDU *alias* NARAYANASWAMI NAIDU AND ANOTHER—ACCUSED NOS. 1 AND 2.

Criminal Procedure Code (Act V of 1898), s. 423 (1)—Jurisdiction—Acquittal—Appeal—High Court, power of, to interfere—Grounds of interference.

In appeals against acquittals the High Court ought not to interfere unless the trying Judge was clearly wrong and the judgment is either perverse or based on obvious error of procedure. [p. 658, col. 2]

Appeal, under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid accused by the Sub-Divisional first Class Magistrate of Coimbatore Division in Calendar Case No. 38 of 1914.

Mr. *P. R. Grant*, for the Crown.

Messrs. *L. A. Govindaraghava Aiyar* and *G. S. Ramachandra Aiyar*, for the Accused.

JUDGMENT.—This is an appeal preferred against the acquittal of accused Nos. 1 and 2, who were charged with offences under section 326, Indian Penal Code.

The case for the prosecution is that there were disputes between the 1st and 2nd accused and P. W. No. 7, who is the brother of P. W. No. 1, in respect of the affairs of a certain fund and that on the night of 15th May 1914 the two accused and two others, who were discharged by the Magistrate without a charge being framed, caused grievous hurt to P. W. Nos. 1 and 2. It is alleged that there was a meeting of the share-holders of the fund on the day in question, that it was proposed that the first accused and P. W. No. 7 should be removed from the office and P. W. Nos. 1 and 2 should be appointed, that 1st and 2nd accused did not consent to this and the meeting broke up, that on the same night, as P. W. No. 7 was returning at about 11 P. M., he was waylaid by the accused, that P. W. No. 1, who is the brother of P. W. No. 7 turned up and that the accused attacked him and also P. W. No. 2 when he came to the scene.

The Magistrate discharged accused Nos. 3 and 4 without framing a charge against them, and it is not alleged before me that the discharge is erroneous. On the contrary it is conceded that on the evidence they could not be held guilty of any offence.

The Magistrate acquitted the 1st and 2nd accused, mainly on the ground that in the telegram sent by P. W. No. 7 on the night of the occurrence no mention is made of the 1st and 2nd accused and that P. W. Nos. 3 and 7 fabricated Exhibit I for the purpose of implicating the two accused. It seems to me that, if these findings are correct, the Magistrate was justified in refusing to place any reliance upon the prosecution witnesses. Exhibit II is a telegram admittedly sent on the night of the occurrence by P. W. No. 7, and it is not disputed that when he sent the telegram he was aware of all the facts and that, if the prosecution evidence is true, he must have been aware of the fact that 1st and 2nd accused were the assailants. The telegram, Exhibit II, sent to the Superintendent of Police, Coimbatore, runs as follows: "Two persons mortally wounded expiring, outrage committed by neigbours. Pray immediate attention with medical officer. Copy Sub-Magistrate Coimbatore and Sub-Inspector Metlupalayam."

The evidence of the prosecution is that P. W. No. 1 went to the Railway station at Periayanayakkanpalayam to give the message that, as he did not know English, he gave Exhibit I to the Court witnesses Nos. 1 and 2, who were Railway Officials at the station, and that Exhibit II, which was an abridgement of Exhibit I, was sent as P. W. No. 7 had not sufficient money to pay for all the words which Exhibit I contained. Exhibit I contains the names of the four accused who were charged in this case as being the assailants of P. W. Nos. 1 and 2. As pointed out by the Magistrate it is difficult to believe that with Exhibit I before them the persons sending the telegram would have sent it in the terms of Exhibit II. The whole case for the prosecution on this part of the subject has been considered very carefully and in detail by the first class Magistrate and I have no hesitation in coming to the conclusion that it is difficult to reconcile the contradictory statements made by Court witnesses Nos. 1 and 2 and P. W. Nos. 3 and 7 as to the circumstances under which Exhibit I was executed. One significant fact is that Exhibit I which ought to have been sent to the head office along with the message, if the

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Statement of Court witnesses Nos. 1 and 2 is to be believed, is said to have remained in the station and is produced from Periayanayakkanpalayam station. I agree with the Magistrate in thinking that the probabilities are all against Exhibit I being the original statement given by P. W. No. 7 on the night of the occurrence and that very probably it was subsequently written and filed in the station for the purpose of lending colour to the prosecution story and for explaining away the fact that no names were mentioned in the telegram sent on the very night of the occurrence.

Mr. Grant argues that it may well be that the Court witnesses Nos. 1 and 2, who got Exhibit I from P. W. No. 7 who did not know English and also received from him Rs. 19-8-0 to send the telegram, Exhibit II, used the minimun number of words possible for the purpose of misappropriating a portion of the money. The force of the argument is entirely lost when it is remembered that the receipt (Exhibit D) for Rs. 19-8-0, the money actually paid by P. W. No. 7, was given that very night and the money was sent to the head office as usual. It also appears from the evidence that the sum of Rs. 19-8-0 sent to the head office was in excess of the number of words contained in the telegram (Exhibit II) and that the head office asked for an explanation from the Court witnesses Nos. 1 and 2 as to why a larger amount was levied. It is, therefore, clear, that no motive can be attributed to Court witnesses Nos. 1 and 2 for having abridged the telegram if, as a matter of fact, Exhibit I was the original from which the telegram (Exhibit II) was written. Except the desire to misappropriate a portion of the money, no other motive is attributed to Court witnesses Nos. 1 and 2 for having sent Exhibit II without any reference to the name of the assailant, and, if this falls to the ground, it is difficult to conceive why Exhibit II was sent without mentioning any names, if, as a matter of fact, Exhibit I contained all the names of the assailants. The only reasonable explanation is that Exhibit I was not the statement as originally given. If this were so, the evidence of P. W. Nos. 3 and 7, who are said to have attested and signed Exhibit I, is open to grave suspicion. It is pretty certain that the prosecution witnesses have not scrupled to introduce a false document for the purpose of gaining a conviction. Under these circumstances I am of opinion that the Magistrate was justified in treating the evidence of the prosecution with great suspicion. There can be no doubt that P. W. Nos. 1 and 2 received serious injuries but the question is, who were the assailants. It is admitted that the assault was committed at 11 o'clock on a dark night and the whole question turns upon the identity of the assailants. It is argued by Mr. Grant that the admitted fact that there were quarrels between the parties as regards the affairs of the *nidhi*, goes a long way to show that the accused must have committed the offence, while on the contrary it is argued by the Vakil for the accused that the fact of ill-feeling between the parties accounts for the false charge being brought against them. In cases of this kind the difficulty is that very often the fact that a crime has been committed is used as a convenient peg whereon to hang a false charge against one's enemies, and I am not prepared to hold that because there were disputes between the parties the inference is irresistible that the accused were the assailants. The principles which ought to guide the Courts in case of appeals against acquittals have been considered by Justices Spencer and Seshagiri Aiyar in Criminal Appeal No. 317 of 1914, and I agree with them in thinking that the Court ought not to interfere with an acquittal by a Magistrate who had the witnesses before him and arrived at conclusions of fact with this great advantage in his favour, unless the Judge was clearly wrong and the judgment either perverse or based on obvious error of procedure.

I have gone through the evidence carefully and giving the case my best consideration, I cannot say that the acquittal was not justified by the evidence on record.

I dismiss the appeal.

Appeal dismissed.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION PETITION No. 7 OF 1915.

March 9, 1915.

Present:—Mr. Saunders, A. J. C.

HASAN CHANEA—APPLICANT

versus

MI SIN—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 488, 489—Application by husband to cancel order of maintenance—Plea of divorce—Duty of Magistrate—Person of full age, whether can be presumed to act under influence of relations.

Where a husband applies for the cancellation of an order of maintenance passed in favour of his wife on the ground that he has been divorced from her, it is the duty of the Magistrate to entertain such plea and give it consideration. [p. 659, col. 2.]

Shah Abu Ilyas v. *Ulfat Bibi*, 19 A. 50; A. W. N. (1896) 173, followed.

Muhammadan Law does not give a wife any authority, except possibly in accordance with a contract entered into at the time of the marriage, to prevent her husband divorcing her by the pronouncing of *talak*. [p. 660, col. 1.]

Asha Bibi v. *Kadir Ibrahim Rowther*, 3 Ind. Cas. 730; 33 M. 22; 6 M. L. T. 285; 20 M. L. J. 1, referred to.

A person who is of age cannot be presumed to be acting under the influence or compulsion of his relations with whom he is living in the absence of any evidence. [p. 659, col. 2.]

Mr. *S. Mukerjee*, for the Applicant.

Mr. *A. C. Mukerjee*, for the Respondent.

JUDGMENT.—The applicant, having been required by an order under section 488 of the Code of the Criminal Procedure to pay Rs. 25 monthly by way of maintenance to the respondent who was his wife, applied to the Magistrate to cancel the order on the ground that he had been divorced from her. The Magistrate held that the divorce had not been shown to be duly effected, and declined to cancel the order. The applicant now comes to this Court in revision.

The application purports to be made under section 489 of the Code of Criminal Procedure. It is suggested that that section has no application, since the change of circumstances referred to in it is a change in the financial circumstances of the parties and not in their status. This appears to have been the view held in *In the matter of the petition of Din Muhammad* (1), but it was held by a majority of the Judges in the Full Bench case of *Shah Abu Ilyas* v. *Ulfat Bibi* (2), that where a husband contended that he was no longer liable to pay maintenance on the ground that he had divorced his wife, it was the duty of the Court to entertain and consider such plea, and whatever may be the exact meaning of the words of sections 488, 489 and 490 of the Code of Criminal Procedure, it appears clear that this is the case.

In *Ma Tin* v. *Maung An Gyi* (3), it was pointed out that where a wife who had obtained an order for maintenence returned and lived with her husband, the effect was to cancel the order for maintenance with effect from the date of her return, and it appears to be obvious that where the husband alleges that he is no longer liable to pay maintenance, he is entitled to have his allegation enquired into. This is not a matter for a Civil Court as the Magistrate apparently was inclind to hold: where a divorce is alleged and denied, it is the duty of the Magistrate to hold an inquiry and come to a decision. Here the applicant, who is a Muhammadan and who claims to be a member of the *Hanafi* sect, states that he has divorced his wife by pronouncing *talak* three times.

The Magistrate has held that only one witness deposes that the applicant is a *Hanafi Sunni*, and that although he states he is not under the influence of his uncle, the latter is living with him in the same house. The significance of this last remark is not clear without a reference to the previous proceedings in which the applicant sought to show that he had divorced the respondent, and in which it was found that he was a minor and was acting under the influence of his uncle. In the present proceedings, the applicant has given his age as 21; there appears to be no reason for doubting the truth of this statement, which was not contradicted. It is true that he is living with his uncle, but his uncle was away at the time that the application was filed, and there is no evidence that he was acting under compulsion from his uncle. A person who is of age cannot be presumed to be acting under the influence or compulsion of his relations with whom he is living in the absence of any evidence, and the mere statement of the respondent that he was induced by his uncle to divorce her is not sufficient proof.

(1) 5 A. 226.

(2) 19 A. 50; A. W. N. (1896) 173.

(3) U. B. R. (1904) 2nd Qr., Crl. Pro. Code p. 23; 1 Cr. L. J. 870.

Whether the applicant is a *Hanafi Sunni* or not, appears to be only material if compulsion has been proved or if the divorce was communicated to the respondent by a third party. There is evidence that the applicant drew up a deed of divorce in which the *talak* was pronounced and sent it by the witness Ismail to the respondent who refused to listen to it. He also sent her a post card on which the words "*talak*" were written in Burmese in red ink, but the respondent refused to accept it. But besides this, it is proved that during the course of the proceedings while the respondent was in the court-house, the applicant pronounced the *talak* in her hearing three times, and he repeated the word again in her presence in Court. There is no doubt that his intention to divorce her has existed for some time and has been deliberate, and apart from any other evidence the pronouncement of the *talak* in the Court was a sufficient divorce. Muhammadan Law does not give a wife any authority, except possibly in accordance with a contract entered into at the time of the marriage, to prevent her husband divorcing her by the pronouncing of *talak*. The law in the case of Muhammadans belonging to the *Hanafi* sect is clearly stated in the case of *Asha Bibi* v. *Kadir Ibrahim Rowther* (4).

In the absence of any rebutting evidence, I am of opinion that the Magistrate was not justified in holding that the applicant was not entitled to divorce the respondent in accordance with the *Hanafi* Law, that in accordance with either the *Hanafi* Law or the Muhammadan Law applying generally to *Sunnis* the divorce has been clearly proved and that the respondent is not entitled to further maintenance with effect from the 23rd November 1914, the date on which the applicant pronounced the divorce in Court.

Revision allowed.

(4) 3 Ind. Cas. 730; 33 M. 22; 6 M. L. T. 295; 20 M. L. J. 1.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION PETITION NO. 304 OF 1914.

January 21, 1915.

Present:—Sir Henry Drake-Brockman, KT., J. C.

ABDUL SATTAR—APPLICANT

versus

THE SECRETARY, MUNICIPAL COMMITTEE, NAGPUR—OPPOSITE PARTY.

Central Provinces Municipal Act (XVIII of 1889), s. 66 (5)—Notice requiring alteration or demolition—Reasonable time—Starting point.

A notice given by a Municipal Committee requiring a party to alter or demolish a building is bad unless given within a reasonable time. [p. 661, col. 2.]

What is "reasonable time" is determined according to the circumstances of the case and with particular reference to the means and ability of the person by whom the duty is to be discharged. [p. 662, col. 1.]

Where a work necessarily spreading over a considerable time is concerned, time should start from its inception. [p. 662, col. 1.]

Criminal revision against an order of the Assistant Commissioner and Magistrate, first Class, Nagpur, dated the 21st September 1914.

Mr. *P. S. Kotwal*, for the Applicant.

Mr. *V. D. Kale*, for the Opposite Party.

JUDGMENT.—The applicant for revision has been summarily tried and fined Rs. 50 under section 139, Central Provinces Municipal Act, for failing to demolish a house as directed by a notice issued under section 66 (5) *ibid.*

The structure in question has taken the place of a house which the applicant pulled down in compliance with a notice issued by the Building Sub-Committee of the Municipal Committee, Nagpur, on the 28th May 1913. The old house was in a dangerous state and action under section 92 of the Municipal Act was taken in respect of it. The applicant began to erect the new superstructure on the existing foundations in December 1913 or January 1914, but omitted to give notice of his intention to do so as required by section 66 (1) of the Act. He was accordingly served on the 6th May 1914 with a notice directing him to remove all the work he had done within four days. This is the notice which he has been fined for disobeying and it was signed by the appropriate authority on the 29th April.

On the 11th May the applicant addressed to the Secretary of the Municipal Committee a petition, which forms Exhibit P-I of the trying Magistrate's record. In this document he represented that no new foundations had been laid and that the work was "almost complete." He also prayed that the house might be inspected and undertook to "comply as far as possible" with any instructions that might be considered necessary. The reply (Exhibit P-III), dated the 18th July, was that the applicant, having failed to give the prescribed notice of his intention to build, must demolish the house as already ordered, on pain of prosecution.

The trial which resulted from the applicant's continued failure to pull down his new superstructure began on the 21st September. He was defended by a Pleader, and the plea advanced in reply to the statement made by the Magistrate under section 242, Criminal Procedure Code, is thus recorded:—

"I ought to have got the notice while the house was in course of construction. I got the notice (Exhibit P-I). The signature on it is mine. I did not pull down the house as ordered. I had no permission. I believed as the foundations were old that no permission was necessary."

The Magistrate held that section 66 (5) of the Municipal Act covers a case of raising a new superstructure on old foundations and convicted the applicant,

The *first* point pressed on this Court is that the Committee was bound by section 66 (5) to give notice to demolish within a reasonable time from the commencement of the new superstructure, and also to prove at the trial that the delay of four to five months was justified. The contention that notice had not been given within a reasonable time seems to me to have been fairly advanced at the trial in the plea above quoted and it is not a little surprising that the Building Inspector, the sole witness for the prosecution, was not examined-in-chief on the point. In cross-examination the witness said:—

"I had seen the house in course of construction. When the notice was served, the walls were in process of construction. The building was finished in May or June."

In showing cause against the Rule issued to him the learned District Magistrate has adopted the following statement obtained by him for the purpose from the trying Magistrate:—

"Before a notice under section 66 (5) issues, the following conditions have to be satisfied:

(*a*) The structure built without sanction has either to be complained of or noticed by some responsible Municipal officer;

(*b*) after complaint or report inquiry has to be made;

(*c*) after inquiry sanction to the issue of notice has to be obtained.

At any one of these stages there may be considerable delay amounting perhaps to several months."

The District Magistrate requests that if this explanation be not accepted, a reference be made by the Court to the Municipal Committee to obtain detailed particulars of its proceedings in the matter. He represents further that this concession may fairly be granted, inasmuch as the Committee is making "great efforts to introduce structural improvement in the buildings of the city."

The Municipal Committee was represented at the hearing by a Pleader who was, however, unable to furnish the missing particulars as to time of discovery, report to Building Sub-Committee, etc. And I cannot see my way to allowing any concession to a powerful Municipality in a matter like the present. The Committee employs a Building Engineer and a Public Prosecutor, presumably to ensure that infringements of the law as to building are promptly detected and adequately prosecuted: it should, therefore, have no difficulty in presenting its cases for trial. Unless then the notice now under consideration was *prima facie* given "within a reasonable time," I think it was bad and that the applicant is consequently entitled to acquittal.

Now as remarked by Blackburn, J., in *Brighty* v. *Norton* (1) it is very difficult to say what is a reasonable time. There is generally, however, less difficulty in deciding whether a particular time is unreasonable or not. In Stroud's Judicial Dictionary (page 1664, Volume III, 2nd Edition) it is said that where a duty has to be discharged within a reason-

(1) (1862) 3 B. & S. 305; 32 L. J. Q. B. 38; 9 Jur. (N. S.) 495; 7 L. T. (N. S.) 422; 11 W. R. 167; 129 R. R. 337; 122 E. R. 116.

able time, such time will have to be determined according to the circumstances of the case, and with particular reference to the means and ability of the person by whom the discharge is to be made. *Goodwyn* v. *Cheveley* (2), *Postlethwaite* v. *Freeland* (3) and *Hick* v. *Raymond* (4) are cited as authorities for this proposition. The last of these cases was decided by the House of Lords, and Lord Ashbourne remarked:—

"What is the meaning of this expression 'reasonable time'? It is obvious that 'reasonable' cannot mean a definite fixed time. It would not be 'reasonable' if it was not sufficiently elastic to allow the consideration of circumstances, which all reason would require to be taken into account."

The effect of the three decisions taken together seems to be that all the actual circumstances must be taken into account. A similar interpretation may fairly be put on the expression where a statutory power is to be exercised. One more favourable to the Municipality is not called for, in view of the principle that a Municipal Act which touches the private rights of individuals must be most carefully construed, without unwarrantable severity on the one hand or unjustifiable lenity on the other: see *Ramdularay* v. *Chhindwara Municipality* (5).

It is contended on behalf of the Committee that the starting point of the "reasonable time" allowed by section 66 (5) may quite well be completion of the building. On the other hand, the applicant's learned Counsel urges that where a work necessarily spreading over a considerable time is concerned, time should start from its inception. The latter view seems to me the more correct one, at any rate in the case of a complete house. But generally speaking the question will be, when the unsanctioned work came to the notice of a Municipal authority concerned to stop it, and in this connection it may be necessary to decide whether with due diligence discovery might not have been made sooner.

(2) (1859) 28 L. J. Ex. 298; 118 R.R. 658; 4 H. & N. 631: 25 L. C. Ed. 298; 7 W. R. 631; s. c. at Nisi Prius, 1 F. & F. 313.

(3) (1880) 49 L. J. Ex. 630; 5 App Cas. 599; 42 L. T. 845; 28 W. R. 833; 4 Asp. M. C. 302.

(4) (1893) A. C. 22; 62 L. J. Q. B. 98; 1 R. 125; 68 L. T. 175; 41 W. R. 384; 7 Asp. M. C. 283.

(5) 6 Ind. Cas. 431; 6 N. L. R. 53 at p. 55.

The structure with which we are here concerned is 28 feet long and 25 feet broad, contains three rooms and abuts on a public thoroughfare. There is no question of any mere addition or alteration which might easily escape the notice of a passer-by. Exhibit P-III shows that the walls, which are said to be 8 feet high, had been completed by the middle of March, and yet seven weeks elapsed before notice to demolish was served on the applicant. It is not a sufficient explanation of delay like this to say that months may pass before a considered decision can be reached by the Building Sub-Committee. Such a body is presumably constituted with the object of accelerating the despatch of public business, and if its decision is unduly delayed, the circumstance must be accounted for by its members, not by the person against whom the decision is directed. Where the Act has fixed a time for action by the Committee in regard to a building, *e. g.*, in section 66 (3), that time is short, and so furnishes an indication that the Legislature expects promptitude of Municipal Commissioners.

I hold that the Municipal Committee should have explained the delay of four to five months in serving notice on the applicant, the plea advanced by him clearly raising an issue in this connection and the burden of proof resting on the Committee. In this view I set aside the conviction and sentence and direct that the fine, if paid, be refunded. I have the less hesitation in reaching this conclusion in that the new building is not alleged in this Court to be insanitary or otherwise undesirable, while the time (four days) allowed in the notice to demolish the old one was *prima facie* unduly short.

It thus becomes unnecessary to consider the applicant's contention that section 66 (5) of the Municipal Act has no application where a new building is erected on the foundations of one recently demolished without any increase of superstructure. This is rested on the omission of all reference to re-erection in the said provision, although both erection and re-erection are dealt with in sub-sections (1) and (2) of section 65. An obvious objection to the interpretation thus contended for is that although notice of intention to re-erect is compulsory, there would be no penalty for failure to give

notice. It seems to me more reasonable to hold that "erected" in sub-section (5) includes "re-erected," "re-erection" being merely a special case of "erection." The explanation which immediately succeeds sub-section (5) is extensive, not limiting in its nature: see *Nasibun* v. *Preosunker Ghose* (6).

Revision allowed.

(6) 8 C. 534.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION PETITION No. 928 OF 1915.

March 30, 1915.

Present:—Mr. Saunders, A. J. C.

MI THI HLA—APPELLANT

versus

MI KIN—RESPONDENT.

Criminal Procedure Code (Act V of 1898), *ss.* 380, 562—*Proceedings submitted to Sub-Divisional Magistrate—Jurisdiction—Power to acquit.*

A Magistrate to whom proceedings are submitted as provided by section 562 of the Criminal Procedure Code may pass such sentence or make such order as he might have passed or made if the case had originally been heard by him. He is not prevented from acquitting the accused, if on a perusal of the evidence he comes to the conclusion that conviction should not have taken place.

Mr. *J. N. Basu*, for the Respondent.

JUDGMENT.—The accused was convicted of stealing a pig. The second class Magistrate recorded a formal finding convicting the accused under section 379 of the Indian Penal Code, and submitted the proceedings to the Sub-Divisional Magistrate under section 562 of the Code of Criminal Procedure with a view to the accused being released on security. The Sub-Divisional Magistrate on a perusal of the evidence came to the conclusion that the accused should not have been convicted, and thereupon acquitted her.

It is now suggested that the Sub-Divisional Magistrate had no power to pass an order of acquittal. It was pointed out in the case of *Morali* v. *Emperor* (1) that the provisos to section 562 and section 380 are similar to section 349 of the Code of Criminal Procedure, but that the proviso to section 562 refers to the case of an offender who is convicted by a Magistrate of the third Class or a Magistrate of the second Class not specially empowered by the Local Government in this behalf, whereas section 349 deals with the case of an accused person who has not been actually convicted, but in respect of whom a Magistrate of the second or third Class records the opinion that he is guilty. There is no doubt that where an accused person is forwarded to a District Magistrate or Sub-Divisional Magistrate in accordance with the provisions of section 349 of the Code of Criminal Procedure, such Magistrate may acquit the accused.

I am of opinion that it was not the intention, in a case in which a conviction has been formally recorded under section 562, that the Magistrate to whom the accused is sent should not have the same powers as he undoubtedly has in the case of an accused person sent to him under section 349. The words of section 380 are sufficiently broad. It is distinctly stated that a Magistrate to whom proceedings are submitted as provided by section 562 may pass such sentence or make such order as he might have passed or made if the case had originally been heard by him. He could obviously have acquitted a person tried by him on a charge of theft, and if it had been intended that he should not have had this power when a case tried by a Subordinate Magistrate was submitted to him, this provision of law would, it appears to me, have been otherwise worded. If this view is not correct, it would appear to follow that even if the Sub Divisional Magistrate considered that the accused was clearly not guilty, he was still bound either to pass sentence or to bind over the accused under section 562 of the Code of Criminal Procedure. The only alternative apparently would be to submit the case to the District Magistrate or to the High Court in revision.

I agree with Mr. Justice Irwin in thinking that it is difficult to suppose that this was the intention of the Legislature. I have no doubt that the Sub-Divisional

(1) 4 L. B. R. 277; 8 Cr. L. J. 476.

Magistrate was justified in passing an order of acquittal.

On the merits, I see no reason to interfere.

The application is dismissed.

Application dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 86 OF 1914.

February 27, 1915.

Present:—Mr. Crouch, A. J. C., and Mr. Crump, A. J. C.

LASHKARI KHAN *walad* RAJO KHAN AND OTHERS—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 99, 141, 149.—Right to defend immoveable property—Person in possession, whether can use force—Test of criminality—Resistance to aggressor, right of.

Every person has a right, subject to the restrictions contained in section 99, Indian Penal Code, to defend his immoveable property. [p. 665, col. 2.]

Once a man is in possession of his own property, he is entitled to use force to defend it. [p. 665, col. 2.]

In cases where a free fight has taken place for the possession of certain property between two parties, the test of criminality is—was accused in possession or not in possession at the time when the alleged offence was committed. [p. 665, col. 2.]

It is no offence under section 149, Indian Penal Code, to resist an aggressor unless the aggression be in execution of the law or of some legal process. [p. 665, col. 2.]

Where the accused and his party were entitled to enter upon certain land and to reap the crop and the complainant with his party came upon the scene to remonstrate and (presumably also) to prevent them from reaping the crop and a fight took place in which persons on both sides were injured:

Held, that the primary object of the accused party having been to retain possession of the land and to reap crop, and not to obtain possession of any property or "to enforce any right or supposed right", they were not guilty of committing any criminal offence by the mere entry on the land or by defending the accused's property against aggression. [p. 665, cols. 1 & 2.]

Appeal from the judgment of Mr. Fawcett, Judicial Commissioner of Sind.

Mr. *T. G. Elphinstone*, for the Appellants.

Mr. *E. Raymond* (Public Prosecutor for Sind), for the Crown.

JUDGMENT.—The nine appellants have been convicted by the learned Judicial Commissioner of Sind under sections 149 and 325, Indian Penal Code, and have been sentenced to six months' rigorous imprisonment. Accused No. 1 has also been ordered to pay a fine of Rs. 300.

The complainant Umar had, for some years prior to 1913-14, cultivated pieces Nos. 6 & 7 of Survey No. 192. The land was let to him on an annual lease, and each year fresh permission to cultivate had to be obtained. For the year 1913-14 it was decided that Nos. 6 and 7 should not be given to Umar, but should be leased to Lashkarikhan, accused No. 1, and on the 20th October 1913 the latter received an *ijazatnama* or formal license to occupy the land. This led to the dispute which culminated in the present affray.

It is important to set out clearly what was implied by the charge as originally framed and as amended. Both charges postulate:

(1) an assembly of five or more persons;

(2) a common object;

(3) an act of grievous hurt done by a member of the assembly in pursuance of the common object.

The charges differ with respect to the second element. In the charge as originally drafted by the learned Judge at the opening of the trial, the common object was assumed to be as in the charge drafted by the Magistrate, which for this purpose runs as follows:

"Preventing complainant Umar Muhammad and others from entering on the land and reaping the crop."

In the charge as amended after the evidence was closed, an alternative is added, *viz.*:

"Or overcoming resistance or threatened resistance on the part of the complainant Umar Muhammad and others to the said crop being reaped by you or by others on your behalf:"

The charge, as originally framed, would mean that the accused and his party were on the land, and that they prevented or endeavoured to prevent the entry of Umar and his party. The question of possession is important and this charge implies that the accused were in possession. The alteration in the charge does not imply any change in the case for the prosecution on this point of fact, as is clearly stated by the learned Judge himself at the beginning of his judgment:

"The alteration involves no change of ground on the part of the prosecution. On the contrary it has been their case all along that the accused's party were reaping the crop, and the complainant's party went there to remonstrate and (presumably also) to prevent them from reaping it. That also is the case for the accused."

There can, therefore, be no question that the accused's party were in possession and were reaping the crop up to the time when the alleged offence began to be committed.

Further, it is not disputed that accused No. 1, by virtue of the *ijazatnama*, was entitled to possession of the land. Whether he was entitled to the crop or not is not free from doubt, but the better opinion appears to be that unless and until the Collector had conceded the crop to Umar, who was a trespasser, the crop would follow the grant of the land to accused No. 1. The learned Judge has accepted this view for the purposes of the judgment under appeal.

It follows that the accused and his party were entitled to enter upon the land and to reap the crop. The complainant and his party came upon the scene to remonstrate and (presumably also) to prevent them from reaping the crop. There was an affray in which persons on both sides were injured. The only point of fact as to which there appears to be any doubt is, who were the aggressors. The learned Judge holds that the accused's party were the aggressors. In coming to the conclusion he appears to have relied on the circumstance that the injuries were more numerous on the side of complainant's party, but this view is not in accordance with the medical evidence (Exhibit 53), which appears to show that the injuries on either side were much the same in point of severity. The probability is that the party out of possession would make the attack. The persons who come forward as eye-witnesses all appear to belong to the complainant's party with one exception, Sidik, and he is of the same caste. In the absence of independent evidence it is difficult to feel satisfied that the accused were the aggressors.

On these facts it would appear that the primary object of the accused's party was to retain possession of the land and to reap the crop. The learned Judge has, however, held that if they went to the land, prepared to overcome any resistance, their common object was within the terms of section 141, *fourth*, of the Indian Penal Code. We find ourselves unable to take this view. The Legislature has studiously confined itself to the words "take or obtain possession of any property", and the words "to enforce any right or supposed right" imply that the party using force uses it to enable him to exercise a right or supposed right, the exercise of which is denied to him by others. Here the accused were in full exercise of their rights when they were attacked by the other party.

Admittedly, accused No. 1 had a legal right to the possession of the land; *his entry in it was peaceable*, his right to reap the crop has been presumed by the learned Judge. Neither he nor any of the appellants committed any criminal offence by the mere entry on to the land.

Every person has a right, subject to the restrictions contained in section 99, Indian Penal Code, to defend his immoveable property or that of any other person against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass. Appellants, therefore, having effected a peaceable entry on to the land, and being in possession of land and crop to which they were by presumption legally entitled, had a good right to prevent complainant's party from doing what they admittedly intended to do, *viz.*, enter forcibly on to the land, and reap and take away the crop of the first appellant.

It is true that an assembly of five or more persons is an unlawful assembly if the common object of the persons is by means of criminal force to enforce a right or supposed right. But once a man is in possession of his own property, he is entitled to use force to defend it. In such a case as the present the test of criminality is—Was accused in possession or not in possession at the time when the alleged offence was committed? Was he defending his property, or was he attempting, by means of force, to obtain possession of it? It is no offence, under section 149, to resist an aggressor, unless the aggression be in execu-

tion of the law or of some legal process. The accused have been held guilty on the ground of collective responsibility, and if there was no unlawful assembly, that charge must fail. We are not concerned with their individual acts.

We reverse the convictions and order the appellants to be acquitted and discharged. The fine, if paid, should be refunded.

Appeal allowed.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION PETITION No. 894 OF 1914.

March 2, 1915.

Present:—Mr. Saunders, A. J. C.

NGA SHWE HMUN—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 421—Reasonable opportunity to appellant to be heard in support of appeal—Advocate filing appeal not Advocate for appellant called upon to support appeal—Reasonale opportunity, if given.

Where the Advocate filing the petition of appeal is not himself the Advocate for the appellant, a reasonable opportunity for hearing the Advocate cannot be said to have been given where he is called upon forthwith to support the appeal

Ramtohal Dusadh v. *Emperor*, 1 Ind. Cas. 868; 9 Cr. L. J. 401; 36 C. 385; 13 C. W. N. 684; *Emperor* v. *Gurshida Balapa Jati*, 7 Bom. L. R. 89; 2 Cr. L. J. 58, referred to.

Mr. *C. G. S. Pillay*, for the Applicant.

JUDGMENT.—Four persons were convicted on a charge of stealing a cow and calf and sentenced to two years' rigorous imprisonment each. On the 29th October 1914 an appeal was presented in the Sessions Court by Maung Pe, second grade Advocate, on behalf of Maung E Maung, second grade Advocate for the appellants. On the same day the Sessions Judge passed the following order:—"The petition of appeal was presented by second grade Advocate Maung Pe of Meiktila on behalf of second grade Advocate Maung E Maung of Yamethin. Maung Pe has nothing to say in support of the appeal. As he appears on behalf of appellants' Advocate, I consider that a reasonable opportunity of being heard has been given. The judgment shows that the four appellants were all caught red handed. It is not necessary to send for the record. The appeals are summarily dismissed."

Section 421 of the Code of Criminal Procedure requires that no appeal presented under section 419 shall be dismissed unless the appellant or his Pleader has had a reasonable opportunity of being heard in support of the same. There is ample authority for holding that reasonable opportunity is not given when the Advocate who appears is required to support his appeal on the same day, *Ramtohal Dusadh* v. *Emperor* (1) and *Emperor* v. *Gurshida Balapa Jati* (2). *A fortiori* when the Advocate who files the petition of appeal is not himself the Advocate for the appellant, a reasonalble opportunity for hearing the Advocate cannot be said to have been given when he is called upon forthwith to support the appeal. In this instance, moreover, the case was tried in one district and the Advocate who presented the appeal was practising in another district. The appeal again set out that the witnesses were not credible, and it was clearly a case in which the record should have been called for before orders were passed.

The order of the Sessions Judge is set aside, and he is directed to re-admit the appeal and give the appellants' Advocate an opportunity of being heard after notice.

Revision allowed.

(1) 1 Ind. Cas. 868; 36 C. 385; 13 C. W. N. 684; 9 Cr. L. J. 401.

(2) 7 Bom. L. R. 89; 2 Cr. L. J. 58.

BOMBAY HIGH COURT.

CRIMINAL REVISION APPLICATION No. 67 o 1915.

March 23, 1915.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

EMPEROR—PROSECUTOR

versus

DOSABHAI J. DHONDY—ACCUSED—APPLICANT.

Criminal Procedure Code (Act V of 1898), ss. 254, 255, 256, 257—Trial in warrant case—Provisions of Code, binding nature of—Magistrate, whether can vary procedure according to usage—Cross-complaints—Prosecution evidence in one cannot be treated as defence evidence in other.

A Magistrate is not at liberty to substitute for the procedure of the Code a procedure which has arisen

EMPEROR *v.* DOSABHAI J. DHONDY.

by usage, however convenient the latter may be. The provisions of the Code must be followed.

Where, therefore, in trying two cross-complaints, the Magistrate heard the evidence for the prosecution in each and without framing a charge formally as required by section 254 of the Criminal Procedure Code and without following the provisions of sections 255, 256 and 257 in the first case, he dealt with it as if a charge had been framed and treated the evidence in the other case as defence evidence in the first:

Held, (1) that a trial conducted in a mode so materially different from that prescribed by law was not a proper trial;

(2) that the differences between the procedure followed and the legal procedure were of too fundamental and important a kind to be treated as irregularities curable by any of the sections in Chapter XLV of the Code.

Criminal application for revision from conviction and sentence passed by the Chief Presidency Magistrate of Bombay.

Mr. *Setalvad* with him Mr. *G. N. Thakor*, for the Applicant.

Mr. *S. S. Patkar*, Government Pleader, (with him Mr. *Nicholson*, Public Prosecutor), for the Crown.

JUDGMENT.

HEATON, J.—This is an unimportant case, except in so far as the points argued before us touch on matters of principle. As it happens, there is a principle of considerable importance which does arise.

What happened was this: cross-complaints were filed, one in the Court of the Chief Presidency Magistrate, the other in the Court of another Presidency Magistrate. The second was transferred for trial to the Chief Presidency Magistrate. He heard the evidence for the prosecution in each of the cases. Then, without framing a charge formally as required by section 254 of the Criminal Procedure Code and without following the provisions of sections 255, 256 and 257 in the first case, he dealt with it as if a charge had been framed and treated the evidence in the other case as defence evidence in the first. On that understanding, both cases were argued before him without any further evidence being taken, and both were decided. In doing this, the Magistrate followed a practice, we learn, which apparently has grown up in the course of years and for which the Chief Presidency Magistrate personally is not responsible. I do not wish to suggest that a trial conducted in that way would not be a fair trial, but it is a trial conducted in a mode materially different from that prescribed by the Code of Criminal Procedure. The provisions of that Code have to be followed, so far as they apply, by Presidency Magistrates, and those Magistrates are not at liberty to substitute for the procedure of the Code a procedure which has arisen by usage, however convenient the latter may be. We find it impossible to hold that a trial conducted in a mode so materially different from that prescribed by law is a proper trial. That it is materially different will appear by considering the provisions of Chapter XXI of the Code, which deals with trial of warrant cases and is applicable. According to the Code, the Magistrate ought to have framed a formal charge and to have called on the accused to plead to that charge. The accused then had to be required to state whether he wished to further cross-examine the prosecution witnesses, and he should have been called on to enter on his defence and produce his evidence. In fact, no formal charge was made, the accused was not asked whether he wished to re-call and cross-examine the prosecution witnesses and he was not called on to produce his evidence. Evidence taken in another case, which included the examination-in-chief and cross-examination of the accused himself, was treated as evidence for the defence. It seems to me that the differences between the procedure followed and the legal procedure are of too fundamental and important a kind to be treated as irregularities cured by any of the sections in Chapter XLV of the Code. As I have said, the case is important only as illustrating a principle, the principle being that the provisions of the Code must be followed; they are not to be set aside in favour of a different procedure. We have been compelled to deal with this case as an illustration of the principle I have mentioned on account of what has been brought to our notice in the case. But the unimportance of the case in itself is such that it is quite unnecessary to direct a fresh trial. Therefore, the order which I would suggest is, that the conviction be set aside and the accused be acquitted and the fine, if paid, be refunded.

SHAH, J.—I agree.

Conviction and sentence set aside.

In re RALLABANDI SOBHANADRI.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 851 OF 1914.
CRIMINAL REVISION PETITION No. 704 OF 1914.

April 15, 1915.

Present:—Mr. Justice Kumaraswami Sastri.

In re RALLABANDI SOBHANADRI AND OTHERS—ACCUSED—PETITIONERS.

Criminal Procedure Code (Act V of 1898), s. 256—Summons case tried together with warrant case—Procedure to be followed—Warrant case dismissed during trial—Summons case proceeded with—Right of accused to re-call and cross-examine prosecution witnesses—Right to re-call and cross-examine—Right refused—Prejudice—Burden of proof.

Where a summons case is tried together with a warrant case, the procedure to be followed is that of a warrant case.

Rajnarain Koonwar v. *Lala Tamoli Raut*, 11 C. 91, relied upon.

A summons case and a warrant case were tried together. During the trial the charge of the warrant case was dismissed and the charge of the summons case was proceeded with. The Magistrate refused to allow the accused to re-call and further examine the prosecution witnesses:

Held, that the refusal was illegal.

The privilege conferred by section 256, Criminal Procedure Code, is a substantive one and when denied, it is for the prosecution to show that the accused was not prejudiced by the denial.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Joint Magistrate of Bezwada, in Criminal Application No. 24 of 1914, preferred against that of the Court of the Stationary Sub-Magistrate of Bezwada, in Calendar Case No. 474 of 1913.

Mr. *P. Nagabhushanam*, for the Petitioners.

Mr. *P. R. Grant*, for the Government.

ORDER.—The chief ground urged in appeal is that the accused were prejudiced by the refusal of the Magistrate to allow them to re-call and cross-examine the prosecution witnesses.

The accused were tried for offences under sections 504 and 352 of the Indian Penal Code, and during the course of the proceedings the Magistrate dismissed the complaint under section 504 and proceeded with the charge under section 352.

When the summons case and a warrant case are tried together, the procedure to be followed is that provided for the warrant case: *Rajnarain Koonwar* v. *Lala Tamoli Raut* (1). The accused would, therefore, have been entitled under section 256 of the Code of Criminal Procedure to re-call and cross-examine the prosecution witnesses had the trial on both charges been proceeded with. They could not have anticipated that during the trial the charge under section 504 would have been dismissed, and it cannot be said that they were in default.

The refusal of the Magistrate to allow the accused to re-call and further cross-examine the prosecution witnesses was, therefore, illegal.

The next question is whether the accused were prejudiced. This is a difficult one to decide, as it may be that if cross-examination had been allowed as provided for in section 256 of the Criminal Procedure Code, facts may have been elicited favourable to them. The privilege conferred by that section is a substantial one, and when denied, it is for the prosecution to show that there was no prejudice. Mr. Nagabhushanam says that the accused were prejudiced and having regard to the evidence and the materials before me, I cannot say that he is wrong.

Two other grounds have been urged, namely, (1) that the Magistrate was wrong in having refused to issue a summons to the *zemindar* of Mylavaram and (2) that he ought to have dismissed the complaint owing to the absence of the complainant. These are matters within the discretion of the Magistrate and I do not think these form grounds for revision.

As I am of opinion that the procedure of the Magistrate in refusing permission to the accused to re-call and further cross-examine the prosecution witnesses is erroneous, I set aside the conviction and sentences and order the fines, if paid, to be refunded. The Magistrate will try the case and dispose of it according to law. It is desirable that the same Magistrate should not try the case.

Conviction set aside; *Re-trial ordered.*

(1) 11 C. 91.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 1039 OF 1914.

December 11, 1914.

Present:—Mr. Justice Scott-Smith.

SHARFA—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 215—Cow lost from grazing ground—Taking money and promising to return cow, whether constitutes offence.

In order to constitute an offence under section 215, Indian Penal Code, it is necessary that the moveable property in question should have been taken out of the possession of some person by means of an offence punishable under the Code.

Where, therefore, the complainant's cow was lost from the grazing ground and the accused took Rs. 12 from him and promised to return the cow in ten days' time, but did not do so and subsequently refused to return either the cow or the money:

Held, that as there was no proof that any offence had been committed in respect of the cow, the accused could not be convicted under section 215, Indian Penal Code.

Hemraj v. *Emperor*, 6 Ind. Cas. 250; 11 Cr. L. J. 295, referred to.

Petition for revision from an order of the Sessions Judge, Hissar, dated the 8th May 1914.

Mr. *Abdul Rashid*, for the Petitioner.

JUDGMENT,—Sharfa, petitioner, has been convicted of an offence under section 215, Indian Penal Code, and has been sentenced to three months' rigorous imprisonment and a fine of Rs. 15. His conviction was upheld on appeal by the Sessions Judge of Hissar.

The facts alleged are that Ilman's cow was lost from the grazing ground. Some days later he heard that Sharfa and others had it. He went to them and Sharfa took Rs. 12 from him promising to return the cow in ten days' time. He did not, however, keep his promise and subsequently refused to return either the cow or the money. To constitute an offence under section 215, Indian Penal Code, it is necessary that the moveable property in question should have been taken out of the possession of some person by means of an offence punishable under the Code. There is no evidence in the present case that the cow was taken out of the possession of Ilman by means of an offence. His own statement has all along been that the cow was lost. What he meant apparently was that it strayed away and subsequently came into the petitioner's possession.

The case reported in *Hemraj* v. *Emperor* (1) was very similar to the present one. In that case a buffalo had disappeared, but there was no evidence to prove that any offence had been committed in respect of it and the facts were compatible with the theory that it strayed away, and the Allahabad High Court set aside the conviction. In the present case, in my opinion, the conviction cannot stand. There is no proof that any offence has been committed in respect of the cow belonging to Ilman. It may have come into Sharfa's possession or it may not, but in any case he cannot be convicted under section 215, Indian Penal Code, merely because he took money from the complainant and promised to restore the cow, which promise he did not carry out.

I, therefore, allow the revision and, setting aside the conviction and sentence, acquit the petitioner who is discharged from his bail. The fine, if paid, will be refunded.

Revision allowed.

(1) 6 Ind. Cas. 250; 11 Cr. L. J. 295.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 66 OF 1914.

January 5, 1915.

Present: —Mr. Stuart, A. J. C.

IBAD-ULLAH KHAN AND ANOTHER—APPLICANTS

versus

RAHAT-ULLAH KHAN AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145—Criminal revision—Judicial Commissioner's Court, powers of—Magistrate's order under s. 145, Criminal Procedure Code, power to set aside.

The Judicial Commissioner's Court, having no authority to revise proceedings except that given to it by the Criminal Procedure Code, has no authority to set aside an order passed by a Magistrate under section 145 of the Criminal Procedure Code. [p. 670, col. 1.]

Criminal reference made by the Sessions Judge of Hardoi, against the order of the Joint Magistrate, Hardoi, dated 20th August 1914.

Saiyed *Ali Mohammad*, for the Opposite Party.

JUDGMENT.—Under the provisions of section 435, Act V of 1898, a High Court has no power to call for the record of a case in which a Magistrate has passed orders under the provisions of section 145 of the Code of Criminal Procedure, as it is distinctly laid down that proceedings under Chapter XII of that Code are not proceedings within the meaning of section 435. There can be no contest as to this point. There has, however, been some difference of opinion in the High Courts with regard to the point, whether Chartered High Courts have or have not power to revise proceedings under Chapter XII by virtue of the authority conferred on them by their respective Charters. It is immaterial whether Chartered High Courts have or have not such a power. This Court is not a Chartered High Court. It is constituted under the provisions of Act XIV of 1891. Nothing in that Act gives it authority to revise criminal proceedings other than the authority which it possesses under the provisions of the Criminal Procedure Code. This Court has no authority to revise proceedings except the authority given to it by that Code, and, as it is clear that under that Code it has no authority to set aside the Magistrate's order, I return the record leaving the Magistrate's order as it is.

Record returned.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 126 OF 1915.
CRIMINAL REVISION PETITION No. 102 OF 1915.

April 29, 1915.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Coutts-Trotter.

THE PUBLIC PROSECUTOR—PETITIONER

versus

KOLANGARET IMBICHIKUTTAM—ACCUSED.

Penal Code (*Act XLV of* 1860), *s.* 307—*Discharging loaded gun from short distance—Causing injuries which might have proved fatal—Offence.*

A person intentionally discharging a loaded gun at another from a short distance inflicting injuries which might have proved fatal is guilty of an offence under section 307 of the Indian Penal Code, and not merely of causing grievous hurt.

Petition, under sections 435 and 439 of the Code of Criminal Procedure of 1898, praying the High Court to revise the judgment of the Sessions Court of South Malabar in Calendar Case No. 66 of 1914.

Mr. *C. Sidney Smith*, for the Petitioner.

ORDER.—We think the accused should have been convicted under section 307, Indian Penal Code. The finding is that he intentionally discharged a loaded gun at the complainant from a short distance and inflicted injuries which might well have been of a fatal character. In the circumstances, we convict the accused under section 307 and enhance the sentence from two to three years' rigorous imprisonment at the same time remitting the fine of Rs. 100.

Sentence enhanced.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 875 OF 1915.
CRIMINAL REVISION PETITION No. 718 OF 1914.

April 30, 1915.

Present:—Mr. Justice Oldfield.

T. V. R. INDRA TALAVAR—ACCUSED—PETITIONER

versus

R. NARASIMHA RAU—COMPLAINANT—RESPONDENT.

Penal Code (*Act XLV of* 1860), *s.* 430—*Intention to cause wrongful loss essential—Sessions Judge dismissing appeal on reasons given in a theft case—Irregularity.*

Where an accused is charged with an offence punishable under section 430, Indian Penal Code, his intention to cause wrongful loss is the essential element to be considered. [p. 671, col. 1.]

Where the Sessions Judge dismissed an appeal against a conviction under section 430 by referring to the reasons given in the judgment in a connected case, in which the accused's conviction was upheld under section 379:

Held, that the Sessions Judge had acted irregularly in not taking into consideration the intention requisite for constituting an offence under section 430. [p. 671, col. 1.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Sessions Court of Tinnevelly, in Criminal Appeal No. 53 of 1914, presented against that of the Joint First Class

Magistrate of Tinnevelly, in Calendar Case No. 47 of 1914.

Mr. *T. Rangachariar*, for the Petitioner.

Dr. *S. Swaminadhan*, for the Respondent.

The *Public Prosecutor*, for the Government.

ORDER.—The accused was charged with an offence punishable under section 430, Indian Penal Code. The Sessions Judge dealt with his appeal against his conviction under that section by referring to the reasons given in the judgment in a connected case in which his conviction was upheld on a charge of an offence punishable under section 379. In the latter, accused was alleged to have stolen stone from the bed of a tank, and the ownership of the tank and the *bona fides* of his claim to it were important. But they could not be decided in this case, in which accused's intention to cause wrongful loss was the essential matter to be considered. The accused's case in fact was that he cut the tank *bund* in order to build a new sluice there, the existing sluice being out of order, and this would be an offence punishable under section 430, only if the intention specified in section 425 as well as the other requisities of the former section were established. The learned Sessions Judge has not dealt with this aspect of the case. His decision is set aside and he is directed to re-hear the appeal in the light of the foregoing.

Petition allowed; Conviction set aside.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 129 OF 1915.

April 28, 1915.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Coutts-Trotter.

THE PUBLIC PROSECUTOR—APPELLANT

versus

THANDAVAN CHETTY—ACCUSED.

Penal Code (Act XLV of 1860), s. 300 (3)—Murder—Medical opinion based on misconception of facts, value of—Injury likely to cause death.

A Medical Officer's opinion that the injuries inflicted were not serious, which is based upon a misconception of facts, should be disregarded when the evidence shows that the injuries inflicted were one inch deep

and they pierced the pleura, which, in the ordinary course of events, is sufficient to cause death.

Appeal, under section 417 of the Code of Criminal Procedure, against the judgment of acquittal passed on the accused in Sessions Case No. 41 of 1914 by the Sessions Judge of Ramnad at Madura.

Mr. *C. Sydney Smith*, for the Appellant.

Mr. *P. R. Srinivasa Aiyangar*, for the Respondent.

JUDGMENT.—The Sessions Judge has not considered the provisions of a law applicable to this offence having regard to the nature of the injuries inflicted by the accused. Under section 300 (3), of the Indian Penal Code the offence is ordinarily murder if the bodly injury intended to be inflicted was sufficient in the ordinary course of nature to cause death. The accused in addition to other wounds inflicted a stab in the back one inch deep which pierced the pleura. This, in our opinion, was an injury sufficient in the ordinary course of nature to cause death. The Medical Officer, thinking the wound was only half an inch deep, stated in the wound certificate that the wounds were not serious. Before the Magistrate he deposed in answer to a question that that he had made this statement, but cannot, we think, have intended to repeat it in the light of the fuller information obtained at the *post mortem* examination. If the wound was of the serious character indicated, it cannot, in our opinion, be seriously suggested that there was any provocation which would take the case out of the section. We allow the appeal, convict the accused of murder under section 302 of the Indian Penal Code, and sentence him to transportation for life.

Appeal allowed.

CALCUTTA HIGH COURT.

CRIMINAL REVISION PETITION No. 2045 OF 1914.

March 12, 1915.

Present:—Mr. Justice Chitty and Mr. Justice Beachcroft.

JAGANNATH RAHATGIR—COMPLAINANT—PETITIONER

versus

Pandit DEOKINANDAN AND ANOTHER—ACCUSED—OPPOSITE PARTY.

Stamp Act (II of 1899), ss. 33, 35—Instrument

insufficiently stamped, examination of, optional—Stamped instrument admitted in evidence does not apply to criminal proceedings—Penal Code (Act XLV of 1860), s. 405—Breach of trust—Conversion, evidence of.

Under section 33 of the Stamp Act it is optional to the Magistrate to examine or impound the instrument if it appears to be insufficiently stamped.

But the prohibition contained in the first part of section 35 that no instrument chargeable with duty shall be admitted in evidence for any purpose or acted upon unless it be duly stamped, does not apply to proceedings in a Criminal Court.

Where it is proved that the two accused or either of them were in fact entrusted with certain property as servants, and they set up a claim that it belongs to them, and refuse to return it, that in itself is evidence of conversion to justify a conviction under section 405, Indian Penal Code.

Babu *Manmotha Nath Mukherjee*, for the Petitioner.

Babus *Probodh Kumar Das* and *Kshitish Chandra Chakravarti*, for the Opposite Party.

JUDGMENT.—In this case the Magistrate, in refusing to admit in evidence the alleged agreement of service of the accused, Pandit Deokinandan, was clearly in error. It was optional to him under section 33 of the Stamp Act to examine or impound the instrument if it appeared to be insufficiently stamped. But the prohibition contained in the first part of section 35 that no instrument chargeable with duty shall be admitted in evidence for any purpose or acted upon unless it be duly stamped, does not apply to proceedings in a Criminal Court [see proviso (*d*) to that section]. The Magistrate, therefore, ought to have taken that document into consideration and come to a finding upon it. With regard to conversion, the opinion of the Magistrate is not correct. It is clear that a servant can be charged with criminal breach of trust under section 405, Indian Penal Code. If in this case it is proved that the two accused (or either of them) were in fact entrusted with the property as servants and now set up a claim that it belongs to them, and refuse to return it, that in itself would be evidence of conversion, which might justify a conviction under the section. If the trial is continued against the accused Pandit Deokinandan, it should be continued also against the accused Baburam.

This Rule is made absolute against both the accused, and the order of discharge set aside. The trial will be resumed from the stage immediately preceding the order of discharge.

Rule made absolute.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 66 OF 1915.
CRIMINAL REVISION PETITION No. 58 OF 1915.
April 22, 1915.

Present:—Mr. Justice Spencer

In re KUTTIATH ODAYOTH VEETIL KOMAR NAMBIAR AND OTHER—ACCUSED—PETITIONERS.

Penal Code (Act XLV of 1860), ss. 378, illustration (a), 425—Theft—Trees, cutting of, to annoy—Offence—Mischief.

Theft of trees will be committed only when they were cut to remove them from the possession of the owner, and not when the cutting was merely to annoy him. The act will amount only to mischief.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate of Tellicherry, in Criminal Appeal No. 116 of 1914, presented against that of the Court of the Second Class Magistrate of Taliparamba, in Calendar Case No. 265 of 1914.

Mr. *C. Madhavan Nair*, for the Petitioner.

Mr. *P. R. Grant*, for the Government.

ORDER.—The illustration (*a*) to section 378, Indian Penal Code, shows that if a tree is cut *with the intention of dishonestly taking it out of the possession* of the person in possession, the offence of theft is complete as soon as the tree is severed in order to such taking.

Here the Appellate Court found that the accused cut the trees "to annoy P. W. No. 1 and to get the better of him." The conviction for theft is accordingly set aside. That for mischief will stand.

The sentence is reduced to the amount of rigorous imprisonment already undergone by the accused and to fines of Rs. 10 each and in default of payment to three weeks' rigorous imprisonment. The order to pay Rs. 20 as compensation to complainant out of the fines, if collected, will stand.

Conviction partly set aside;
Sentence reduced.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 7 OF 1914-15 OF BALLIA DISTRICT.

May 4, 1915.

Present:—Mr. Holms, S. M., and Mr. Campbell, J. M.

RAM SUBHAG CHAUBE—DEFENDANT—APPELLANT

versus

Maharaja KESHO PRASAD SINGH—PLAINTIFF—RESPONDENT.

Appeal, second—Oral evidence discredited on general reasons—Particular deponent not discredited—Error in law—Appeal.

To discredit oral evidence on merely general reasons not affecting the credit of any particular deponent, is an error in law and justifies interference in second appeal.

Selected Decision No. 9 of 1914, relied upon.

Second appeal from an order of the Commissioner, Benares Division, dated the 15th September 1914, reversing that of the Assistant Collector, Ballia District, in a case of ejectment.

JUDGMENT.

HOLMS, S. M.—(*April 23rd*, 1915).—As regards ground 4, I do not think there is any estoppel. The land-holder collected rent from the appellant in the three years when he was recorded as occupancy tenant. This is to some extent evidence in support of his claim to have succeeded to the former occupancy tenant, but not very strong evidence, and is certainly not an estoppel. The first ground is, I think, a good one. The Additional Commissioner has written as to the evidence of what he terms "many apparently respectable witnesses" He writes:—"It cannot be said that the evidence breaks down in any way. At the same time I am altogether sceptical as to its reliability. I consider that in a case of this kind the adoption is on the face of it very suspicious, and I would accept no evidence short of documentary evidence of adoption coming from the hand of the person who had a right to adopt." It is perfectly true that in a case of this sort, the oral evidence should be carefully scrutinised, but I do not think that the Additional Commissioner was justified on general grounds in discarding the oral evidence altogether. In Selected Decison No. 9 of 1914, when oral evidence was discredited on merely general reasons not affecting the credit of any particular deponent, it was held that such discredit of the evidence was an error in law which allowed the supperior Court to interfere on second appeal. This decision governs the present case.

I would, therefore, set aside the order of the Additional Commissioner and direct the present Commissioner to re-hear the appeal, costs following the event.

CAMPBELL, J. M.—I agree.

Appeal allowed; *Cause remanded.*

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 99 OF 1914.

April 21, 1915.

Present:—Mr. Justice N. Chatterjea and Mr. Justice Mullick.

BONOMALI BANIKYA—PETITIONER—APPELLANT

versus

JOY KUMAR BAIDYA AND OTHERS—OPPOSITE PARTY—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 47, 151, O. XXI, r. 16—Application for execution by transferee of decree—Notice to parties—Decree set aside—Execution—Procedure not given.

An *ex parte* decree obtained in a mortgage suit was transferred but the transferee neither got his name substituted in the place of the decree-holder nor was any notice under Order XXI, rule 16 of the Civil Procedure Code served either upon the decree-holder or upon the judgment-debtor. The judgment-debtor applied to set aside the *ex parte* decree making only the decree-holder party to it. The decree-holder failed to appear and the *ex parte* decree was set aside. The transferee of the decree thereafter applied for execution:

Held, that the transferee could not proceed with the execution before the order setting aside the *ex parte* decree was set aside; [p. 674, col. 2.]

that the Court could not set aside the order setting aside the *ex partee* decree under section 151, Civil Procedure Code. [p. 674, col. 2.]

Appeal against an order of the District Judge, Noakhali, dated the 28th of November 1913, affirming that of the Munsif, First Court at Feni, dated the 9th of August 1913.

Babu *Dhirendra Lal Kastgir*, for the Appellant.

Babu *Bepin Chandra Bose*, for the Respondents.

JUDGMENT.—This appeal arises out of an application under section 47 of the Civil

BONOMALI BANIKYA *v.* JOY KUMAR BAIDYA.

Procedure Code. The facts are these: One Rajdhar Shaha obtained a mortgage-decree against the appellant and some other persons in Suit No. 1124 of 1903 on the 22nd February 1904. Rajdhar having died, his widow Bidya Sundari obtained the final decree in the mortgage suit on the 20th March 1906. She executed the decree in 1907. Then she transferred the decree to certain persons from whom the present respondents purchased it on the 16th March 1910. On the 3rd May 1910, the respondents applied for execution of the decree in Execution Case No. 314 of 1910. No notice under Order XXI, rule 16, was issued or served upon the decree-holders or the judgment-debtors, but, on 2nd June 1910 a notice under Order XXI, rule 22, Code of Civil Procedure, was served upon the judgment-debtors, and on the next day, the execution case was dismissed. On the 18th September 1912, the appellant applied under Order IX, rule 13, to set aside the *ex part* decree. The application was made against Bidya Sundari alone as the opposite-party. Bidya Sundari did not appear in that application and the *ex parte* decree was set aside on the 15th February 1913 and the original suit was revised, but, as Bidya Sundari did not appear to prosecute the suit, it was dismissed for default on 12th March 1913. Meanwhile, on the 29th November 1912, the respondents applied for execution of the *ex parte* decree and a notice under Order XXI, rule 22, Code of Civil Procedure, was again served upon the judgment debtors on the 30th December 1912. The suit having been dismissed for default on the 12th March 1913, the present application was made by the appellant under section 47, Code of Civil Procedure, on the 1st May 1913 objecting that the execution case could not proceed on the grounds that no notice under Order XXI, rule 16, had been served, that the respondents had not acquired any interest in the decree by transfer and that the *ex parte* decree sought to be executed, having been already set aside, could not be executed at all. A petition of objection was filed on behalf of the present respondents and they urged that the Court, having regard to the circumstances, ought to exercise the powers under section 151, Code of Civil Procedure, and set aside the order by which the *ex parte* decree had been set aside.

The Court of first instance held that the appellant had notice of the transfer in favour of the respondents, that he, therefore, ought to have taken steps to have the respondents brought on the record of the case for setting aside the *ex parte* decree and that having taken proceedings, in the case in the absence of the persons who were interested, he did not act *bona fide* and it accordingly disallowed the application of the judgment-debtors. On appeal, the learned Judge, although he agreed generally with the Munsif, held that no notice having been served under Order XXI, rule 16, the execution could not proceed until the service of the notice and remanded the case to the Court of first instance, in order that the question whether the respondents had really a right to execute the decree might be determined after service of the notice under Order XXI, rule 16, Code of Civil Procedure. One of the judgment-debtors has appealed to this Court.

It appears that the respondents who claimed under a transfer from Bidya Sundari did not get themselves substituted in the place of Bidya Sundari under any order of the Court, and no notice under Order XXI, rule 16, Code of Civil Procedure, having been served either upon Bidya Sundari or upon the judgment-debtors, the execution could not proceed under the express terms of Order XXI, rule 16 of the Code. The respondents not having been substituted by the order of the Court in the Execution Case No. 314, the appellant was not bound to proceed against these persons in the application for setting aside the *ex parte* decree which was made against the only person on the record, *i.e.*, Bidya Sundari, and, although a good deal of suspicion arises out of the circumstances of the case, we do not see how the respondents can proceed with the execution before the order setting aside the *ex parte* decree is set aside. We are unable to give effect to the contention that the order setting aside the *ex parte* decree should be set aside under section 151 of the Civil Procedure Code, and that for two reasons: the *first* being that the present proceedings have arisen in the course of execution proceedings, and, *secondly*, that the question whether there had been real transfer of the interest in the decree to the respondents has not yet been determined by the Court. It seems to us that it is necessary for the respondents to take steps for setting aside the

order by which the *ex parte* decree was set aside. So long as the dismissal of the original suit stands, we think the respondents cannot execute the decree. Under the circumstances, the orders of the Courts below will be set aside, but, having regard to the circumstances of the case, each party will bear its own costs in all the Courts.

Appeal allowed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 4 OF 1914-15 OF HARDOI DISTRICT.

April 19, 1915.

Present:—Mr. Campbell, J. M.

PITAM SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DEBI PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Oudh Rent Act (XXII of 1886), s. 129—Mortgage of sir before 1901—Sale of equity of redemption in 1905—Mortgagors minors—Ex-proprietary rights claimed by mother of minors—Mother's claim wrongly disallowed—No appeal preferred—Subsequent suit for declaration of ex-proprietary rights.

The *sir* land in dispute was mortgaged before the passing of the Tenancy Act. In 1905 its equity of redemption was sold to one *D*, who applied for mutation in his favour. The mortgagors were four minor brothers and their mother on their behalf claimed ex-proprietary rights in the course of mutation proceedings. The Tahsildar rejected the claim in 1906, but his order was not objected to or appealed against and after that most of the land then claimed passed out of the possession of the four brothers. In 1913, two of the brothers on their own behalf as well as on behalf of the other two brothers who were still minors sued for a declaration of their ex-proprietary rights in the whole land:

Held, that inasmuch as the ex-proprietary rights arose in 1905 at the time of the sale of the equity of redemption and on their being disallowed by the Tahsildar, though wrongly, his order was not appealed against, the present claim was barred by section 129 of the Oudh Rent Act.

Obiter dictum.—Section 36 (3) is not very clear when it says that a case shall be referred to the Collector when ex-proprietary rights have been created, not where they have been claimed.

Third appeal from an order of the Commissioner, Lucknow Division, dated 7th October 1914, reversing that of the Collector, Hardoi District, in a case of ex-proprietary rights.

JUDGMENT.—This is a difficult case, but I think that the Commissioner's finding is correct.

Appellants' title to ex-proprietary rights first came into existence in 1905, when their equity of redemption of their mortgaged proprietary rights was sold in execution of a decree.

When the new proprietor, the respondent, applied for mutation the appellants' guardian, their mother, claimed ex-proprietary rights on their behalf, as they were then minors. The Tahsildar in the course of the mutation proceedings rejected this claim.

There is no doubt that in this he was in error and (probably) acting *ultra vires*. But section 36 (3) is not very clear. It only lays down that a case shall be referred to the Collector when ex-proprietary rights have been created, not where they have been claimed. Be that as it may, appellants' guardian accepted the Tahsildar's decision, which was delivered in 1906. She did not object to, nor appeal against, it and between that date and 1913, she and the appellants have allowed most of the 24 *bighas* then claimed to pass out of their possession, as they are only now the recorded tenants of 4 *bighas* 16 *biswas*.

After an interval of seven years appellants came into Court asking that they may be declared the ex-proprietary tenants of the whole 24 *bighas*. Two of the appellants are found to be grown men who attained their majority four or five years ago, while two of them are still minors.

There can be no doubt that the claim of the two adults is barred by section 129, Oudh Rent Act. They urge, however, that they can claim at least half the land in dispute as guardians of their minor brothers. But I do not think that this claim can now be admitted and am of opinion that it is barred by the action (or rather inaction) of their mother, who was the guardian of all the plaintiffs in 1905. If she had put in no claim in their behalf, the minors might now have some *locus standi*. As it is, I think that they have none. I, therefore, uphold the Commissioner's order and dismiss this appeal with costs.

Appeal dismissed.

KALKA PRASAD *v.* BAIJ NATH PRASAD.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 15 OF 1913-14 OF BASTI DISTRICT.

August 23, 1914.

Present:—Mr. Baillie, S. M., and Mr. Tweedy, J. M.

KALKA PRASAD AND OTHERS – DEFENDANTS —APPELLANTS

versus

Babu BAIJ NATH PRASAD—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 185—Revision—Interference—Miscarriage of justice—Occupancy tenant mutating tenancy in favour of his sons, effect of.

The Board can interfere in revision only when there is a *very grave* error of law and as a matter of policy will not interfere unless there has also been a *miscarriage of justice.*

A *Kayastha* got entered in the *patwari's* papers the names of his natural (*kahar*) sons in place of his name in respect of his holding but himself remained in possession with his sons. The *zemindar* was no party to this application for entry of names:

Held, that as the entry of the sons' names had no legal force and the father remained in possession with his sons, his rights as an occupancy tenant did not come to an end.

Application for revision from an order of the Commissioner, Gorakhpur Division, dated the 2nd March 1914, confirming that of the Assistant Collector, Basti District, in a case of ejectment.

JUDGMENT.

TWEEDY, J. M.—(*August 7th*, 1914.)—The Board can only interfere under section 185 when there is a *very grave* error of law, and as a matter of policy they will not interfere unless there has also been a *miscarriage of justice.* Both these conditions appear to be fulfilled in the present case. Appellant, an old Kayasth, got the name of his natural (*kahar*) sons entered as occupancy tenants in place of his own as far back as 1902. The *zemindar* was no party to this application (which should not have been granted by the Revenue Courts) and the Court's order had no force whatever, the whole transaction being purely a paper transaction. It is perfectly clear that Kalka Prasad, the father, remained in cultivation with his sons just as before and that the occupancy tenancy did not determine and is still in existence. I would set aside the orders of the Commissioner and the Assistant Collector and decreeing the application for revision, would dismiss the suit for ejectment.

BAILLIE, S. M.—I concur.

Application allowed.

RISAL RAI *v.* NEPAL RAI.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 50 OF 1913-14 OF GHAZIPUR DISTRICT.

April 17, 1915.

Present:—Mr. Holms, S. M.

RISAL RAI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

NEPAL RAI—DEFENDANT—RESPONDENT.

Tenant—Mortgagee—Rent-paying grove mortgaged—Suit for arrears of rent against mortgagor—Mortgagee not made party—Ejectment of mortgagee.

A rent-paying grove-holder mortgaged his grove with possession. After the mortgage the *zemindar*, without impleading the mortgagee as a defendant, sued the mortgagor for arrears of rent, obtained a decree and ejected him for its non-payment. Then he sued to eject the mortgagee as a tenant from year to year, the mortgagor's rights having been extinguished:

Held, that the mortgage being with possession, the mortgagee was a necessary party to the suit for arrears of rent and that the landlord could not eject him so long as he did not pay up the mortgage-money or so long as the land retained the character of a grove. [p. 676, col. 2; p. 677, col. 1.]

Second appeal from an order of the Commissioner, Benares Division, dated 20th April 1914, reversing that of the Assistant Collector, Ghazipur District, in a case of ejectment.

JUDGMENT.—There is a finding of fact that the land is a grove. It cannot then be the subject of an occupancy tenure. There is no evidence to show how long the occupancy tenancy has been recorded. This being so, the mortgage with possession of 17th January 1910 of the grove was a valid mortgage. The mortgagor was ejected in April 1912 for decreed arrears. The *zemindar* at that time was well aware of the mortgage with possession, for he instituted a suit to set it aside under section 31, which he afterwards withdrew on taking a sub-mortgage himself. If the arrears of rent were on account of the period subsequent to the mortgage, he should have

made the mortgagee in possession a defendant in the suit and given him an opportunity of paying up the rent. This he did not do, and now he cannot eject the mortgagee so long as he does not pay up the mortgage-money or so long as the land retains the character of a grove. There is no evidence that the arrears decreed were for a period prior to the mortgage.

I dismiss the appeal with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 57 OF 1913-14 OF GHAZIPUR DISTRICT.

May 5, 1915.

Present:—Mr. Holms, S. M., and Mr. Campbell, J. M.

BHAGWAN SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

DWARKA RAI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Estoppel—Tenancy admitted by landholder to be a fixed-rate tenancy—Tenant, whether can be ejected as occupancy tenant.

In a suit for enhancement of rent against his tenant, the *zemindar* entered into a compromise in which he said that the nature of the tenant's tenancy would be that of a fixed-rate tenancy and proceeded to describe certain of its incidents. No mention was made of the grounds mentioned in clause (*d*) of section 57 Act II of 1901, probably because he had said that the land will be treated as a fixed-rate tenancy. The land-holder then brought the present suit for the ejectment of the tenant and his mortgagee on the ground that the tenant had transferred his holding which he alleged to be an occupancy tenure:

Held, that the *zemindar* was estopped from asserting that it was not a fixed-rate tenancy.

Bachchi alias *Bachchia* v. *Bachchi*, 3 A. L. J. 513; A. W. N. (1906) 219; 28 A. 747, distinguished.

Kesho Das v. *Doolar Ram*, 22 Ind. Cas. 124, referred to.

Second appeal from an order of the Commissioner, Benares Division, dated the 6th July 1914, reversing that of the Assistant Collector of Ghazipur District, in a case of ejectment.

JUDGMENT.

HOLMS, S. M.—(*April 19th*, 1915.)—The land-holder sues to eject the defendant and his mortgagees, on the ground that the tenant has transferred his holding in which the land-holder alleges to be an occupancy tenancy, in contravention of the provisions of the Act. A suit for enhancement was brought by the predecessors of the land-holder against the husband of the present tenant which was compromised in 1893. Under the compromise the land-holder said that the nature of the tenancy would be that of a fixed-rate tenancy, and he proceeded to describe certain of the incidents. He went on to say that he would have no power of ejectment on account of anything done contrary to the intention of the *patta* or on account of injury to the land. This condition probably covered clauses (*b*) and (*c*) of section 57, and the reason probably that no mention was made of the grounds in clause (*d*) of section 57 was, that he had above said that the land will be treated as that of a fixed-rate tenant. The special provision, which I have quoted, is, therefore, in support of the contention that the land-holder intended that the holding should be transferable like that of a tenancy at fixed rates, and this contention is supported by the subsequent conduct of the land-holder who, as he admits, himself bought several of the plots included in the holding from the tenant. It seems to me that whatever the nature of the tenancy may be, that the land-holder is estopped by the action of his predecessor-in-interest from alleging the holding cannot be transferred. It is true that the High Court have held in *Bachchi* alias *Bachchia* v. *Bachchi* (1) that a *zemindar* executing a deed in favour of a tenant cannot make him a fixed-rate tenant within the meaning of section 8 so as to alter the succession, which would otherwise have obtained had the holding been regarded as an occupancy holding; but there was no question of estoppel in that case. Another High Court decision, *Kesho Das* v. *Doolar Ram* (2), is to some extent in point.

I consider that in this case the plaintiff is estopped, by the action of his predecessor in the compromise and in the subsequent pur-

(1) 3 A. L. J. 513; A. W. N. (1906) 219; 28 A. 747.
(2) 22 Ind. Cas. 124.

chase of some plots as held in fixed-rates, from ejecting the defendant on the ground that he has transferred his holding in contravention of the provisions of the Act which apply to occupancy tenants. I would set aside the order of the Collector and restore the order of the Assistant Collector, respondent paying costs throughout.

CAMPBELL, J. M.—I agree.

Appeal allowed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 11 OF 1913-1914

OF CAWNPORE DISTRICT.

March 22, 1915.

Present:—Mr. Holms, S. M.

Sardar SUNDAR SINGH—APPLICANT

versus

SITAL PRASAD AND OTHERS—RESPONDENTS.

Revision, if allowed where appeal lies—Revision application treated as appeal.

Where an appeal lies a revision application will not be entertained, but it may be treated as an appeal.

Application for revision from an order of the Commissioner, Allahabad Division, dated the 11th May 1914, in a case of mutation of names, dismissing the appeal for default.

JUDGMENT.—This is filed as an application for revision, but as a third appeal lies to the Board, no order in revision can be passed. I have allowed the applicant to treat this as a third appeal. On the 29th January when the present appellant paid in the process fees for service on the respondent, Govind Prasad, who he said lived in Gwalior, he was told that orders will be passed on the 2nd February, the date fixed for the hearing of the case. Under the impression that the summons on Govind Prasad could not be served before that date, he did not appear, but Govind Prasad apparently being informed by his brother, another of the respondents, turned up and the appeal was dismissed for default by the Collector. The present appellant, however, had received a definite order to appear on the 2nd February, and his affidavit that he was ill is so vague that I am not surprised that the Collector refused to act on it.

Appeal dismissed with costs and Rs. 5 Pleader's fee.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 35 OF 1913-14

OF ALIGARH DISTRICT.

February 24, 1915.

Present:—Mr. Holms, S. M.

UDAI RAM—DEFENDANT—APPELLANT

versus

COURT OF WARDS, ALIGARH—

PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11, O. II, r. 2—Suit for resumption of rent-free grant—Land found not resumable—Rent or revenue not assessed—Provisions of s. 153, Agra Tenancy Act (II of 1901), not given effect to—Fresh suit to assess rent, if barred—Res judicata.

A suit for resumption of a rent-free grant was brought and dismissed on the ground that the land was not resumable. In that suit, rent or revenue was not assessed as required by section 153 of the Agra Tenancy Act, II of 1901. A fresh suit was brought to assess rent and it was pleaded (1) that it was *res judicata* under section 11, Civil Procedure Code, (2) that the suit was barred under Order II, rule 2:

Held, overruling the contentions, that the suit was maintainable. [p. 679, col. 1.]

Second appeal from an order of the Commissioner, Agra Division, dated the 20th May 1914, reversing that of the Assistant Collector, Aligarh District, in a case of assessment of rent.

JUDGMENT.—I am entirely in accord with the view taken by Mr. Brown and Mr. Hose in this matter, and to my mind the officiating Commissioner, Mr. Mardon, entirely omitted to consider the application of section 153 (1) of the Tenancy Act. Section 153 (1) distinctly lays down that, in a suit for the resumption of a rent-free grant, when the Court finds on certain grounds that the grant is not liable to resumption, it shall proceed to determine whether the land is liable to the assessment of rent or of revenue under sections 126 and 158 respectively. It will be noticed that no mention is made of a suit to have rent assessed on the land. The only reason is, that in that case the Court would naturally decide whether rent is assessable or not. The Assistant Collector, even though resumption alone was sued for, should have proceeded to

act under section 153 and determined whether rent or revenue was assessable on the land. The appellant makes two contentions before me: (1) that it is *res judicata*, under section 11 of the Code of Civil Procedure and (2) that rent is not assessable on the land, and relies on Explanations 4 and 5. Explanations 5 is inapplicable for there was no claim in the plaint for assessment of rent. Explanation 4 is only applicable if the assessment of rent ought to be made the ground of attack by the plaintiff in the suit and even then it is only applicable if this matter had been heard and finally decided which it was not.

The *second* contention is that the plaintiff should have sued under rule 2, Order II, of the Code of Civil Procedure, for assessment of rent as an alternative remedy. Had the Assistant Collector done his duty under section 153 (1) of the Tenancy Act, the difficulty would not have arisen. I have then to see whether rule 2, clause (3), applies. In this particular case, the plaintiff was, to my mind, not entitled to more than one relief cumulatively. He was either entitled to get resumption or, in the circumstances as found, to get assessment of rent, but not both. Rule 2, clause (3), seems only to apply to a case in which a person is entitled to more than one relief in respect of the same cause of action, that is, to one relief and another or more than another as well, which is not the case in the present suit.

I may observe that in any case I should have been quite ready, if necessary, to review the order of my predecessor and have returned the original suit for decision as to assessment of rent.

I dismiss the appeal with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 196 OF 1914-15 OF GONDA DISTRICT.

March 29, 1915.

Present:—Mr. Holms, S. M., and Mr. Campbell, J. M.

RAM SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Thakur INDER BAHADUR SINGH—PLAINTIFF—RESPONDENT.

Oudh Rent Act (XXII of 1886), s. 108 (5)—Contract Act (IX of 1872), s. 209—Agent—Accounts, suit for—Representative of deceased landlord, when can sue—Jurisdiction of Civil and Revenue Court.

The representative of a deceased landlord can sue the agent employed by the former when alive for rendition of accounts of the period of his agency, and such a suit is cognizable by a Revenue Court. [p. 680, col. 1.]

Second appeal from an order of the Additional Commissioner, Fyzabad Division, dated the 16th October 1914, reversing that of the Assistant Collector, Gonda District, in a case of accounts and recovery of collection papers etc.

JUDGMENT.

HOLMS, S. M.—(*March* 29th, 1915.)—The question of jurisdiction is not altogether an easy one. The appellant urges that the heir of a deceased landlord cannot sue the agent employed by the previous landlord in the Revenue Courts under section 108 (5) of the Rent Act, when he is not the agent of the heir. He bases his argument largely on the analogy of the rulings regarding the right of an assignee of arrears of rent to sue for them. There is some difference of opinion between the Courts as to the rights of an assignee, but in any case this is not a parallel instance because the assignee possesses only part of the bundle of rights which a land-holder possesses. The appellant further relies on rulings as to the rights and duties of heirs of *lambardars*. These I do not think are applicable either, for the *lambardar's* position is one of a representative of other people. On the other side, the wording of section 108 (5) is referred to. The wording is, "suits by a *landlord* against agents employed by *landlords* in the management of land or the collection of revenue or rent, etc". The wording is

rather loose and I do not think much can be inferred from it. It is urged that the personal relation which existed between the former landlord and her agents does not exist between the present landlord, the respondent, and the appellants. It is true that the Civil Court would probably be a more suitable tribunal than a Revenue Court to try troublesome questions relating to accounts for a period of 14 years during which the present landlord, the respondent who has sued, had no personal knowledge of the matters in suit or how the relations stood between his predecessor and her agents, especially when one of them (Ram Singh) was her own nephew. I consider, however, that the lower Courts have rightly held that the suit lies in the Revenue Court. The present plaintiff appears to be without doubt the legal representative of the deceased principal who employed the agent, and, as the suit has been brought within one year from the date of the determination of the agency by her death, it is within time. The defendants can hardly plead that there has been no relation of agent and principal between them and the present plaintiff, for under section 209 of the Contract Act the agent is under a duty to the representative of his late principal, and although the agency ends with the death of the principal the responsibility continues in favour of the representative and enables the latter to resort to all remedies open to the principal, subject to the rule of limitation. If the suit had been instituted by the late principal and she had died while the suit was proceeding her legal representative could certainly have continued the suit, and there is no reason why the representative should not in the same way commence the suit if it is within limitation.

Though the question of whether a suit can jointly lie against both the defendants has not been raised by the defendants in the case, at first sight it seemed to me that no such suit could lie. However, there is some evidence that Sangam Lal acted under Ram Singh, and probably it will be convenient that accounts should be rendered by both of them in the same suit. The Commissioner should, I think, have stated with more precision the period and the land in respect of which he directed the accounts to be taken by the preliminary decree. Both Courts have found that Ram Singh was employed by the former landlord in the management of her estate, and in one village at any rate in the collection of rent, and that Sangam Lal was the *diwan* apparently working under Ram Singh and keeping accounts and collecting, at any rate, in respect of the *sir* in three villages. I take it then that the Commissioner's order related to the rendering of accounts in respect of the whole estate during all the years in suit. Ram Singh may, of course, be able to show that the deceased landlord allowed him to enjoy part of the profits of the estate in consideration of his close relationship to her.

Appeal dismissed with costs and Rs. 16, Pleader's fees.

CAMPBELL, J. M.—I agree.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1646 OF 1913.

May 21, 1915.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Chapman.

NISTARINI DASSYA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SARAT CHANDRA MOJUMDAR—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. I, r. 10 (i)—Suit by mother as administratrix—Subsequent addition of sons as plaintiffs—Suit, whether barred—Limitation Act (IX of 1908), s. 12—Bona fide mistake, meaning of.

Where by a *bona fide* mistake it is erroneously supposed that a plaintiff should be represented in a particular way and subsequently the plaintiff is permitted to rectify the mistake and appear personally, this does not amount to the addition of a new plaintiff within the meaning of section 22 of the Limitation Act. [p. 682, cols. 1 & 2.]

Subodini Debi v. *Cumar Ganoda Kant Roy*, 14 C. 400; *Manni Kasundhan* v. *Crooke*, 2 A. 296; *Raja Peary Mohan Mookerjee* v. *Narendra Nath Mookerjee*, 9 C. W. N. 421; 32 C 582, followed.

In matters of this kind the substance is to be looked to rather than the form. [p. 682, col. 2.]

Dhurm Das Pandey v. *Shama Soondri Dibiah*, 3 M. I. A. 229; 6 W. R (P. C.) 42; 1 Suth. P. C. J. 147; 1 Sar. P. C. J. 27; 18 E. R. 484; *Hari Saran Moitra* v. *Bhubaneswari Debi*, 16 C. 40; 15 I. A. 195 (P. C.); 12 Ind. Jur. 373; 5 Sar. P. C. J. 198, followed.

NISTARINI DASSYA *v.* SARAT CHANDRA.

Where a mistate is not made deliberately and where it is honestly made, the mistake is *bona fide*. [p. 681, col. 2.]

Where, therefore,a suit upon a registered mortgage-bond was originally instituted within the period of limitation by a widow not for her own benefit, but as administratrix for the benefit of her sons, and subsequently the names of the sons were added as plaintiffs after the period of limitation:

Held, (1) that the change was one of form only and not of substance and that there was no introduction of new plaintiffs when the sons were brought on the record; [p. 682, col. 2.]

(2) that, therefore, the suit was not barred [p. 682, col. 2.]

Appeal against the decree of the Officiating Sub-Judge, Jessore, dated the 17th February 1913, reversing that of theMunsif, first Court of that place, dated 18th December 1911.

Babus *Brojo Lal Chakravarti* and *Harendra Nath Ganguly*, for the Appellants.

Babus *Sarat Chandra Roy Choudhry*, *Satya Chandra Sinha* and *Bhudar Halder*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit upon a registered mortgage bond. The Munsif decreed the suit. In the Court of first appeal the suit has been dismissed on the ground of limitation. The plaintiffs appeal now to this Court.

The bond was executed in October 1895, the due date being April 1900. It was executed in favour of one Gopal Chandra De. The suit was brought on the 29th April 1911, shortly before the expiry of 12 years after the due date by the widow of Gopal Chandra De, who had been appointed administratrix to his estate. On the 30th November 1911, the widow presented a petition supported by an affidavit stating that her Pleader had discovered that her powers as administratrix had come to an end before the suit was instituted. It appeared that under the Letters of Administration her appointment as administratrix was to terminate when the eldest son of Gopal Chandra De attained majority and this had occurred some years prior to the institution of the suit. She prayed that the three sons of Gopal Chandra De who were his heirs should be added as plaintiffs. The Munsif made the order prayed for. It will be observed that the three sons were added as plaintiffs some months after the period of limitation had expired.

The order of the Munsif was made under clause (1), rule 10, Order I, of the first Schedule to the Code of Civil Procedure. The Munsif held in the terms of the claus that the suit had been instituted through a *bona fide* mistake in the name of the wrong person as plaintiff and accordingly ordered that the right persons, namely, the three sons, be added as plaintiffs. He held the suit was not barred by limitation and decreed it on the merits.

The learned Subordinate Judge has held in first appeal that the mistake was not *bona fide*. In his opinion *bona fide* means with due care and attention and he held that with the least care and attention, the plaintiff could well understand that her powers had come to an end. He inferred that the suit must be taken to have been instituted when the three sons came in as plaintiffs. This was after the period of limitation. He accordingly dismissed the suit without going into the merits.

We are of opinion that the Court of first appeal erred in the interpretation of the word *bona fide*. Where a mistake is not made deliberately and where it is honestly made, the mistake is *bona fide*. The widow was illiterate and *pardanashin*. The eldest son was 26 when the suit was brought, but it is clear from his deposition that he is not very intelligent. He says that for the last five or seven years he looks after his suits and collection of rent, but it is not said in whose name these suits to which he refers were instituted. The management was really done, it seems, by agents. No dishonest motive can be suggested : the mistake was brought to notice by the widow herself. We hold that the mistake was *bona fide* and that the order adding the three sons as plaintiffs was properly made under clause 1, rule 10, Order I.

It is then contended that the provisions of section 22, Indian Limitation Act, apply, which are to the effect that where after the institution of a suit a new plaintiff or defendant is substituted or added the suit shall, as regards him, be deemed to have been instituted when he was made a party.

The contention is that even though it be held that the three sons were properly added as plaintiffs yet, inasmuch as this was done after the period of limitation had expired, the suit must under the provisions above referred to be held to be barred.

In the present case, however, when the suit was originally instituted within the

period of limitation it was instituted by the widow not for her own benefit, but as administratrix for the benefit of the three sons. They were the real persons throughout who were to benefit. The change that was made after the period of limitation was one of form only, not of substance.

In the case of *Subodini Debi* v. *Cumar Ganoda Kant Roy* (1) it was held that where a suit was originally instituted in the name of a manager and the names of the employers were subsequently substituted as plaintiffs after the period of limitation, the suit was not barred. It is true that the decision rests partly on a consideration of the wording of the Code as it then stood. The learned Judges say, "the answer is that this suit is the original suit and was brought in time". This is a general observation, the principle of which is applicable to the present case.

In the case of *Manni Kasundhan* v. *Crooke* (2) where a suit was brought originally against a Municipal Committee represented by the Secretary, instead of by their President, as it should have been, and where the plaintiff applied after the expiry of the period of limitation for substituting the name of the President for that of the Secretary, it was held that by reason of such substitution the suit could not be deemed to have been instituted against the Municipal Committee when such substitution was made. The judgment was referred to in the case of *Raja Peary Mohan Mookerjee* v. *Narendra Nath Mookerjee* (3), in which the learned Judges stated the rule to be that where relief is originally claimed against a party who has to be represented by some person, the proper representation of that party subsequently made has not the effect of adding a "new defendant" to the suit. We are of opinion that a similar principle is applicable to a case such as the present where by a *bona fide* mistake it is erroneously supposed that a plaintiff should be represented in a particular way and subsequently the plaintiff is permitted to rectify the mistake and appear personally, this is not the addition of a new plaintiff within the meaning of section 22 of the Limitation Act.

That in matters of this kind the substance is to be looked to rather than the form will be apparent from the judgments of the Privy Council in the cases of *Dhurm Das Pandey* v. *Shama Soondri Dibiah* (4) and *Hari Saran Moitra* v. *Bhubaneswari Debi* (5). In both these cases a minor was treated as if he had been a party to the litigation, although in fact he never had been made a party and the litigation had been prosecuted by his mother in her personal capacity. "The suit must", their Lordships say in the first case, "be considered to have been prosecuted by her in her name for the minor's benefit". So, in the present case, the suit must be considered to have been originally instituted by the widow for the benefit of her sons and there was thus no introduction of new plaintiffs when the sons were brought on to the record.

We hold that the suit was not barred by limitation. We set aside the judgment and decree of the learned Subordinate Judge and remand the case for disposal on the merits. Costs to abide the result.

Decree set aside; *Case remanded.*

(1) 14 C. 400.
(2) 2 A. 296.
(3) 9 C. W. N. 421; 32 C. 582.
(4) 3 M. I. A. 229; 6 W. R. (P.C.) 43; 1 Suth. P. C. J. 147; 1 Sar. P. C. J. 27; 18 E. R. 484.
(5) 16 C. 40 (P. C.); 15 I. A. 195; 12 Ind. Jur. 373; 5 Sar. P. C. J. 198.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 357 OF 1912.

March 25, 1915.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Chapman.

RAMA NATH CHAKRAVARTI—PLAINTIFF—APPELLANT

versus

THE COLLECTOR OF KHULNA AND OTHERS—DEFENDANTS—RESPONDENTS.

Probate and Administration Act (*V of* 1881), *s.* 58 *—Application for Letters of Administration with Will annexed—Heirs in existence—Government, whether has* locus standi *to oppose grant—Confidential proceedings, legality of.*

An application for Letters of Administration with the Will annexed was filed before the District Delegate and upon an objection being made by a third party, the case was sent up to the District Judge and taken up as a contested case. In

the meantime the Chairman of the local Municipality made a report to the Sub-Divisional Officer that the Will was forged, whereupon the latter took some "confidential" proceedings and sent the record to the Collector asking him to oppose the grant of the Probate, who did so on behalf of Government:

Held (1) that the "confidential" proceedings of the Sub-Divisional Officer were not in accordance with law; [p. 683, col. 1.]

(2) that at the inception of the proceedings the Government had a *locus standi* in the matter but that as soon as it appeared that there were "heirs" in existence, the Government ought to have retired. [p. 683, col. 2.]

Appeal against the decree of the Subordinate Judge, Khulna, dated the 15th of August 1911.

Babus *Sarat Chandra Roy Chowdhury* and *Charu Chandra Bhattacharjee*, for the Appellant.

Babus *Srish Chandra Chowdhury*, for Babu *Ram Chandra Mitra*, for the Respondents.

JUDGMENT.—This appeal arises out of an application for Letters of Administration with the Will annexed of one Mati Moyi Debya. The Will purported to give away all the properties in the possession of the testatrix, being her own self-acquired property as well as the property inherited by her from her husband. At first the application was filed before the District Delegate and upon an objection being made by one Sarba Sundari, the case was sent up to the District Court and taken up as a contested case. In the meantime the Chairman of the Debhatta Municipality is said to have made a report to the Sub-Divisional Officer, Babu A.N. Sen, that the Will of which Probate had been asked for by Rama Nath Chakraburty was a forged one. Upon that information the Sub-Divisional Officer took some proceeding which he headed as confidential and examined certain witnesses, and then sent the record to the Collector asking him to oppose the grant of the Probate. It is not quite clear under what law this proceeding was taken. It appears that immediately upon the death of the deceased, the petitioner removed certain moveable property to his house and upon that Sarba Sundari lodged a complaint at the *thana* about this matter and he was arrested and taken to the *thana*. It is a question whether at the *thana* he did or did not make any mention of the Will. The Court, however, under these circumstances allowed Government to put in a caveat. There were three objectors, Sarba Sundari, the Government and a third person named Rama Nath Banerjee, who claimed under a *kobala* from the brothers of the deceased. As the Government took up the case, the caveators did not take any steps in opposition of the Will. Witnesses were examined on behalf of the petitioner and also on behalf of the Government and the lower Court has held that the Will was a spurious one and has, therefore, refused to grant Letters of Administration.

On appeal it is contended that the Government has no *locus standi* to oppose the grant in this case and, *secondly*, that on the evidence taken as a whole even if the evidence adduced on behalf of the Government be taken into consideration, the Will should be taken as proved. As regards the *first* contention, we think regard being had to the statement in paragraph 5 of the petition for Letters of Administration, "The deceased left no (near or distant) relative as her heir", the Government may have been led into thinking that this was really a case in which there were no heirs and although the Collector might have made an inquiry as to the existence or non-existence of heirs so as to attract the right by escheat before launching the Government into an expensive litigation, we cannot say that at the inception of the proceeding the Government had no *locus standi*. Although we decide this question of the *locus standi* of the Government to oppose the application in favour of the Government at its inception, we think that as soon as it appeared that there were heirs in existence who would inherit, the Government ought to have retired.

It appears from the evidence that the deceased left two brothers, who upon the evidence would be the legal heirs of her pre-deceased son whom she had succeeded. However, the first question raised in appeal is so far decided in favour of the Government.

In regard to the *second* question we think that on the whole we cannot agree with the decision of the learned Judge. It appears from the evidence that this woman was living with the petitioner and if anybody

was more near to her than anyone else it was the petitioner and it was, therefore, natural that she should have liked to have the properties of which he had been the manager after her husband's death to go to him. The Will is proved by the petitioner, Uma Nath Chakraburty, the writer of the Will, and Khetra Nath Chakraburty, one of the attesting witnesses to the Will, and one of the witnesses examined on behalf of the Government. We find that Pran Krishna Bhattacharjee as a witness said: "Rama Nath said when I saw him at the *thana* that he had seized her property as she had executed a Will in his favour Gokul, the Head Constable, was present then. He wanted to see the Will. Rama Nath said he had a Will". Therefore the case of the existence of the Will was made out as soon as he was arrested, and that was only a few days after the death of Mati Moyi. Then the Head Constable Gokul was examined and he said: "I brought him up to the *thana* at Debhatta. There he told me he had a Will which was in the custody of Paresh Babu, a Pleader. I then asked him who was the scribe and who were the attesting witnesses to the Will. He could not give me their names." Then we have the depositions of the Doctor Bhupendra Bhusan Biswas who treated the deceased It appears that this man was examined by the Deputy Magistrate in his confidential proceeding. In his depositions he is said to have stated that he did not sign any Will of Mati Moyi as an attesting witness or otherwise. Being examined by the Court, however, he proved the Will and as regards his depositions made before the Deputy Magistrate he said: "The Sub-Divisional Officer asked me if I had attested a Will forged by Rama Nath said to have been executed by Mati Moyi. I replied 'no'. I gave my answer in Bengali." Considering the whole of the evidence of this witness we think that his statements should be believed and that his evidence must have been imperfectly recorded at the summary and confidential proceeding by the Deputy Magistrate. In any case we find that the execution of the Will is proved by this witness and that the *zemindari's naib*, Bharat Chandra Mukerjee who appeared as a witness on behalf of the Government must have had some hand in the matter of the opposition to the Will. The petitioner says that this man had demanded certain sums of money as a consideration for supporting the Will and that being refused, he turned against him and brought about this trouble. We do not think that this is very improbable. Both the witnesses Pran Krishna and the Head Constable Gokul said that the petitioner had spoken to them of the Will, after his arrest, at the *cutchery*, in which Bharat lived and yet Bharat said that he did not hear him say to the Head Constable, when he was arrested at the rent office, that he had a Will executed by Mati Moyi in his possession.

It is not within the scope of this proceeding to say whether or not the petitioner is entitled to the property covered by the Will. This is a matter which the party that may be entitled will see to. But so far as this proceeding is concerned, we think that the Will is proved and we direct that Letters of Administration with the Will annexed be granted to the petitioner.

The order of the Court below is set aside.

The petitioner is entitled to his costs in this Court, hearing-fee four gold *mohurs*.

Order set aside.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL NO. 127 OF 1914.

September 15, 1914.

Present:—Sir Charles Fox, KT., Chief Judge, and Justice Sir Henry Hartnoll, KT.

E. F. DOVER—PLAINTIFF—APPELLANT

versus

E. S. DOVER AND OTHERS—DEFENDANTS—RESPONDENTS

Partnership, dissolution of—Receiver, appointment of—Purpose.

The usual way of guarding the divergent interests of the partners when they fall out is by appointing a Receiver and ordering the good-will of the business and stock in-trade to be sold, the partners being at liberty to bid at the sale. [p. 686, col. 1.]

Appeal against the judgment and decree of Mr. Justice Robinson, sitting on the original side of the Chief Court, dated the 9th

DOVER, E. F, *v.* DOVER, E. S.

July 1914, in Civil Regular No. 151 of 1914.

Mr. *Campagnac*, for the Appellant.

Mr. *Lambert* (Senior), for the Respondents.

ORDER.—This is an application for the appointment of an *ad interim* Receiver of partnership property pending the disposal of an appeal from a preliminary decree directing accounts of the partnership to be taken. The judgment on which the preliminary decree is based was adverse to the appellant.

Complications have arisen in connection with the estate of the late E. T. Dover owing to his widow and administratix not having dealt with the estate in the way in which the law directs an estate should be dealt with. The consequence is that the parties have created a non-descript relationship between themselves in connection with the business of the deceased, which vested in the administration as part of his estate. In the course of the case, however, the Advocates for all parties agreed that this relationship should be regarded as one of partnership and on the 18th June a petition by the appellant consented to by the Advocate of the defendants was filed, praying that Tuesday the 23rd June might be fixed for passing a preliminary decree for dissolution of the partnership and for taking of partnership accounts, etc. The day mentioned was fixed for the purpose but no preliminary decree was then made. Issues were fixed upon the points in dispute, evidence was taken and a decision was come to on all the issues except one, and a preliminary decree was drawn up. This omits a good deal of what is included in Form 21 of Appendix D of the first Schedule to the Code of Civil Procedure. The record affords no explanation of why the judgment did not direct a decree in the ordinary form, nor does the judgment explain why accounts were to be taken to the 31st March of this year only.

The decree should in ordinary course have declared that the partnership should stand dissolved as from the day on which the judgment was pronounced, and should have appointed a Receiver of the partnership estate and effects to get in the debts due to it and should have ordered the good-will of the business and stock-in-trade to be sold on the application of the parties, leaving it to an officer of the Court to fix a reserved bidding, and should further have ordered that any of the parties should be at liberty to bid at the sale.

The form in the Schedule to the Civil Procedure Code is based on the ordinary practice of the English Courts: see Lindley on Partnership (8th Edition), page 614.

The application for a Receiver is opposed by the defendants on the ground that it will cause some of them great inconvenience and expense, and incidentally that those living in the house where the business is carried on and those engaged in carrying on the business at the present time should be allowed to do so. This assumes that the good-will should be allotted to them, and that the Court should tell the plaintiff that he must be content with what the Court may, by some unexplained method of valuation, hold to be the value of the good-will and assets of the business.

Inconvenience to the parties is an inevitable incident when partners fall out and is a disadvantage of carrying on business in partnership. The rules as to good-will are thus stated in Lindley on Partnership, page 511:—

1. That if a firm is dissolved and there is no agreement to the contrary, the good-will must be sold for the benefit of all the partners if any of them insist on such sale.

2. That so far as is possible, having regard to the right of every partner to carry on business himself, the Court will on the dissolution interfere to protect and preserve the good-will until it can be sold.

The way in which it does interfere is to appoint a Receiver of the partnership assets. A dissolution is inevitable in the present case, and we may regard as done what should have been done by the preliminary decree. It does not appear to us that in the present state of feeling between the plaintiff and the defendants there is any ground for hope that the parties will come to an arrangement about taking over the business. We, therefore, think that the ordinary course should be followed in the suit.

Mr. A. Agabeg having already been appointed Commissioner to take the accounts

we appoint him Receiver of the partnership estate and effects to get in its outstanding book-debts and claims, to manage the business until it can be sold and to sell the stock-in-trade and good-will of the business as a going concern at such reserve as he may think fit to fix, the parties being at liberty to bid at the sale. It being evident that the lease of the premises in which the business is carried on was taken for the purposes of the business, the remainder of the term of the lease must be included in the sale. If, however, the parties all agree to some other arrangement within a month from this date, the sale need not be carried out. The defendants must pay the plaintiff's costs of this application—three gold *mohurs* being allowed as Advocate's fees.

Appeal allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 203 OF 1913.

June 4, 1915.

Present:—Justice Sir John Woodroffe, KT., and Mr. Justice Mullick.

EAKUF ALI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MEAJAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Sale of holding for arrears of rent—Merger of occupancy rights—Notice to quit, effect of.

Where a *raiyat* under the landlord mortgaged the property to a third person, who got possession and inducted the present defendants on the land, and the landlord brought a suit for rent against the heirs of the *raiyat* and bought up the holding at a sale for arrears of rent:

Held, that the occupancy holding still continued to exist even after the purchase by the landlord. [p. 686, col. 2.]

Akhil Chandra Biswas v. *Hasan Ali Sadagar*, 20 Ind. Cas. 698; 18 C. L. J. 262; 19 C. W. N. 246, referred to.

Where the landlord sold, thereafter, the permanent *raiyati* right to another who also took a lease from the landlord and then sold it to the plaintiff, who intending to eject the defendant served him with notice:

Held, that the defendant, having been duly served with notice to quit, must be ejected. [p. 687, col. 1.]

Appeal against the decree of the Subordinate Judge, first Court, Chittagong, dated the 4th October 1912, modifying that of the Munsif, South Rauzan, dated the 14th of August 1911.

Babu *Probode Kumar Das*, for the Appellants.

Babu *Manmatha Nath Roy*, for the Respondents.

JUDGMENT.

WOODROFFE, J.—This appeal has been heard at very great length; but I think the appellant has established his argument. The facts are that under the landlord there was a *raiyat* of the name of Fakir Mahamed. Fakir Mahamed mortgaged the property to one Ishan Poddar, who got possession. Ishan inducted the present defendants on the land. The landlord brought a suit for rent against the heirs of Fakir Mahamed and he bought up the holding at a sale for arrears of rent. The first and perhaps the main question in this appeal is, what is the effect of such purchase? Did it, as has been contended by the respondent, effect a complete merger of the holding and of the occupanncy right in the landlord's right or did it, as the appellant contends, keep alive the occupancy holding though merging the occupancy right? This question has been discussed in the case of *Akhil Chandra Biswas* v. *Hasan Ali Sadagar* (1), where a distinction is drawn between an occupancy holding and an occupancy right. I should state here that this case has been decided on the old law as it existed prior to 1907. Following the principle enunciated in the decision to which I have just referred, I would hold that the occupancy holding still continued to exist even after the purchase by the landlord. The landlord then sold to one Magan Ali the permament *raiyati* right. Magan Ali also took a lease from the landlord and the plaintiff has bought from Magan Ali and now desires to eject the defendant who had been inducted into possession, as stated.

The first Court held that he was entitled to a decree. The decision was reversed on appeal. For the reasons I have stated the landlord was able to transfer the holding to Magan Ali, through whom it

(1) 20 Ind. Cas. 698; 19 C. W. N. 246; 18 C. L. J. 262.

came to the plaintiff. The defendant continued to be what he was, an under-*raiyat*, and it has been found that he has been duly served with notice. The learned Judge has referred at the conclusion of his judgment to section 167. In my opinion this does not stand in the way. A further question was sought to be argued, and that is this, that in the suit to which Magan Ali was a party it was held that he could not get possession except by proceeding under section 167. This question is not a point which has been either raised or dealt with in the judgment under appeal and, therefore, cannot be entertained now. The defendants, having been duly served with notice to quit, must be ejected.

I, therefore, would allow this appeal, set aside the judgment and decree of the lower Appellate Court and restore those of the first Court with costs of this Court and of the lower Appellate Court.

MULLICK, J.—I agree.

Appeal accepted.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST APPEAL No. 1552 OF 1914.

April 20, 1915.

Present:—Mr. Justice Shadi Lal.

MAYA RAM AND OTHERS—APPLICANTS—APPELLANTS

versus

Musammat MALAN DEVI—DEFENDANT—RESPONDENT.

Will—Application for Letters of Administration—Institution of subsequent suit to contest validity of Will—Probate Court, if to stay proceedings—Factum of Will—Judgment in rem—Oral evidence as to execution of Will—Improbabilities.

A Probate Court is bound to determine whether a Will was as a matter of fact made, and it cannot stay its proceedings and wait indefinitely for the decision of a suit subsequently instituted in regard to validity of the Will which decision may or may not be in favour of the caveator. The possibility of a finding as to the invalidity of a Will, which finding can only be binding upon the parties to the suit, does not constitute a sufficient justification for a Probate Court to postpone its decision as to its due execution, more especially as the decision of the Probate Court on the point operates as a judgment *in rem*. [p. 688, col. 1.]

In order to conclude whether a Will is genuine, internal evidence is no doubt of great importance. But an improbability to prevail against direct evidence of disinterested witnesses must be clear and cogent. The incidents mentioned by a Court for raising a presumption of probability or improbability are of no value if they are either wrong on facts or capable of explanation by reference to other considerations which have been lost sight of by that Court. [p. 690, col. 1.]

Chotey Narain Singh v. *Ratan Koer*, 22 I. A. 12; 22 C. 519 (P. C.), referred to.

Miscellaneous first appeal from an order of the District Judge, Jhelum, dated the 30th March 1914, rejecting the application.

Bakshi *Tek Chand*, for the Appellants.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Respondent.

JUDGMENT.—The appellants, who are the collaterals of one Karam Chand deceased, applied to the District Judge for Letters of Administration *cum testamento annexo* to the estate of his wife, *Musammat* Bhag Sudhi, and propounded Exhibit PA as her last Will and testament. The respondent, *Musammat* Malan Devi, her co-widow, lodged caveat with the District Judge and contested the genuineness of the Will. The learned Judge arrived at the conclusion that the propounders had failed to establish the genuineness of the document put forward by them and he, therefore, rejected their application. Against his order the present appeal has been preferred under section 86 of Act V of 1881, and the sole question which arises for determination in these proceedings under the Probate and Administration Act relates to the genuineness or otherwise of the Will.

Before taking up the matter in controversy between the parties, I must deal with a prayer made on behalf of the respondent at the commencement of the hearing of the appeal. Mr. Shafi, for *Musammat* Malan Devi, stated that validity of the Will was the subject of an issue in a suit instituted subsequently to, but tried simultaneously with, the application for Letters of Administration and that an appeal is now pending in the lower Appellate Court against the decree passed in that suit. He further stated that that appeal had been adjourned pending the trial of this appeal and requested that as the decision on the validity of the Will, if given in favour of the caveator, would render the decision *re* the *factum* unnecessary, I should postpone the trial of this appeal until the determination of the issue as to the validity. The question is

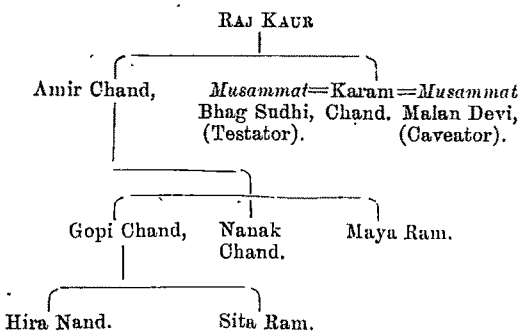
whether the adjudication on the *factum* of the Will should or should not precede that upon its validity, and I have not the slightest hesitation in answering it in the affirmative. It seems to me clear that a Probate Court is bound to determine the matter whether a Will was, as a matter of fact, made and it cannot stay its proceedings and wait indefinitely for the decision in regard to the validity of the Will, which decision may or may not be in favour of the caveator. I do not think the possibility of a finding as to the invalidity of Will, which finding can only be binding upon the parties to the suit, constitutes a sufficient justification for a Probate Court to postpone its decision as to its due execution, more especially when it is to be remembered that the decision of the Probate Court operates as a judgment *in rem*. Further, the District Judge has, in this case, held that the Will is a forged document, a finding which is fraught with serious consequences to the appellants and their witnesses, and I consider they are fully entitled to ask the Appellate Court to pronounce its opinion on the genuineness or otherwise of the document propounded by them as the last Will and testament of the lady. For these reasons, I cannot accede to the prayer of the respondent and must try the appeal on the merits. The simple issue in this case is whether the appellants have succeeded in establishing that the document Exhibit A is the genuine Will of the deceased *Musammat* Bhag Sudhi. *Ex facie* the Will appears to be duly executed by the testator and properly attested by no lesst han fifteen witnesses. It purports to bear the right thumb mark of the deceased lady and also her signature in Gurmukhi characters. I find that the appellants have adduced the evidence of the scribe and six of the attesting witnesses, who all swear that the Will was duly executed by the lady prior to her departure for a pilgrimage. I have considered this evidence and observe that no reason whatsoever has been shown why the testimony of the witnesses should not be believed. In fact, there is only one witness, Ram Chand, P. W. No. 4, a collateral of the husband of the testator, whose credit has been impeached before me on the ground that he is not a disinterested witness. Other persons, who have given evidence, are not of the same caste as the testator or the appellants and they appear to be disinterested witnesses and nothing has been urged against them which would justify the Court in discrediting their testimony. It is to be noted that the caveator did not make the slightest attempt to summon any of the remaining witnesses to establish her contention that the Will was not made by *Musammat* Bhag Sudhi, and it is significant that one Thaker Singh, her own witness, had to admit that the document bears the seal of his father, Sobha Ram, who is a *lambardar* of the village.

This, then, is the direct evidence in support of the Will and upon the present record it stands unrebutted. The learned District Judge, instead of examining the evidence and giving his reasons for disbelieving it, has absolutely ignored it and contented himself with the remark that the full power of disposition by a widow is regarded with disfavour among the Hindus and that suggestion appears, according to him, to be the sole ground for the witnesses coming forward to depose falsely in favour of the Will. Now I consider this is altogether an insufficient reason for condemning a fairly large number of disinterested persons as suborned witnesses and for thinking that they and other persons, who have all signed the Will, conspired together to commit a forgery which did not benefit them in the least. The grounds upon which the District Judge has found against the Will are conjectural and his so-called improbabilities do not stand the test of examination.

As regards the thumb-impression, the Will itself mentions that it is the impression of the right hand, and this appears to be the opinion of the experts who state that it is probably for that reason that the impression in question does not correspond with any of the thumb marks on other documents executed by the deceased. The District Judge has not noticed this fact, which seems to be the explanation for the difference in the thumb impressions. The appellants have also produced some witnesses to prove the fact that the deceased was literate and knew Gurmukhi characters, and one Sant Ram has produced a bond, dated the 26th December 1904, purporting to bear her signature. It is true that the other documents on the record, admittedly executed by her, are simply thumb-marked and not signed by her, but the reason for not signing them may be that they are all documents intended for presentation in a Court of

Justice or to a Revenue Officer and it was probably considered necessary to put thumb-marks instead of signatures upon them. Be that as it may, the fact remains that there is evidence to show which has not been rebutted, that the deceased knew how to read and write, and it appears that the signature on the bond resembles the disputed writing on the Will.

In connection with the alleged improbabilities based upon the provisions of the Will, it is necessary to give here a brief pedigree-table to expl in the relationship between the parties.



Karam Chand, the husband of the testator, bequeathed his entire property by a Will, dated the 10th of February 1904, to his two widows in equal shares, conferred upon them the full power of alienation, and directed that, in the event of the death of the one, the other should succeed to her estate. It appears that he was displeased with Maya Ram by reason of the latter having brought a widow to live with him in his house and he accordingly provided in the Will that Maya Ram was not to receive any portion of his property so long as the aforesaid widow continued to live with him. On the strength of this clause in Karam Chand's Will, the contention is raised that it is unlikely that *Mussammat* Bhag Sudhi would execute a Will in contravention of the wishes of her husband, but the answer to it is two-fold. In the *first* place, it must be remembered that Karam Chand was not in any way hostile to Maya Ram, and it is not improbable that when the widow had remained in the family for some years and had, as it were, become a regular member thereof, the resentment which was legitimate in 1904 had spent its force in 1911 when the Will in question was written. *Secondly*, Maya Ram is only one of the beneficiaries under the Will and there is absolutely no reason why *Musammat* Bhag Sudhi should disinherit Nanak Chand and the sons of Gopi Chand who, under the Will, get ⅔rds of the estate. I may add that there is no reliable evidence that her relations with the appellants were strained or that she had any reason to be dissatisfied with them.

The next argument advanced in support of the theory of improbability is, that *Musammat* Bhag Sudhi, who was on good terms with her co-widow, *Musammat* Malan Devi, was not likely to disinherit her and give the property to the collaterals of her husband. But Malan Devi had already ample property for all legitimate purposes and it was only right that the deceased should bequeath her estate to the persons who were the real heirs of her husband.

Further, the Will directs the legatees to build a *dharmsala* and a direction of that kind can only be carried into execution by male members. For these reasons I do not consider that the internal evidence afforded by the Will throws any doubt on the genuineness thereof. On the other hand, the bequests are just those which a Hindu widow in the position of *Musammat* Bhag Sudhi would ordinarily make, and I do not think that any circumstance likely to excite suspicion has been disclosed.

Lastly, it is strongly pressed upon me that the failure on the part of the appellants to produce the Will at the time of the mutation of the estate in favour of *Musammat* Malan Devi in February 1912 goes to show that it did not exist at that time and was manufactured subsequently. Now the *patwari's* evidence shows that the usual proclamation before sanctioning mutation was not issued in this case. And the mutation order makes it clear that only the *lambardar* and the *patwari* were present at the time when the order was passed. It appears that the Tahsildar sanctioned the mutation not in the village of the parties, but in another village called Maha·a. It is urged on

behalf of the respondent that Sita Ram, one of the appellants, got a mutation effected in connection with a mortgage on that very day, but the order with respect to that mutation was, as pointed out by Mr. Tek Chand, passed in another village called Chhappar. There is not an iota of evidence on the record to prove that any one of the appellants was present at the time of the mutation on the 13th of February 1912, or knew of it, and the circumstances mentioned above do not, in my opinion, raise a presumption of knowledge.

The learned District Judge states in his judgment that the appellants "allowed one year to elapse over the mutation in favour of the defendant before they produced the Will." But this is not quite correct, for *Mussammat* Bhag Sudhi died on the 16th December 1911, and the Will was produced on the 4th of September 1912, when the question of mutation in respect of a sale made by the caveator came up for decision before a Revenue Officer. This mutation has evidently been overlooked by the learned Judge.

These are all the points upon which the theory of improbability rests and after giving my careful consideration to the *pros et cons*, I do not think they outweigh the direct testimony in favour of the Will. The judgment of the District Judge suffers from the defects that he has ignored that evidence *in toto*, and that the incidents mentioned by him for raising a presumption of improbability are either wrong on facts or capable of explanation by reference to other considerations which have been lost sight of by him. As observed by their Lordships of the Privy Council in *Chotey Narain Singh v. Ratan Koer* (1), an improbability to prevail against the direct evidence of disinterested witnesses must be clear and cogent; and the circumstances upon which the order of the lower Court proceeds do not, in my opinion, satisfy this test. For the aforesaid reasons I hold that Exhibit A has been proved to be the last Will and testament of *Musammat* Bhag Sudhi. I accordingly allow the appeal, set aside the order of the lower Court and direct that Letters of Administration to her estate with a copy of the Will annexed be granted to the appellants. They must execute a bond in the sum of Rs. 5,000 with two sureties in like amount for the due administration of the estate as required by the provisions of section 78 of Act V of 1881. The respondent must pay the costs of the appellants in both the Courts.

Appeal allowed.

(1) 22 C. 519 at p. 531 (P. C.); 22 I. A. 12.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2607 OF 1913.

May 19, 1915.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Roe.

KRISHNA KUMAR NANDY—PLAINTIFF—APPELLANT

versus

JOY KRISHNA NANDY AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 53—Mortgage executed in order to defeat creditors, if void—Consideration paid in part—Suit to enforce mortgage security—Lien.

Section 53 of the Transfer of Property Act does not render a transaction void, but it is only voidable at the option of any person defrauded, defeated or delayed thereby. [p. 692, col. 1.]

In order to bring a case within the scope of section 53 fraudulent intention alone is not enough, there must also be evidence to show that there were other creditors at the time of the transaction who were intended to be defrauded or defeated. [p. 692, col. 1.]

A mortgage can be enforced for so much of the consideration as is proved to have been paid by the mortgagee to the mortgagor. [p. 692, col. 2.]

Where the defendant No. 1 executed a mortgage of two properties, a parcel of land and a hut on another parcel, in favour of the plaintiff and the defendant No. 2, a creditor of the defendant No. 1, obtained a money-decree against him and in execution thereof purchased the hut; in a suit to enforce the mortgage security:

Held, (1) that defendant No. 2 as purchaser of the equity of redemption in the hut alone was in no way interested in the first parcel of land which belonged to the mortgagor and could not, therefore, object to the sale of that parcel by the mortgagee, [p. 692, col. 1.]

Chidambaram Chettiar v. *Srinivasa Sastrial*, 23 Ind. Cas. 714; 18 C. W. N. 84; 36 M. 227; 16 M. L. T. 286; (1914) M. W. N. 754; 16 Bom. L. R. 783; 1 L. W. 963; 20 C. L. J. 571; 26 M. L. J. 473, distinguished.

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(2) that it being plain from the orders in the execution proceedings, wherein defendant No. 2 became the purchaser, that he acquired the hut subject to the lien of the plaintiff, he could get relief only on condition that he satisfied that lien. [p. 692, cols. 1 & 2.]

Rajani Kumar Das v. *Gaur Kishore Shaha*, 7 C. L. J. 586; 12 C. W. N. 761; 35 C. 1051 and *Jaladanki Chinna Pitchia, In re*, 11 Ind. Cas. 868; 10 M. L. T. 183; 36 M. 29; (1911) 2 M. W. N. 152, referred to.

Appeal against the decree of the Sub-Judge, Barisal, dated the 9th May 1913, modifying that of the Munsif, second Court, Barisal, dated the 3rd of April 1912.

Babu *Brojendra Nath Chatterjee*, for the Appellant.

Babu *Gunoda Chandra Sen*, for Babu *Chandra Kanta Ghosh*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff in a suit to enforce a mortgage security, which comprised two properties, namely, a parcel of land and a hut on a second parcel. The mortgage was executed by the first defendant in favour of the plaintiff on the 11th October 1909. The second defendant, a creditor of the first defendant, obtained a decree for money against the mortgagor on the 27th August 1909, and in execution of that decree, purchased the hut on the second parcel for a sum of Rs. 50. The present suit has been defended by the purchaser, who has been joined as a party, on the ground that he has acquired an interest in the equity of redemption subsequent to the mortgage. The Court of first instance found that the plaintiff had failed to prove that any money was advanced on the mortgage and consequently dismissed the suit. Upon appeal the Subordinate Judge found that though the consideration for the mortgage was stated to be Rs. 150, the plaintiff had established that a sum of Rs. 50 only was due to him from the mortgagor under a prior mortgage of the 25th March 1909. The second defendant thereupon contended that a decree should not be made in favour of the plaintiff even for this sum together with interest thereon, because the transaction was voidable under section 53 of the Transfer of Property Act inasmuch as the mortgage had been created with a view to defeat or delay the creditors of the mortgagor. The Subordinate Judge overruled this contention and gave the plaintiff a decree for realization of the mortgage-money by sale of the first property alone. He exempted the second party from the mortgage lien, on the ground that the transaction was void as against the second defendant, who is a *bona fide* purchaser at a sale held in execution of a decree of his own against the first defendant. Neither party is satisfied with this decision. The plaintiff has appealed and contended that a decree should have been made against both the properties included in the security. The second defendant has appealed and urged that on the facts found by the Subordinate Judge, no decree should have been made even in respect of the first property.

As regards the cross-appeal of the second defendant, we are of opinion that it cannot possibly succeed. The second defendant, as purchaser of the equity of redemption in the hut, is in no way interested in the first property, which still belongs to the mortgagor, he cannot consequently be permitted to impeach the decree for the sale of that property.

As regards the appeal of the plaintiff, it has been contended on behalf of the respondents that the Subordinate Judge should have held, on the authority of the decision in *Chidambaram Chettiar* v. *Sami Iyer* (1) confirmed on appeal to the Judicial Committee in *Chidambaram Chettiar* v. *Srinivasa Sastrial* (2), that the mortgage transaction which was voidable under section 53 of the Tranfer of Property Act must be avoided in its entirety and cannot be made the basis of a decree even for such portion of the consideration as is proved to have been passed from the mortgagee to the mortgagor. The case mentioned is clearly distinguishable. The Subordinate Judge has found that the mortgage-bond was executed for an antecedent loan of Rs. 57 and an alleged cash payment of Rs. 93 and that the payment of the cash consideration was doubtful or had not been proved. He has further found that the plaintiff was not, at the date of the mortgage transaction, aware of the decree obtained by the second defendant nor of

(1) 30 M. 6; 16 M. L. J. 427; 1 M. L. T. 351.

(2) 23 Ind. Cas. 7 4; 20 C. L. J. 57 ; 26 M. L.J. 473; 18 C. W. N. 841; 36 M. 227; 16 M. L. T. 286; (1914) M. W. N. 754; 16 Bom. L. R. 783; 1 L. W. 963.

its impending execution against the first defendant. There is also no evidence to show that there were other creditors of the mortgagor at the time of the mortgage transaction who were intended to be defrauded or defeated. But the Subordinate Judge seems to have held that the intention of the mortgagor was to put a fictitious statement of consideration in the mortgage-bond so that it might be of use to him as against possible creditors at some future time ; there is, however, no direct evidence to show that the mortgagee was aware of this fraudulent intention. The facts found by the Subordinate Judge are, consequently, not sufficient to bring the case within the scope of section 53, as explained by this Court in the cases of *Ishan Chunder Das Sarkar* v. *Bishu Sirdar* (3) and *Hakim Lal* v. *Mooshahar Sahu* (4).

But we need not rest our decision on this basis alone. We shall assume, for our present purposes, that the mortgage is within the mischief of section 53 and that the facts sufficient to justify this conclusion have been found by the Subordinate Judge, still the question arises, what is the relative situation of the parties to this litigation ? Section 53 does not render the transaction void ; it is only voidable at the option of any person defrauded, defeated or delayed thereby. Let us assume also, as was done in the case of *Eastern Mortgage and Agency Co., Ltd.* v. *Rebati Kumar Roy* (5), that the validity of the mortgage can be questioned by way of defence and that it is not obligatory upon the person prejudicially affected to institute an action to avoid the transaction. If these assumptions are made, the inference follows that the second defendant is entitled to question the mortgage, only in so far as it affects the property acquired by him, namely, the hut on the second parcel. But the Court, when it proceeds to grant relief by way of avoidance of the transaction, will do so only on equitable considerations and will apply the principles of justice, equity and good conscience. In the present case, it is plain from the orders in the execution proceedings wherein the second defendant became the purchaser, that he acquired the hut subject to the lien of the plaintiff; consequently, if at his instance the mortgage is avoided, he should be granted relief, only on condition that he satisfied that lien. It follows that the plaintiff is entitled to a decree for his dues as against the second property in the hands of the second defendant. This view is in accord with that taken in the cases of *Rajani Kumar Das* v. *Gaur Kishore Saha* (6) and *Jaladanki Chinna Pitchia, In re* (7), which recognise the principle that a mortgage can be enforced for so much of the consideration as is proved to have been paid by the mortgagee to the mortgagor.

The result is that this appeal is allowed, the cross-objection dismissed and the decree of the Subordinate Judge discharged. There will be a mortgage-decree in favour of the plaintiff against both the properties included in the security. But the decree will direct that the plaintiff must, in the first instance, proceed to realise his dues by sale of the first property. If such sale is not found sufficient to satisfy his dues, he will be entitled to proceed against the second property to recover the balance. As the hut, after purchase by the second defendant, has been demolished and can no longer be brought to sale, the decree will specify the sum recoverable by the plaintiff from the defendant under our judgment. Each party will pay his own costs throughout the litigation.

Appeal allowed.

(3) 24 C. 825; 1 C. W. N. 665.
(4) 34 C. 999; 6 C. L. J. 410; 11 C. W. N. 889.
(5) 3 C. L. J. 260
(6) 35 C. 1051; 7 C. L. J. 586; 12 C. W. N. 761.
(7) 11 Ind. Cas. 868; 36 M. 29; 10 M. L. T. 183; (1911) 2 M. W. N. 152.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 711 OF 1914.

June 1, 1915.

Present:—Justice Sir George Knox, KT.

JWALA SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ABDUL RAZAK AND ANOTHER—DEFENDANTS—RESPONDENTS.

Ferry—Crown grant—Right to ply boats—Prescription.

The plaintiffs were the owners of *Mouza* R and the defendants of *Mouza* B. Between villages R and B flowed the river G. The plaintiffs alleged that they

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were entitled to ply boats across the river and to disembark passengers on land belonging to the defendants and prayed that the defendants be restrained from obstructing:

Held, that the use of a ferry by the *zemindars* of *Mouza* B, which had been found to be a long and continuous use, was entitled to prevail until the plaintiffs, who were starting up an opposition ferry, could show a Crown grant or could give evidence from which a Crown grant could be presumed. [p. 694, col. 1]

Nityahari Roy v. *Dunne*, 18 C. 652, followed.

Second appeal from the decision of the District Judge of Shahjahanpur, dated 4th March 1914.

Mr. *Peare Lal Banerji*, for the Appellants.

Mr. *Iqbal Ahmad*, for the Respondents.

JUDGMENT.—The plaintiffs-appellants in this Court describe themselves as *zemindars* of *Mouza* Rampur Jaichand, *Mahal Awal*; the defendants, they say, are *zemindars* of *Mouza* Bamhiana. The river Gara flows between the two villages. They add that the boats of both parties ply between the *Mouzas* Bamhiana and Rampur Jaichand but the defendant No. 4 in collusion with defendants Nos. 1 to 3 has of late prevented the plaintiffs from plying their boats and has appropriated the whole income that results from the same; in law and custom the owners of both villages are entitled to ply boats in the Gara between Rampur Jaichand and Bamhiana. They prayed that the defendants may be restrained from obstructing, and that damage may be awarded. In defence the plea is taken that for a very long time the ferry at Bamhiana and the right to ply boats has always appertained to *Mouza* Bamhiana and the income resulting from the ferry has always been entered in the revenue papers of that village as *sewai* income.

The Munsif of Tilhar, in whose Court the case was instituted, says in his judgment, "It is clear from the statement of the plaintiffs' own witness, the *patwari*, that the defendants alone have been working the ferry referred to since the last Settlement." The plaintiffs had failed to prove that they at any time since the last Settlement or before have ever worked the ferry on their own side. On the other hand, the defendants had by their evidence shown that they alone had been working the ferry for more than 20 years and had assured a right to do so by prescriptive and adverse possession. It held, however, that a monopoly to a ferry can only be acquiesced by a Crown grant. For these reasons it decided that the plaintiffs were entitled to start a rival ferry and that the defendants could not restrain them. It accordingly granted the plaintiffs a decree to this effect, that they are entitled to ply their boats on the river between the villages referred to and that the defendants be restrained from interfering with their doing so. It pronounced no decision upon the question whether the plaintiffs have a right to embark and disembark passengers on the Bamhiana side, holding that it did not arise in the present case. The defendants went in appeal to the District Judge of Shahjahanpur. That Court held that for more than 20 years ferry boats had been plying and the ferrymen had taken leases from the defendants, the owners of the village Bamhiana, and the income arising from it is entered by the *patwari* in the *khatoni* of that village; further, it held that the opposite bank of the river belongs to the defendants. The mere fact that there is a right of way across the river does not give the plaintiffs the right to disembark passengers on the defendants' land. There is no public landing place there which every one has the right to use. For these reasons it held that the plaintiffs had no right to a declaration that they were entitled to carry passengers across the river at this ferry and allowing the appeal, it dismissed the plaintiffs' claim with costs.

The plaintiffs have come to this Court and they contend, *first*, that the defendants have no monopoly to ply their boats across the river and plaintiffs have equal rights with the defendants, *next*, that the Court below having found that there was a right of way from one village to the other across the river when it was dry, it follows that the plaintiffs could ply their boats over the river when it was full. The second plea was the one that was strongly urged. The learned Vakil's argument was that as the public had the right to go down by a path or road to Rampur Jaichand side, to cross the river when it was shallow, land on the Bamhiana side and take up their journey onwards, the defendants could not claim any monopoly to carry passengers across. When asked to point out the law or custom on which the plaintiffs based their alleged right, the learned Vakil could point

out neither. Several English cases were cited but I do not think that they are of much use in deciding this matter. The case, in my opinion, resolves itself into the question whether the plaintiffs have acquired any right to easement or to a right in the nature of an easement on the Bamhiana side of the river, when that involves a right to embark and disembark passengers on another's land. It is a misnomer to talk of a public road. Whatever might be the nature of the track from the river side onwards, that track is on land belonging to the *zemindars* of Bamhiana and the plaintiffs are really seeking to enforce a right in the nature of an easement, when they claim a right to embark and disembark passengers on the Bamhiana land. Following the view taken by the Calcutta High Court in *Nityahari Roy* v. *Dunne* (1), I am prepared to hold that the use of a ferry by the *zemindars* of Bamhiana, which has been found to be a long and continuous use, is entitled to prevail until the plaintiffs who are starting up an opposition ferry can show a Crown grant or give evidence from which a Crown grant can be presumed. The result is that the appeal is dismissed with costs, which will include fees in this Court on the higher scale.

Appeal dismissed.

(1) 18 C. 652.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 1563 OF 1913.

June 9, 1915.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice N. Chatterjea.

HIRANMOY KUMAR SAHA—PLAINTIFF—APPELLANT

versus

RAMJAN ALI DEWAN—DEFENDANT—RESPONDENT.

Landlord and tenant—Suit for arrears of rent—Previous decree, whether proves landlord's title—Presumption as to continuance of relationship—Evidence Act (I of 1872), s. 114, ill (d).

In a suit for arrears of rent a decree for rent obtained by the landlord in a prior suit against the same defendants is not merely an item of evidence, but is conclusive as to the relationship between the parties at the time to which the previous suit referred.

Section 114 illustration (*d*) of the Evidence Act does not compel, but certainly permits, the Court to make a presumption as to the continuance of the state of things.

Appeal against a decree of the Subordinate Judge, first Court, Burdwan, dated the 21st of February 1913, affirming that of the Munsif, Additional Court, Kalna, dated the 30th of May 1912.

Babu *Kherode Nath Bhuya*, for the Appellant.

Babu *D. N. Bagchi*, for the Respondent.

JUDGMENT.—This is a suit for arrears of rent. It was necessary for the plaintiff to establish that he was the defendants' landlord. He proposed to do that by utilizing, among other things a decree for rent which he had obtained in a prior suit against these defendants. The lower Appellate Court has rejected the decree as an item of evidence, apparently on the ground that it was *ex parte*. This is manifestly erroneous. The decree is not merely an item of evidence, but is conclusive as to the relationship between the parties at the time to which the previous suit referred. That does not mean that in the circumstances of this case it is conclusive as to the present relation between the parties. But it is good and valuable evidence in so far as it establishes the relationship at a time that has passed. Its value becomes more apparent when the terms of section 114 of the Evidence Act and illustration (*d*) are borne in mind, which does not compel, but certainly permits, the Court to make a presumption as to the continuance of the state of things. The decree has been excluded from consideration by the lower Appellate Court in error.

We must, therefore, reverse the decree of the lower Appellate Court and send back the case in order that it may be determined according to law. Costs hitherto incurred will abide the result.

Decree reversed; Case remanded.

BISHAMBHAR NATH *v.* JAGAN NATH PRASAD.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 541 OF 1914.

May 26, 1915.

Present:—Justice Sir P. C. Banerji, KT., and Mr. Justice Rafique.

BISHAMBHAR NATH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

B. JAGAN NATH PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Easements Act (V of 1882), s. 13, cl. 3 (d)—Easement of necessity—Doors not necessary for light and air, if can be opened—Drains.

Where the defendants were alleged to have practically closed by staking bricks three doors appertaining to a house and to have stopped the flow of water through a drain which had existed for a number of years, and it appeared that the keeping open of the doors was not necessary for the enjoyment of the premises, that the doors used practically to be closed always, that there was access to the house of the plaintiffs otherwise than through one of these doors and that sufficient light and air could be obtained without the opening of the doors:

Held, (1) that the plaintiffs' claim in respect of the doors was rightly dismissed; [p. 695, col. 2.]

(2) but that as there was no other drain in the house of the plaintiffs and for the flow of water from the kitchen of the house there was no other outlet, the plaintiffs were entitled to use the drain for the flow of water from the kitchen and the defendants could not obstruct it. [p. 696, col. 1.]

Second appeal from a decision of the District Judge of Cawnpore, dated the 23rd of January 1914.

Mr. *Ramakant Malaviya*, for the Appellants.

Mr. *B. E. O'Conor*, for the Respondents.

JUDGMENT.—The facts of this case are these:—The father of the plaintiff-respondent No. 1 was the owner of an enclosure, on one side of which there was a temple. The enclosure was sold by auction in execution of a decree and was purchased by the defendants. There was some litigation between the parties as regards the portion of the building known as the temple. In that litigation the defendants failed. It is alleged that the defendants have now practically closed, by staking bricks, three doors appertaining to the house, and have stopped the flow of water through a drain which had existed for a number of years. The present suit was accordingly brought for removal of the obstruction to the three doors and for restoration of the drain and for an injunction. It was alleged that the door C, marked on the plan filed with the plaint, was used as a passage and that the doors A and B were used principally for light and air. The Courts below decreed the claim. Upon appeal this decree was set aside and the claim of the plaintiffs was dismissed in its entirety. It is contended on behalf of the plaintiffs-appellants that the lower Appellate Court has wrongly applied the provisions of section 13 of the Easements Act to this case. The learned Vakil for the appellants relies on clause 3 (*d*) of that section, which is to the effect that if an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer took effect, the transferee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement. It is urged that the learned Judge ought not to have considered the matter from the point of view of an easement of necessity, but should have determined whether the doors were necessary for the enjoyment of the building as it was enjoyed before the transfer in favour of the defendant took effect. In our opinion as regards the three doors in question, the learned Judge has found, upon a consideration of all the circumstances, that the keeping open of the three doors is not necessary for the enjoyment of the premises as it was enjoyed before the sale to the defendants. He visited the locality and he has found that according to the statement of the plaintiffs themselves, the doors used practically to remain closed always. He further found that there is access to the house of the plaintiffs otherwise than through one of these doors, and that in two of the rooms there is plenty of light and air, and sufficient light and air can be obtained without the opening of the doors. He came to the conclusion that the existence of these doors was not in the least necessary either for egress and ingress or for the enjoyment of light and air. The meaning of his finding clearly is that for the enjoyment of the house as it was enjoyed before the sale, the existence of the doors is not necessary. In view of this finding the claim in respect of the three doors has been rightly dismissed. As for the drain, we do not agree with the learned Judge. He himself finds that there is no other drain in the house of

the plaintiffs, and that for the flow of water from the *rasoi* or kitchen of the house there is no other outlet. It is thus clear that the maintaining of the drain is necessary for the enjoyment of the house for the flow of water from the kitchen, and the defendants are not entitled to close the drain. Of course the plaintiffs' right is a right to use the drain for the flow of water from the kitchen or *rasoi*, and not for the discharge of ordinary sullage water or rain water from the whole house. The defendants will be at liberty to cover up the drain, but in such a way as not to obstruct the flow of water as it has hitherto been discharged from the kitchen or *rasoi*. We accordingly vary the decree of the Court below to this extent that we direct that the drain be restored for the discharge of water from the kitchen, the defendants being at liberty to cover it up in such a way as not to obstruct the flow of water from the kitchen. In other respects we affirm the decree of the Court below. The parties will pay and receive costs in all Courts proportionately to failure and success, and the costs in this Court will include fees on the higher scale.

Appeal partly allowed.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 67 OF 1914.

May 28, 1915.

Present:—Sir Lawrence Jenkins Kt., Chief Justice, and Mr. Justice N. Chatterjea.

DURGA CHARAN CHANDRA—PLAINTIFF—APPELLANT

versus

THE KHORDA COMPANY, LIMITED—DEFENDANTS—RESPONDENTS.

Sale—Consideration—Kobala *containing recital of payment of consideration*—Benami, *onus of proving*—*Defendant in possession—Presumption, whether arises—Admission of first evidence.*

In a suit for possession on the basis of a sale-deed the plaintiff (vendee) has to prove his title where the defendant (vendor) in possession pleads that he is only a *benamidar* but he shows a *prima facie* title by producing and proving his conveyance which contains a recital of receipt of the consideration. [p. 697, col. 1.]

In such a case the onus is upon the defendant (vendor) to show the non-payment of consideration. [p. 697, col. 2.]

Where after the close of evidence on both sides, the plaintiff applied to the Court to be allowed to adduce further evidence but the application having been disallowed, he applied to withdraw from the suit with liberty to bring a fresh suit but the order granting this latter application was set aside on revision, and the plaintiff then applied for summons on certain persons to prove a certain part of his case, but the defendants objecting, the Court did not allow these persons to be produced, though present:

Held, that under the circumstances the plaintiff ought to have been allowed to tender further evidence. [p. 698, col. 1.]

Appeal against a decree of Mr. Justice Coxe, dated the 28th of May 1914, in appeal from Appellate Decree No. 2959 of 1911.

Dr. *Rash Behari Ghose*, Babus *D. N. Chakravarti* and *Kali Kinkar Chakravarti*, for the Appellant.

Mr. *S. R. Das* and Babu *Ambika Pada Choudhury*, for the Respondents.

JUDGMENT.—The plaintiff-appellant sued the defendant company for damages for having demolished a building, a 19/80th share of which is alleged by the plaintiff to have been purchased by him from one Ram Chandra Banerjee in the name of one Bepin Behari Haldar on the 10th December 1907. The defendants also purchased the same share from the heirs of Ram Chandra on the 22nd September 1908. They also purchased the remaining shares from the other co-sharers and dismantled the whole building in October 1909.

The defence was that the alleged purchase by the plaintiff from Ram Chandra was a colourable and *benami* transaction and the plaintiff had not acquired any title under it.

The Court of first instance placed the burden of proving the *benami* upon the defendants, and decreed the suit, but that decree was reversed by the District Judge on appeal, and the decree of the District Judge was affirmed on second appeal by Mr. Justice Coxe. The plaintiff has preferred this appeal under the Letters Patent.

The learned District Judge was of opinion that the Munsif had wrongly placed the onus of proving *benami* upon the defendants. He held that "the burden was clearly upon the plaintiff to prove the reality of the sale to him and the fact that consideration had passed from him to Ram Chandra," that he had failed to prove the same, and came to the conclusion that the sale to the plaintiff was a colourable and *benami* transaction.

Now, the plaintiff claimed the property under a registered conveyance from Ram Chandra, through whom the defendants also claimed it. The execution of the *kobala* by Ram Chandra has been proved and the

kobala has been produced by the plaintiff. Apparently a valid transfer was effected by the *kobala*, and the onus, therefore, lay upon the defendants to show that it was not a real transfer.

It is contended on behalf of the defendants that the principle is inapplicable to a case where the defendant in possession sets up the plea of *benami*. No doubt the fact that the defendants are in possession is in their favour, and is an important element to be taken into consideration in determining whether the transaction is *benami*. But there is no presumption in favour of *benami* even where the defendant is in possession. In *Uman Parshad* v. *Gandharp Singh* (1), where the plaintiff sought to recover possession on the strength of certain deeds against the defendants in possession who pleaded that the deeds were *benami*, the Judicial Committee observed: "It is familiar to us all that the system of putting property *benami* is so extremely common in India that the mere fact of a deed being executed in proper form, and apparently effecting a valid transfer to another, is not as good evidence of a real transfer as it would be in other countries, and even a slight quantity of evidence to show that it was a *sham* transaction will suffice for the purpose. Still such a transfer cannot be considered as nothing. The person who impugns its apparent character must show something or other to establish that it is a *benami* or *sham* transaction."

No doubt a plaintiff has to prove his title where the defendant in possession pleads that he is only a *benamidar*, but he shows a *prima facie* title by producing and proving his conveyance, which usually contains a recital of the receipt of consideration. In the present case also, the *kobala* contains an admission by the vendor (Ram Chandra) of the receipt of consideration. That admission is evidence, though not conclusive, against the defendants [*Foolee Bibee* v. *Bessirudi Mirdha* (2)]. The learned District Judge, however, is of opinion that this "case should be distinguished from those cases in which one of the parties to a deed denies the truth of a statement made as to the passing of the consideration;" and that the "issue of *benami* or not *benami* turns principally on the question whether the plaintiff has shown that he paid the stated consideration to Ram Chandra." But the defendants stand in the same position as Ram Chandra himself through whom they claim, and the non-payment of consideration is a matter to be taken into account in determining whether the *kobala* was *benami*. The onus, therefore, is upon the defendants to show the non-payment of consideration.

It is contended on behalf of the defendants that the learned District Judge has considered the question of possession, and upon a consideration of the whole evidence has come to the conclusion that the *kobala* was a *benami* one, and the same view has been taken by Coxe, J. But it seems to us that the conclusion arrived at has been influenced by the view taken by the District Judge as to the incidence of the burden of proof. The question of possession, no doubt, is to be taken into consideration as well as other circumstances and probabilities in deciding whether a *kobala* is a real and *bona fide* or merely a *benami* transaction, but the learned District Judge appears to have arrived at the conclusion that the *kobala* was *benami* by placing the onus upon the plaintiff of proving the reality of the transaction and the passing of the consideration.

The judgment of Coxe, J., and the decree of the District Judge are accordingly set aside, and the case sent back to the lower Appellate Court for a re-hearing of the appeal according to law. Costs to abide the result

The plaintiff complains before us, that some important evidence which he wanted to adduce for proving payment of consideration to his vendor had been excluded by the Courts below.

It is stated in the *kobala* of the plaintiff that the consideration was paid by a currency note for rupees one thousand, the number of which was mentioned in it. The plaintiff stated in his deposition that he drew the note from the Commercial Bank and paid it over to his vendor, Ram Chandra. After the close of evidence on both sides he applied to the Court to be allowed to adduce further evidence, but the application having been disallowed, the plaintiff applied to withdraw from the suit with liberty to bring a fresh suit. The application was granted

(1) 15 C. 20 at p. 28; 14 I. A. 127; 11 Ind. Jur. 474; 5 Sar. P. C. J. 71; Rafique & Jackson P. C. No. 98.
(2) 12 W. R. (F. B.) 25.

by the Court, but the order was set aside on revision by the Court, and the Munsif was directed to take up the case at the stage at which the order for withdrawal was made. The plaintiff then applied for summons upon the Liquidator of the Commercial Bank and the Comptroller of Paper Currency to produce certain books of their offices and it appears that certain clerks of the said office were present in Court with the books required. The defendants objected to the reception of further evidence, and the Munsif was of opinion that having regard to the order of the High Court the plaintiff could not be allowed to adduce further evidence. We think that under the circumstances the plaintiff ought to have been allowed to tender the books in evidence and we direct the lower Appellate Court to do so. The defendants also will be entitled to adduce evidence relevant to the question.

Decree set aside ; Case remanded.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 151 OF 1914.

September 8, 1914.

Present:—Mr. McColl, A. J. C.

NGA TUN LU—PLAINTIFF—APPELLANT

versus

NGA SHWE CHIN—DEFENDANT—RESPONDENT.

Mortgage—Mortgage for Rs. 105 *unregistered but known to subsequent purchaser, proof of, if necessary—Evidence Act* (*I of* 1872), *s.* 58—*Subsequent purchaser, right of.*

Where the purchaser of certain lands admitted previous knowledge of a mortgage of part of the lands in possession of the mortgagee:

Held, that it was unnecessary to prove the mortgage in a suit for possession by the purchaser against the mortgagee and that the fact that the mortgage-deed was for Rs. 105 and was unregistered was immaterial. [p. 699, col. 2.]

Held, further, that the purchase being subject to the mortgage, the purchaser could not recover the land without paying the mortgage-money. [p. 699, col. 2.]

An admission made by a party when examined as a witness comes within the purview of section 58 of the Evidence Act. [p. 699, col. 1.]

Mr. *S. Mukerjee*, for the Appellant.

Mr. *D. Dutt*, for the Respondent.

JUDGMENT.—The plaintiff-appellant alleged that he had purchased a holding from Maung Shwe So for Rs. 600 by a registered deed of sale and that the defendant-respondent had wrongfully entered into two plots and, he sued for possession of these two plots.

There is realy no dispute as to the facts. The whole holding originally belonged to Maung Shwe So and some years ago he mortgaged it to the defendant-respondent's brother-in-law, Maung Tha Gyaw, for Rs. 205. Then he purchased some cattle from the defendant-respondent for Rs. 105 on credit and agreed to create a second mortgage on the land in his favour for this amount. A document was executed on stamped paper but it was not registered. On account of this agreement Maung Tha Gyaw gave the defendant-respondent possession of the two plots in suit, though he was under no obligation to do so. Then Maung Shwe So redeemed the remaining plots from Maung Tha Gyaw apparently for Rs. 205. Finally Maung Shwe So executed a registered deed of sale of the whole land in favour of the plaintiff-appellant and then as the defendant-respondent began to cultivate the two plots already in his possession, the plaintiff-appellant sued him.

The Township Judge held that as the mortgage-bond executed in favour of the defendant-respondent had not been registered, this second mortgage could not be proved and, therefore, the plaintiff-appellant was entitled to a decree.

Part of the defendant-respondent's case was that a condition of the second mortgage was that if Maung Shwe So did not redeem the land by 1269, it should become the property of the 1st and 2nd mortgagees. When the plaintiff-appellant was examined as a witness he admitted the mortgage and this agreement, but alleged that prior to purchasing the land he had inquired from Maung Shwe So whether there was encumbrance on the land and was told that there was none. The learned Additional Judge of the lower Appellate Court accordingly held that as the plaintiff-appellant had admitted the 2nd mortgage and the agreement then made, it was unnecessary to prove them and the fact that the mortgage-deed was unregistered was immaterial, and that as Maung Shwe So had not redeemed the two plots in suit

by 1269, they had become the property of the defendant-respondent and that Maung Shwe So, therefore, had no interest in them at the time he executed the deed of sale which he could transfer to the plaintiff-appellant. He, therefore, reversed the first Court's decree and dismissed the suit.

It is now urged that as the plaintiff-appellant's admission was not made in the pleadings but in his deposition as a witness, the Court could not dispense with proof of the second mortgage in the defendant-respondent's favour, that the position of the burden of proof is fixed by the pleadings and cannot be altered, and that as owing to the non-registration of his document the defendant-respondent was debarred from putting it in evidence, he was unable to prove anything and the plaintiff-appellant should have succeeded.

This argument is ingenious but it cannot be sustained. Courts have to try questions on which the parties disagree, not those on which they agree. There is no authority for the contention that the words "at the hearing" in section 58, Evidence Act, refer only to the 1st hearing at which issues are framed. For instance *A* sued *B* for compensation for breach of contract and *B* denied the breach but also alleged certain facts in mitigation of damages in case the breach were held proved. The burden of proof would be on *A* but the burden of proving the special facts would be on *B*. If then on cross-examination as a witnesses *A* admitted these facts, it would obviously be waste of time to require *B* to prove them. It not unfrequently happens, especially when one party at the first hearing has merely put the other party to the proof of a certain fact, that after a certain amount of evidence of that fact has been given, the first party or his Advocate admits it in order to save time and expense. I have no doubt that an admission made by a party when examined as a witness comes within the purview of section 58, Evidence Act, and is not merely a piece of evidence carrying special weight as coming from the enemy's camp, and I do not think this decision is really in conflict with the decision of *Sadhu* v. *Nga Si Gyi* (1).

(1) U. B. R. (1907), Evidence, 1.

I am of opinion, therefore, that there was no necessity to prove the second mortgage and as the plaintiff-appellant was aware of it at the time he purchased the land, the purchase is subject to that mortgage. He stated that he questioned Maung Shwe So prior to the purchase and was told that there was no encumbrance on the land, but it was not only Maung Shwe So whom he should have questioned, he should also have inquired of the defendant-respondent who is and was in possession.

The plaintiff-appellant, therefore, cannot recover the land without paying the mortgage-money, Rs. 105. On the other hand the contention that owing to Maung Shwe So's failure to redeem, the land has become the defendant-respondent's property cannot be sustained. It was explained in *Nga Kyaw* v. *Nga Zu Nut* (2) that such an agreement could not execute itself, and that a further transaction was necessary to give it effect.

The plaintiff-appellant therefore, has a right to redeem the land. The decree of the Court below is accordingly set aside and the plaintiff-appellant will be given a decree for redemption for Rs. 105, six months being allowed. There will be no order as to costs in any of the three Courts as both sides have contended for too much.

Decree set aside.

(2) U. B. R. (1907) 3rd Qr., Mortgage, 1.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 127 OF 1909.

June 4, 1915.

Present:—Mr. Justice N. Chatterjea and Mr. Justice Mullick.

RAJAB ALI CHOWDHURY—PLAINTIFF—APPELLANT

versus

HEDAYET ALI CHOWDHURY AND OTHERS—DEFENDANTS—RESPONDENTS.

Fraud—Contemplated fraud not effected, effect of—Fraudulent confiderate, when can take advantage—Equitable relief—Collusive decree—Agreement not to execute, effect of.

Where the contemplated fraud has not been effected, a party to the fraudulent transaction does not lose his right to be relieved from the effect of such a transaction. [p. 703, col. 2.]

RAJAB ALI *v.* HEDAYET ALI.

Petherpermal Chetty v. *Muniandy Servai*, 35 C. 551 (P. C.); 35 I. A. 98; 5 A. L. J. 290; 7 C. L. J. 528; 18 M. L. J. 277; 12 C. W. N. 552; 10 Bom. L. R 590; 4 M. L. T. 12; 4 L. B. R. 266; 14 Bur. L. R. 108, *Param Singh* v. *Lalji Mal*, 1 A. 403, followed.

Chenvirappa v. *Puttappa*, 11 B. 708 and *Jadu Nath Poddar* v. *Rup Lal Poddar*, 10 C. W. N. 650; 4 C. L. J. 22; 33 C. 967, referred to.

Akhil Prodhan v. *Manmatha Nath Kar*, 22 Ind. Cas. 86; 18 C. L. J. 616, followed.

To enable a fraudulent confederate to retain property transferred to him in order to effect a fraud, the contemplated fraud must be effected when and when alone does the fraudulent grantor or giver lose his right to claim the aid of the law to recover the property he has parted with. [p. 705, col. 1.]

The principle, that a party to a fraudulent transaction is entitled to relief in a Court of Equity as against his fraudulent confederate so long as the fraud contemplated has not been carried into effect, is not inapplicable merely because the party suffers a decree to be passed against him in a fictitious and collusive suit which is only a part of the fraudulent scheme. [p. 705, col. 2; p. 706, col. 1.]

Where, therefore, the defendant obtained a collusive decree against the plaintiff promising to execute only against the plaintiff's brother and then sued out execution against the plaintiff himself, on a suit to have it declared void and of no effect:

Held, that even if the plaintiff could not impugn the decree he was entitled to relief having regard to the agreement that it could not be enforced against him. [p. 706, col. 1.]

Appeal from a decree of the Subordinate Judge, first Court, Chittagong, dated the 23rd of December 1908.

Babus *Dwarka Nath Chakrabarti* and *Dhirendra Lal Kastgir*, for the Appellant.

Dr. *Sarat Chandra Bysack* and Babu *Chandra Sekhar Sen*, for the Respondents.

JUDGMENT.—The plaintiff and the defendants in the present suit are residents of Chittagong, who were carrying on business at Rangoon. In 1898 the business of the plaintiff and his brother, defendant No. 5, failed and it is alleged that he thereupon under the advice of Nur Ali, the predecessor of defendants Nos. 2 and 4, paid Nur Ali a sum of Rs. 50,000 out of his own pocket for the purpose of settling with the creditors of the joint business. In 1899 the plaintiff and his brother fell out and the latter declined to contribute his share of Rs. 50,000 thus paid by the plaintiff. The plaintiff admits that he thereupon on the 5th June 1899 at the instigation of Nur Ali executed in favour of Nur Ali a collusive mortgage-bond for Rs. 67,000, in which he gave as security the joint ancestral properties of himself and his brother, signing the bond on behalf of himself and also on behalf of his brother upon the authority of an alleged power-of-attorney. Being subsequently advised that the power-of-attorney had ceased to be operative after the dissolution of the partnership between the plaintiff and his brother and a mortgage-deed executed after such dissolution was not binding upon his brother, the plaintiff again at the instigation of Nur Ali executed a collusive promissory note for Rs. 5,000 in favour of Nur Ali on the 10th June 1900 on behalf of himself and his brother. In this document also the plaintiff signed for his brother as his duly constituted agent, and his case is that it was intended that Nur Ali should bring a test suit upon the promissory note and in the event of obtaining a decree against both the plaintiff and defendant No. 5, should execute the decree against the defendant No. 5 alone. A suit was next to be brought upon the mortgage-bond and a similar procedure was to be adopted in respect of it in execution. The plaintiff does not deny that his scheme from the outset was to defraud his brother. But all did not go smoothly. The plaintiff returned to Chittagong and was away from Rangoon for nearly three years. It is alleged that during his absence and without any notice to him Nur Ali in 1903 transferred the promissory note to the first defendant, Hedayet Ali. Hedayet Ali then sued upon the note and on the 25th November 1903 obtained a decree against the plaintiff alone. The decree was subsequently transferred to Chittagong for execution and on the 17th August 1907 attachment of the plaintiff's immoveable property was made in the Chittagong District. The plaintiff thereupon brought the present suit in the Court of the Subordinate Judge of Chittagong on the 6th December 1907 praying for the following reliefs.

1. That the decree in Suit No. 86 of 1903 of the Chief Court of Lower Burma on the basis of the said on demand-note, which is without consideration and ineffectual, be declared to be collusive, fraudulent and ineffectual and not binding upon the plaintiff and the said decree be declared null

and void and incapable of execution against the plaintiff.

2. That an order be made for whatever other relief the Court thinks fit to grant under the circumstances of the case.

Separate written statements were filed on the one hand by defendant No. 1, Hedayet Ali, and on the other by defendants Nos. 2-4, the sons of Nur Ali who have succeeded to his estate upon his death. The Subordinate Judge found in the plaintiff's favour upon the issues relating to jurisdiction and limitation and *res judicata*, but he found against the plaintiff on each of the most important issues which run as follows:

5. Whether the decree in the suit was obtained by fraud as alleged in the plaint?

6. Whether the defendant No. 1 was servant *benamidar* of the deceased Nur Ali Chowdhury?

7. Whether the promissory note on demand on which the decree complained against has been based was executed by the plaintiff under misrepresentation and inducement without consideration as alleged in the plaint?

8. What relief, if any, can the plaintiff get in the suit?

The suit having been dismissed, the plaintiff appeals.

Although the learned Subordinate Judge finds that there was no fraud on the part of Nur Ali, either in execution of the mortgage-deed of the 5th June 1899 or in the execution of the demand promissory note of the 10th June 1900, or in its subsequent transfer to Hedayet Ali or in the matter of the decree of the 25th November 1903 obtained in the Chief Court of Lower Burma, he is of opinion that the last finding alone is sufficient for defeating the suit now before us. We think, however, that the plaintiff has succeeded in establishing that he was prevented from making a proper defence to the suit by the fraudulent assurances received from Nur Ali and Hedayat Ali. The learned Subordinate Judge has, in our opinion, refused on inadequate grounds to accept the evidence of the plaintiff and of his witness D'Costa to the effect that Nur Ali in the presence of Hedayet Ali assured the plaintiff that he would take out a decree against the plaintiff and his brother, defendant No. 5, but execute it against the latter only and that relying upon that assurance, the plaintiff went to his home in Chittagong and took no further steps to defend the suit. The plaintiff admits that one Kala Mia, a mutual friend of the parties, attempted to induce Nur Ali to withdraw the suit, that Nur Ali declined to do so and that the plaintiff thereupon filed a written statement alleging undue influence in the matter of the promissory note. This admission is not inconsistent with the plaintiff's allegation that there was a subsequent arrangement between the parties by which Nur Ali agreed to proceed in execution against defendant No. 5 only. The view that there was some such agreement is further supported by an examination of the various transactions between the parties. To begin with we must, in disagreement with the learned Subordinate Judge, hold that mortgage-bond of 1899 was a fraudulent contrivance for cheating defendant No. 5. The partnership between the plaintiff and his brother was dissolved on the 31st July 1898 by mutual consent and a notice to that effect was duly published in the local official Gazette dated the 25th February 1899. There is no reason for doubting that after the dissolution the claims against the plaintiff amounted to Rs. 67,000 as set out in the schedule to the mortgage-bond. The plaintiff's case is that out of this sum he paid Rs. 50,000 and Nur Ali paid Rs. 2,500, but that the bond was a wholly collusive affair. It is contended by the defendant that the whole of this sum of Rs. 67,000 was paid by Nur Ali out of his own pocket. Upon the face of it this allegation is untrue, for it appears from the bond that a sum of Rs. 8,000 was not paid by Nur Ali at all, while the plaintiff asserts without contradiction that a cheque for the sum of Rs. 6,500 issued by Nur Ali in plaintiff's favour was subsequently dishonoured. It further appears that at the time when Nur Ali is said to have been making these advances to the plaintiff at an interest of 12 per cent. per annum, he was himself borrowing morey at much higher interest and that his liabilities were then certainly not less than Rs. 2,00,000. In our opinion he was not in a position

to lend so large a sum as Rs. 67,000 to the plaintiff. It is noticeable that defendants Nos. 2 to 4 do not come forward to depose, nor do they attempt to show either by their account books or by calling any attesting witnesses, that any consideration passed. On the other hand the plaintiff's witness Kalusemam states on oath that on the same day that the bond was executed Nur Ali gave the plaintiff an acknowledgment, in the shape of the letter Exhibit 13, of the payment of Rs. 50,000 by plaintiff. The learned Subordinate Judge has declined to believe Kalusemam and ordinarily we should in appeal be loth to interfere with his finding on a question of the credibility of a witness, but in the present case this witness as well as the witness D'Costa was examined on commission and we in appeal are in as good a position as the learned trial Judge to judge his veracity. We think that having regard to the witness's present position in life and all the circumstances of the case, his story as to the character of the bond is substantially true. It is to be noticed that no one denies that the signature on the letter purporting to be that of Nur Ali was his.

The plaintiff charged his brother's properties when he had no authority to do so. His object was to realise from his brother a part of the Rs. 50,000 he had paid to Nur Ali. The mortgage-deed was clearly a fraudulent transaction. The same remark applies to the promissory note executed in the following year. The defendants allege that Nur Ali lent Rs. 5,000 on this note to enable plaintiff to pay a creditor named Verappa Chetty. But Nur Ali was then in no better financial position and the plaintiff's story that the promissory note was executed for the purpose of bringing a test case, to be followedup in the event of success by the larger suit upon the mortgage-bond, is true.

The plaintiff's case on this point is supported by his witness Abdul Gani. On the other side we have no evidence whatsoever to prove passing of consideration Nur Ali's account books would have been very valuable evidence in behalf of the defence. Moreover, if the schedule to the mortgage-bond is to be believed Verappa Chetty, though a former creditor, was not one of the creditors in June 1899. It appears from Exhibit II that the plaintiff owed Rs. 15,000 to M. T. T. V. Verappa Chetty, which wass ecured by a mortgage of eleven boats. The plaintiff swears that the debt was satisfied by making over the boats to the creditors and the bond has been produced by the plaintiff in the present case. Did he then again become a creditor subsequently? It is singular that we have no definite evidence upon this point on either side, and we think that the probabilities are that the alleged consideration for the promissory note was a fictitious debt. At that time Rajab Ali had lost all credit and it is not likely that a Chetty would advance a loan of Rs. 5,000 at such a time without any security. We are satisfied that the document was fraudulent, collusive and without consideration. The Court below relies upon a statement of the plaintiff that he offered to renew the promissory note when he proposed to Nur Ali to withdraw the suit, but plaintiff has offered an explanation which may be accepted.

The defendants are in no better position in the matter of assignment of the promissory note by Nur Ali, and here again we must differ from the learned Judge's finding upon a question of fact. Hedayet Ali came to Burma without any money and worked for some years as Nur Ali's servant till apparently by means of a successful marriage, he started business on his own account. He says he paid Nur Ali Rs. 4,500 for the note. For a man of his position this was a large sum to lay out on an obviously bad investment, for from the notification in *Burma Gazettee* he must have known that Rajab Ali and his brother had dissolved partnership long before the execution of the alleged note and that so far as the defendant No. 5 was concerned, it was extremely doubtful whether he was liable for the debt. The plaintiff is supported by his witness Abdul Bari and Abdul Rasul, who state that Nur Ali made a *benami* transfer to Hedayet Ali who was then a fellow-employee in Nur Ali's service. On the other hand Hedayat Ali's brother, Ahmad Mia, and witness Sayanutulla depose to a cash payment of Rs. 4,500 to Nur Ali and Hedayet Ali. But the latter witness is on hostile terms to the plaintiff and the balance of evidence is decidedly in the plaintiff's favour. We have to observe again that the

defendants have declined to produce any account books to show the payment or receipt of the alleged consideration. The result is that, in our opinion, the assignment was fraudulent and part of the general scheme to defraud defendant No. 5.

Finally, we come to the proceedings in the suit in Rangoon. The bond was executed on the 10th June 1900. The suit was instituted on the 9th June 1903 when Rajab Ali was absent at Chittagong. Rajab Ali filed his written statement on the 6th July 1903 and Faiz Ali filed his on some date in the same month not disclosed in the evidence. The plaintiff's case is that shortly before he filed his written statement, Kala Mia made an unsuccessful attempt to get Nur Ali to withdraw the suit; that a few days after that he met Nur Ali in Court and was advised by Nur Ali not to contest the suit; that not satisfied with this assurance he on the 11th August 1903 applied for a Commission to examine witnesses; that that night or the following night Nur Ali and Hedayet Ali came to his house and assured him that the suit was for his benefit and advised him to leave by the next day's steamer, and that he accordingly did so. It is alleged that the witness D'Costa, whose father had been in plaintiff's service and, his mother were present at this conversation. We think this story is substantially true. It is argued that the plaintiff had the full knowledge of the suit and that as he failed to defend it, he alone must be responsible. But the question is whether the plaintiff was deceived by any promise made by Nur Ali and, in our opinion, the reply must be in the affirmative. The plaintiff was induced into the belief that Nur Ali would obtain the decree against the plaintiff and defendant No. 5 but would execute it against the defendant No. 5 alone. It appears that on the 25th November 1903 the Court, after examining the defendant No. 5, recorded the following order: "Mr. Burjorji, after examining the said defendant, says that he cannot carry the case further against him. There is, therefore, no sufficient evidence on the record to prove what is required, namely, the authority of the second defendant to his brother, the first defendant, to borrow the money sued for. The power-of-attorney, which the first defendant held from the second defendant, was for the purpose of partnership and this was dissolved in July 1898—two years before the promissory note in question was signed. The suit must be dismissed as against the second defendant with costs. There will be a decree against the first defendant, who admits execution of the promissory note but has not appeared or offered any evidence on the other issues, the burden of proving which lay upon him."

It may be that it was not Nur Ali's fault that the Court declined to give a decree against the defendant, No. 5 but that does not affect the question whether there was fraud upon the plaintiff, if the plaintiff was in fact induced by Nur Ali not to defend the suit upon the assurance that the decree would be passed jointly against the two defendants but would be executed against the plaintiff's brother alone.

The result is that we are satisfied that the mortgage-bond and the promissory note were executed with the intention of defrauding the defendant No. 5 Faiz Ali; that Nur Ali thereafter turned against his confederate and with the intention of defrauding him assigned the promissory note to Hedayet Ali; and fraudulently caused an *ex parte* decree to be obtained thereupon. We understand that a suit has been instituted upon the mortgage-bond for Rs. 67,000. The question whether the bond is a real or fictitious transaction does not directly arise in the present case. It arises incidentally and we desire to make it clear that our finding so far as that bond is concerned is based solely on the evidence before us and is necessarily incidental.

The decree being a fraudulent one, the question is, has the plaintiff any remedy? Is the plaintiff debarred from relief, because he was a party to a scheme for defrauding his brother, although as a matter of fact the brother was not defrauded?

Now it is well-established where the contemplated fraud has not been effected, a party to a fraudulent transaction does not lose his right to be relieved from the effect of such a transaction. It is unnecessary to discuss the authorities upon the point, as the question has been finally set at rest by the Judicial Committee in the case of *Petherpermal Chetty* v. *Muniandy Servai* (1). In that

(1) 35 C. 551; 35 I. A. 98; 5 A. L. J. 290; 7 C. L. J. 528; 18 M. L. J. 277; 12 C. W. N 552; 10 Bom. L. R. 590; 4 M. L. T. 12; 4 L. B. R. 266; 14 Bur. L. R. 108.

case a *benami* deed of sale was executed in order to defeat the claim of an equitable mortgagee, but his claim was not defeated and the Judicial Committee observed:—"The plaintiff, in suing to recover possession of his property, is not carrying out the illegal transaction, but is seeking to put every one, as far as possible, in the same position as they were in before that transaction was determined upon. It is the defendant who is relying upon the fraud, and is seeking to make a title to the lands through and by means of it. And despite his anxiety to effect great moral ends, he cannot be permitted to do this. And, further, the purpose of the fraud having not only not been effected, but absolutely defeated, there is nothing to prevent the plaintiff from repudiating the entire transaction, revoking all authority of his confederate to carry out the fraudulent scheme, and recovering possession of his property. The decision of the Court of Appeal in *Taylor* v. *Bowers* (2), and the authorities upon which that decision is based, clearly establish this. *Symes* v. *Hughes* (3) and *In re Great Berlin Steamboat Company* (4) are to the same effect. And the authority of these decisions, as applied to a case like the present, is not, in their Lordships' opinion, shaken by the observations of Fry, L. J., in *Kearley* v. *Thomson* (5)."

It is contended, however, on behalf of the respondent that the transaction in that case rested merely upon the conveyance and that the principle enunciated in that case is inapplicable where, as in the present case, the original relations of the parties had merged in a decree of the Court. It is urged that a party to a collusive decree is, bound by it and reliance is placed upon the cases of *Chenvirappa* v. *Puttappa* (6), *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy* (7), quoting *Prudham* v. *Phillips* (8), *Venkataramanna* v. *Viramma* (9), *Rangammal* v. *Venkatachari* (10), *Varadarajulu Naidu* v. *Srinivasulu Naidu* (11). In the last two cases, the fraud had been partially carried out, and those cases, therefore, need not be considered. In the first three, however, the fraud contemplated does not appear to have been effected.

On the other hand, the Allahabad High Court in *Param Singh* v. *Lalji Mal* (12) held that the plaintiff in that case was entitled to recover possession of properties in respect of which he had executed a fictitious deed of conditional sale, in order to protect the properties from the claims of his son, and had suffered judgment to go by default in a suit for foreclosure upon the deed, on the defendant undertaking that the decree would not be executed and if executed, the property would be restored to him. The learned Judges were of opinion that the plaintiff was not estopped by the decree, and that even if it were held that the plaintiff was bound by the decree, he was entitled to insist upon the agreement and on the strength of it to recover possession from the defendant. The case was not followed by the Bombay High Court in *Chenvirappa* v. *Puttappa* (6). But the Bombay case, as well as some of the Madras cases cited above, were considered by this Court in the case of *Jadu Nath Poddar* v. *Rup Lal Poddar* (13), and the learned Judges declined to follow those cases, if they laid down anything inconsistent with the decisions of this Court. In the case of *Jadu Nath Poddar* v. *Rup Lal Poddar* (13) there was no decree passed upon the conveyance, and the question of the effect of a collusive decree upon one of the parties to it does not appear to have been considered in that case. In a later case, however, *Akhil Prodhan* v. *Manmatha Nath Kar* (14), the Court relieved the plaintiff from the effect of a collusive *ex parte* decree. The facts of that case are given in the head-note, and are as follows :—"In 1898, a tenant executed a fictitious conveyance of his land in favour of *A*, with a view to protect himself from

(2) 46 L. J. Q. B. 39; 1 Q. B. D. 291; 34 L. T. 938; 24 W. R. 499.
(3) 9 Eq. 475; 39 L. J. Ch. 304; 22 L. T. 462.
(4) 26 Ch. D. 616; 54 L. J. Ch. 68; 51 L. T. 445.
(5) 59 L. J. Q. B. 288; 24 Q. B. D. 742; 63 L. T. 150; 38 W. R. 614; 54 J. P. 804.
(6) 11 B. 708.
(7) 6 B. 703.
(8) 2 Amb. 763; 27 E. R. 490.
(9) 10 M. 17.
(10) 18 M. 378.
(11) 20 M. 333.
(12) 1 A. 403.
(13) 10 C. W. N. 650; 4 C. L. J. 22; 33 C. 967.
(14) 22 Ind. Cas. 86; 18 C. L. J. 616.

invasion of his rights by his landlords. In 1899 he, to protect himself from *A*, who proved unfaithful, induced his landlords to institute a fictitious suit for rent. That suit was decreed on the 7th November 1899. The landlords took out execution of that decree. *A* thereupon preferred a claim which was disallowed on the 20th January 1900. The decree was subsequently executed, and at the sale which followed, the landlords purchased the holding on the 19th March 1900 and possession was delivered on the 5th June 1900. On the 10th April 1900, *A* sued the tenant and the landlords for declaration of his title on the basis of his conveyance; but on the 23rd July 1900 this suit was withdrawn. In 1906 the landlords turned against the tenant and with the help of the Police took away by force the crops raised by him. On the 15th March 1907 the tenant commenced the present suit for declaration that the entire proceedings in the rent suit of 1899 were fictitious and that the landlords did not acquire any title on the basis of their purchase at the execution sale. The plaintiff also alleged that the landlords-defendants agreed to execute a release and in the prayer clause of the plaint he asked for a decree for execution of such release by the landlords."

It was held that as the conveyance in favour of *A* was a fictitious document, *A* had no real title to the property and was not defrauded: that the case thus falls within the principle of the decision of this Court in *Jadu Nath Poddar* v. *Rup Lal Poddar* (13) and of the Judicial Committee in *Petherpermal Chetty* v. *Muniandy Servai* (1), namely, that to enable a fraudulent confederate to retain property transferred to him in order to effect a fraud, the contemplated fraud must be effected, when and where alone does the fraudulent grantor or giver lose the right to claim the aid of the law to recover the property he has parted with. The plaintiff is consequently not disentitled to protection in a Court of Equity. It was declared that the rent suit and all proceedings based thereon were fictitious and had not affected the plaintiff's title and the plaintiff's possession was confirmed. The two cases referred to in the judgment, *viz.*, *Jadu Nath Poddar* v. *Rup Lal Poddar* (13) and *Petherpermal Chetty* v. *Muniandy Servai* (1), were both cases in which the plaintiff sought to be relieved from the effect of a fraudulent conveyance and cases where a decree of Court had been passed upon it. Apparently, therefore, in the opinion of the learned Judges in the case of *Akhil Prodhan* v. *Manmatha Nath Kar* (14), the question whether a party to a fraudulent transaction is entitled to protection in a Court of Equity depends upon whether the fraud has been carried out, irrespective of the question whether a collusive decree has been passed between the parties. The learned Judges in dealing with the contention whether section 317 of the Civil Procedure Code barred the suit, which was overruled by them on the ground that a fictitious decree was passed in a fictitious suit and that the sale held in execution of that decree was equally fictitious, referred to the observations of Lord Brougham in *Bandon* v. *Beecher* (15): "A sentence is a judicial determination of a cause agitated between real parties, upon which a real interest has been settled; in order to make a sentence there must be a real interest, a real argument, a real prosecution, a real defence, a real decision. Of all these requisites not one takes place in the case of a fraudulent and collusive suit; there is no Judge, but a person invested with the ensigns of a Judicial Office is misemployed in listening to a fictitious cause proposed to him; there is no party litigating, there is no party defendant, no real interest brought into question." It is true that these observations were made in a case where the person who impugned the decree was not a party to it. But he was a tenant in remainder and was treated in argument in that case as having been represented by the parties to the former suit, and the observations were relied upon in the case of *Akhil Prodhan* v. *Manmatha Nath Kar* (14) as showing the nature of a fictitious and collusive suit.

We agree with the decision in the case of *Akhil Prodhan* v. *Manmatha Nath Kar* (14) and *Param Singh* v. *Lalji Mal* (12). We think that the principle that a party to a fraudulent transaction is entitled to relief in a Court of Equity as against his fraudulent

(15) 3 Cl. & F. 479; 9 Bligh (N. S.) 532; 6 E. R. 1517 at p. 1529.

confederate so long as the fraud contemplated has not been carried into effect, is not inapplicable merely because the party suffers a decree to be passed against him in a fictitious and collusive suit which is only a part of the fraudulent scheme.

But even if the decree cannot be impugned by the plaintiff, we think that having regard to the agreement that it would not be enforced against the plaintiff, the latter is entitled to relief. The Bombay High Court in the case of *Chenvirappa* v. *Puttappa* (6) is of opinion that such an agreement should be pleaded in the first suit and cannot be made the basis or support of a separate subsequent suit by the defendant in the earlier case. But we agree with the view taken by the Allahabad Court that the agreement bound the plaintiff in the first suit not to execute his decree and the question whether it barred execution could not have been determined in that former suit and, therefore, the then defendant (the present plaintiff) is not estopped by the decree and is entitled to have it declared that the decree is incapable of execution.

There is no prayer for injunction but we can grant that relief under the prayer for general relief, if it were necessary to grant relief by way of injunction. We are of opinion however that it is unnecessary to do so, and it would be sufficient to declare, having regard to the agreement not to execute the decree, that it cannot be executed, a declaration expressely prayed for by the plaintiff.

It is true that a Court of Justice will not interpose actively in favour of a party who is *particeps criminis* to an illegal or fraudulent transaction but will leave him to the consequences of his own inequity. But here it is the defendant who by applying for executing the fictitious decree sought the assistance of the Court actively in his favour, and the plaintiff thereupon sought the assistance of the Court to prevent the decree being put into execution.

The result is that the decree of the Court below is set aside and the *ex parte* decree, dated the 25th November 1903, obtained by the defendant is declared incapable of execution. But having regard to the circumstances of the case, each party will bear its own costs in both Courts.

Decree set aside.

LOWER BURMA CHIEF COURT.
FIRST CIVIL APPEAL No. 182 OF 1913.
May 6, 1915.
Present:—Mr. Justice Twomey and
Mr. Justice Ormond.
MAUNG KA GU—PLAINTIFF—APPELLANT
versus
MA HNIN NGWE AND OTHERS—DEFENDANTS—RESPONDENTS.

Burmese Buddhist Law—Orasa *son, death of*—*Younger brother, if becomes* orasa—*Share of* orasa *son*—*Failure to claim promptly, effect of*—*Presumption.*

Under the Burmese Buddhist Law if the eldest son attains his majority and fulfils the prescribed conditions and then dies before his parents, his position as *orasa* remains unfilled and the next younger brother does not succeed to it. [p. 707, col. 1.]

Tun Myaing v. *Ba Tun*, 2 L. B. R. 292, followed.

If the eldest son reaches the age of manhood before his death, the presumption is that he fulfils the prescribed conditions as *orasa*. [p. 707, col. 2.]

The *orasa* son must exercise his option of claiming a 1/4th share promptly; if he fails to do so, he must be held to have abandoned the right. [p. 707, col. 2.]

Mr. *Villa*, for the Appellant.
Mr. *Ba Dun*, for the Respondents.

JUDGMENT.—The plaintiff-appellant, Ka Gu's father having died, Ka Gu sued his mother, Ma Hnin Ngwe, and other members of the family for 1/4th share of the joint estate of his father and mother, alleging that he is the *orasa* or eldest capable son of his parents. In the written statement defendants denied that the plaintiff was entitled to claim partition of 1/4th share of the eldest child according to the Burmese Buddhist Law, but gave no particulars of their objection. The District Court without examining the parties and without taking evidence decided in favour of the plaintiff. His mother then applied for review of judgment, pleading that the plaintiff had suppressed the important fact that he had an elder brother, Myat E, who pre-deceased his father after reaching the age of 25 and thus attained the status

of *orasa* before his death. The District Judge admitted the application for review and after hearing the evidence produced by Ma Hnin Ngwe as to the death of her eldest son, Myat E, dismissed the plaintiff's suit.

In this appeal it is urged in the first place that the District Court erred in allowing the review of judgment, as the defendants had every opportunity of producing evidence at the first hearing of the case to prove the facts relating to the elder son Myat E. On this point we are of opinion that the District Court ought to have examined the parties in the first instance and ascertained the nature of the defendants' objection to the plaintiff's claim. It is clear that the Judge passed his first judgment under a misapprehension as to the true facts of the case and that though the defendants were partly to blame in giving no particulars of their objection in their written statement, the omission would have been of no consequence if the Judge had followed the ordinary procedure and questioned the parties as to the family history before framing issues. We decide, therefore, that there was sufficient cause for granting the review.

It is now admitted by Mr. Villa for the appellant that if there was an elder capable son who died at the age of 25, the younger son, Ka Gu, has no right to the status of *orasa* and his suit must be dismissed. This is clear from the ruling in *Tun Myaing* v. *Ba Tun* (1). Ka Gu was the eldest surviving son when his father died, but the eldest surviving son is not necessarily the *orasa*. In the case above cited, it was held that if the eldest son attains his majority and fulfils the prescribed conditions and then dies before his parents, his position as *orasa* remains unfilled and the next younger brother does not succeed to it. This is exactly the case alleged by the defendants here.

There remains, therefore, only the question of fact, *i.e.*, whether Ka Gu had an elder brother, Myat E, who attained the status of *orasa*, before he died in his parents' lifetime. Ma Hnin Ngwe, herself a woman of 89, gave evidence that she had four sons and five daughters, that Maung Myat E was the eldest son and died at the age of 25 and that the plaintiff, Ka Gu, is the youngest son. There is no evidence of birth registration, but this is not surprising seeing that the family lived in a remote district. Ma Hnin Ngwe says she threw away Myat E's horoscope when he died. He was going to become a Upazin when he was 19 years old but was not actually received into the order. He died six or seven years after that. Ma Hnin Ngwe is corroborated by her daughter Ma Hnin, 49 years old, her brother Pe To 61 and Pe To's wife, Ma Shwe Mi, 58. Pe To says that Myat E was born in 1217 and was over 20 when he died. If he was born in 1217 B. E.= 1856 A. D. and died when 25 years old, the year of his death would be 1242 B. E.=1881, that is 32 years ago. Ka Gu gives his own age as 38 years and he would, therefore, have been a very young child when Myat E died. The evidence produced by the defendants is, in my opinion, amply sufficient to establish the fact in question and Ka Gu has made no attempt to rebut it. Myat E having reached the age of manhood before he died, the presumption is that he fulfilled the prescribed conditions as *orasa*.

The appeal is dismissed with costs. We note that even if Ka Gu were the rightful *orasa*, his suit for the *orasa's* share might well have been contested by his mother on the ground that he did not claim the share till 18 months after his father's death. We have recently held that the *orasa* son must exercise his option of claiming a 1/4th share promptly and that if he fails to do so, he must be held to have abandoned the right.

Appeal dismissed.

(1) 2 L. B. R. 292.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 25 OF 1914.

May 27, 1915.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Roe.

AKBAR FAKIR—PLAINTIFF—APPELLANT

versus

INTAIL SAYAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract of sale or lease followed by delivery of possession—Document not executed, effect of—Subsequent suit, maintainability of—Ejectment——Vendor, whether can eject purchaser.

Where in pursuance of an agreement for a lease or sale the intended transferee has taken possession, though the requisite documents have not been

executed, the position is the same as if the documents had been executed, provided that specific performance can be obtained between the same parties in the same Court and at the same time as the subsequent legal question falls to be determined. [p. 708, col. 2.]

Walsh v. *Lonsdale*, 52 L. J. Ch. 2; 21 Ch. D. 9; 46 L. T 858; 31 W. R. 109, followed.

Bibi Jawahir Kumari v. *Chatterput Singh*, 2 C. L. J. 343, *Bepin Behari Mitter* v. *Tinkowri Pathak*, 9 Ind. Cas. 374; 13 C. L. J. 271; 15 C. W. N. 976, *Champaklatika Mitra* v. *Nafar Chandra*, 8 Ind. Cas. 44; 13 C. L. J. 300; 15 C. W. N. 536, *Secretary of State for India* v. *Forbes*, 17 Ind. Cas. 180; 16 C. L. J. 217, *Mati Lal* v. *Darjeeling Municipality*, 18 Ind. Cas. 844; 17 C. L. J. 167, referred to.

Kurri Veerareddi v. *Kurri Bappireddi*, 29 M. 336; 1 M. L. T. 153; 16 M. L. J. 395 (F. B.), dissented from.

Where, therefore, the plaintiff in a suit for ejectment was the admitted proprietor of the land in dispute and the defendants resisted his claim for ejectment on the ground that they had come into occupation by his leave and license under an agreement for sale on the payment of part of the consideration money :

Held, that the plaintiff was not entitled to eject the defendants nor was he entitled to a decree for the balance of the consideration in the suit, because he had not sued to recover the money. [p. 709, col. 1.]

Appeal against the decree of the Sub-Judge, Faridpore, dated 26th September 1913, reversing that of the Munsif, second Court of Chekandi, dated 8th January 1913.

Babu *Monmohan Bose*, for the Appellant.

Babu *Jyotish Chandra Hazra*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff in an action in ejectment commenced on the 10th April 1912. The plaintiff is the admitted proprietor of the land in dispute. The defendants resist his claim on the ground that they came into occupation by his leave and license under an agreement for sale executed on the 12th February 1912, whereby it was stipulated that a conveyance would be executed by the plaintiff in their favour on or before the 13th April 1912. Rupees 80 was fixed as the consideration and the plaintiff was actually paid Rs. 50 on the date of the agreement. The defendants alleged that they subsequently offered the balance but the plaintiff refused to accept the sum and execute a conveyance. The question thus arises, whether this constitutes a sufficient answer to the claim for ejectment.

On behalf of the plaintiff, reliance has been placed upon the decision of a Full Bench of the Madras High Court in *Kurri Veerareddi* v. *Kurri Bapireddi* (1). That case is an authority for the proposition, that a contract of sale followed by delivery of possession does not, when there is no registered sale-deed, create any interest in the property agreed to be sold and, cannot, even if enforcible at the date of suit or decree, be pleaded in defence to an action for ejectment by one who has a legal title to recover. With all respect, we are unable to accept this principle of law as consonant with the rules of justice, equity and good conscience. A contrary view has been adopted in a long series of decisions of this Court, amongst which may be mentioned *Bibi Jawahir Kumari* v. *Chatterput Singh* (2), *Singheeram Poddar* v. *Bhagbat Chander Nundi* (3), *Bepin Behari Mitter* v. *Tinkowri Pathak* (4), *Champaklatika Mitra* v. *Nafar Chandra* (5), *Sarat Chandra Ghose* v. *Sham Chand Singh* (6), *Secretary of State for India* v. *Forbes* (7) and *Mati Lal* v. *Darjeeling Municipality* (8). These cases are based on the well-recognised doctrine of equity explained by Sir George Jessel, M. R., in *Walsh* v. *Lonsdale* (9), where in pursuance of an agreement for a lease or sale the intended transferee has taken possession, though the requisite documents have not been executed, the position is the same as if the documents had been executed, provided specific performance can be obtained between the same parties in the same Court and at the same time as the subsequent legal question falls to be determined. If we were to accept the contention of the appellant, the result would be this : as soon as the suit for enjoyment is instituted, the defendant must institute in that very Court a counter-suit for specific performance of his contract and obtain a stay of proceedings

(1) 29 M. 336; 1 M. L. T. 153; 16 M. L. J. 395 (F. B.).
(2) 2 C. L. J. 343.
(3) 6 Ind. Cas. 632; 11 C. L. J. 543.
(4) 9 Ind. Cas. 374; 13 C. L. J. 271; 15 C. W. N. 976.
(5) 8 Ind. Cas. 44; 13 C. L. J. 300; 15 C. W. N. 536.
(6) 14 Ind. Cas. 701; 39 C. 663; 16 C. L. J. 71.
(7) 17 Ind. Cas. 180; 16 C. L. J. 217.
(8) 18 Ind. Cas. 844; 17 C. L. J. 167.
(9) 21 Ch. D. 9; 52 L. J. Ch. 2; 46 L. T. 858; 31 W. R. 109.

in the suit for ejectment. When the defendant is successful in the suit for specific performance, he will have the conveyance executed in his favour by the plaintiff or by the Court on his behalf. This will perfect his title and clothe him with authority to continue in possession, with the inevitable result that the suit for ejectment will stand dismissed. Clearly, the Court should not encourage mischievous multiplicity of litigation in this manner. We hold that the plaintiff is not entitled to eject the defendant, nor is he entitled to a decree for the balance of the consideration in this suit because he has not sued to recover the money.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL NO. 292 OF 1913.

May 10, 1915.

Present:—Mr. Justice Young.

MA THIN HTON AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MA HNIN THET AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Agreement to redeem on certain date and in default to leave mortgagee in undisturbed possession, validity of—Subordinate Court, duty of, to follow rulings of its Superior Court—Practice.

A person mortgaged his land before the Transfer of Property Act came into force by way of usufructuary mortgage for Rs. 800 and agreed to redeem it on a certain date after seven years for Rs. 850 and in default, the mortgagee might take possession. The mortgagor failed to redeem on the due date but sued to redeem a year later:

Held, that there was nothing unconscionable in the contract of the parties and that it is in accordance with equity, justice and good conscience to keep parties to their agreements made voluntarily and with full knowledge when those agreements are themselves reasonable. [p. 709, col. 2; p. 710, col. 1.]

It is the duty of a Subordinate Judge to follow the decision of its Superior Court which is binding on it and leave it to the Superior Court to take such action with regard to the conflict of the opinion as it may be advised. [p. 709, col. 2.]

Mr. *Maung Thin*, for the Appellants.

JUDGMENT.—On the 4th day of March 1904 and before the Transfer of Property Act had been extended to the district in which the property in question was situated, the plaintiff mortgaged by way of usufructuary mortgage certain property to the defendant for seven years in consideration of a loan of Rs. 800 and agreed that on the expiry of the seven years, namely, on the full moon day of *Tabodwe* 1272 he would redeem the mortgaged land for Rs. 850 and that in default, the mortgagees might take possession. The mortgagor failed to redeem on the due day but sued to redeem a year or so later. The lower Court held him to his contract. The Divisional Court, though aware of the decision of this Court in *Maung Naung* v. *Ma Bok Son* (1) by which it was bound, preferred to adopt the reasoning of the Upper Burma case of *Ma Kyaw* v. *Nga Zu Nut* (2). It has been repeatedly pointed out that the duty of a Subordinate Judge in such circumstances is to draw attention to the decision which he prefers, but to follow the decision that is or should be binding on him and leave it to the Superior Court to take such action with regard to the conflict of the opinion as it may be advised, and the learned Divisional Judge should have known and followed this rule. The *ratio decidendi* adopted by this Court in the case cited was that the parties should be kept to their contracts save where those contracts were unreasonable. The position adopted by the Judicial Commissioner of Upper Burma was that the decision should be in accordance with equity, justice and good conscience and that the rules contained in the Transfer of Property Act had in more than one decision been commended to the Courts as worthy to be followed as rules of equity, justice and good conscience. I cannot, however, myself see that in this particular case there is anything unconscionable in a person agreeing to re-pay Rs. 850 for a loan of Rs. 800 on the expiration of the seven years and in default agreeing to leave the lender in undistrubed possession of certain land, the profits of which he was to enjoy during the seven years by way of interest, nor do I think it contrary to, but rather in accordance with, equity, justice and good

(1) 1 L. B. R. 192.

(2) U. B. R. 1907, 3rd Qr., Mortgage, 1.

conscience to keep parties to their agreements made voluntarily and with full knowledge when those agreements are themselves reasonable.

The agreement is perfectly plain and the mortgagor had seven years in which to get ready to discharge his debt and he has only himself to thank if the due date found him unready. Moreover, the decision in *Maung Naung* v. *Ma Bok Son* (1) was given in 1902 and was itself based on an earlier decision of 1891. To distrub them might, even if I agreed with the reasoning of the Upper Burma Court, render many transactions and titles dubious. It seems to me to be a case where the maxim of *stare decisis* should in any event be applied. For both reasons, therefore, I would allow the appeal and restore the decree of the Court of the first instance, with two gold *mohurs* costs.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 814 OF 1914.

June 7, 1915.

Present:—Mr. Justice Piggott.

SUNDAR LAL—PLAINTIFF—APPELLANT

versus

MALTHU—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), *ss.* 154 (b), (c) *and* 158, 177 (c)—*Resumption—Proprietary title—Appeal to District Judge—Interpretation of* Wajib-ul-arz—*Finding of fact—Evidence not referred to in judgment, effect of.*

Where in a suit for resumption of land held rent-free, filed in the Court of an Assistant Collector the defendant pleaded that it had been held rent-free for a period of 100 years and that he was entitled under section 158 of the Tenancy Act to be declared to be the proprietor of the land:

Held, that under section 177 (c) of the Tenancy Act an appeal lay to the District Judge from the decision of the Assistant Collector. [p. 711, cols. 1 & 2.]

Baldeo Singh v. *Mardan Singh*, 6 Ind. Cas. 425, 7 A. L. J. 818, distinguished.

Sunder Singh v. *Collector of Shahjahanpur*, 11 Ind. Cas. 514; 33 A. 553; 8 A. L. J. 539, followed.

Where the District Judge misapprehended a certain entry in the *Wajib-ul-arz* and, while recording a finding did not in express terms discuss the evidence upon which the finding was based, the High Court, in the absence of a certificate that the finding rested upon no evidence, treated the decision of the lower Appellate Court on this point as a finding of fact with which it could not interfere. [p. 712, col. 1.]

Second appeal from the decision of the Additional District Judge of Etawah, dated the 7th March 1914.

Mr. *L. E. Dube*, for the Appellant.

Mr. *Brij Nath Viyas*, for the Respondent.

JUDGMENT.—In this suit the plaintiff, who is the appellant here, sought a decree for the resumption of certain rent-free land, consisting of five specified plots with a total area of 5 *bighas* 4 *biswas*, in the possession of the defendant-respondent. The suit was filed in the Court of an Assistant Collector of the first Class. He came to the conclusion that the grant in question was assumable at the pleasure of the grantor, and he gave the plaintiff a decree accordingly. The defendant appealed to the District Judge. It would not appear from the judgment of the lower Appellate Court that any objection was taken in that Court with regard to the proper form of appeal. The learned District Judge found on the evidence, and principally on the interpretation of a particular clause in the *wajib-ul-arz* of 1872, that the grant in question was not resumable at the pleasure of the grantor. It does not seem that it was ever suggested, or was ever part of the plaintiff's case, that the grant was liable to resumption under clause (*b*) or clause (*c*) of section 154, sub-section (1) of the Tenancy Act. The finding of the lower Appellate Court on this point amounts, therefore, to a finding that this land was not liable to resumption under section 154 of the Tenancy Act. The learned Additional Judge went on to say: "On the evidence I also find that this *muafi* has been held for 50 years and by two successors to the original grantee." He accordingly declared the defendant, the holder of the said grant, to be the proprietor thereof under section 158 of the Agra Tenancy Act. Having allowed the appeal to this extent, he sent back the case to the Court of the Assistant Collector in order that the matter might be finally determined in accordance with the provisions of section 158 aforesaid by an order fixing the revenue payable by the defendant.

The plaintiff comes to this Court in second appeal. It is contended, *first*, that no appeal lay to the District Judge from the decision of the Assistant Collector. Undoubtedly a suit for the resumption of a rent-free grant or a suit for the assessment to revenue of a

rent-free grant, is placed in the 4th Schedule to the Agra Tenancy Act in group C, that is to say, amongst suits triable by an Assistant Collector of the first Class in which appeal lies to the Revenue Court. This specification in the Schedule must, however, obviously be read subject to the provisions of section 177, clause (*c*), according to which an appeal lies to the District Judge from the decree of an Assistant Collector of the first Class in all suits (no matter what may be the group of the fourth Schedule to which such suits are assigned) in which a question of proprietary title has been in issue in the Court of first instance and is a matter in issue in the appeal. In the present case the defendant had pleaded all along that the land in suit was not liable to resumption under section 154, and that it had been held rent free for generations, or at least for a period of a hundred years. He expressly pleaded in fact that he was entitled under section 158 of the Tenancy Act to be declared to be the proprietor of this land. The question whether upon these pleadings it can be said that a question of proprietary title has been in issue within the meaning of section 177 clause (*c*), would seem to be open to argument, but I find that the point is covered by authority. The appellant, no doubt, relies upon the decision of a Bench of this Court in *Baldeo Singh* v. *Mardan Singh* (1) and he is able to point out that in that case a suit apparently very similar to the present was in fact appealed from the Court of the Assistant Collector to that of the Commissioner, and was thence taken to the Board of Revenue for final decision. It is clear, however, that the point which the learned Judges of this Court had before them for determination in that case was totally different from the question now before me. They had to decide whether a party who had failed in the Revenue Courts, in a suit to which the provisions of sections 150 and 154 of the Tenancy Act applied, was entitled to challenge the decision of the Revenue Courts by means of a fresh suit instituted in a Civil Court as a Court of first instance. Such a suit the learned Judges held to be clearly barred by the provisions of section 167 of the Agra Tenancy Act. That section, however, reserves the appellate jurisdiction of the Civil Courts in all cases to which section 177 of the Act applies. Hence that ruling simply brings me back to the question whether or not the provisions of section 177, clause (*c*), apply to the appeal filed by the defendant in this case in the Court of the District Judge. I have been referred to two authorities on this point, one is an unreported decision by a single Judge, *Nawab Sayed Ali Hasan Khan* v. *Mohan Das*, Civil Revision No. 1 of 1907, decided on the 29th of April 1907. In that case a suit for resumption had been dismissed by the Assistant Collector in whose Court it was filed. The plaintiff appealed to the District Judge and the latter held that the appeal lay only to the Court of the Commissioner, and he returned the memorandum of appeal for presentation to the proper Court. This order was reversed by this Court in revision and the District Judge was directed to entertain and dispose of the appeal. The next case is the case of *Sunder Singh* v. *Collector of Shahjahanpur* (2). The headnote to the report, (8 A. L. J.,) refers to a different matter; but the report itself shows that the learned Judges distinctly held that the provisions of section 177, clause (*c*), of the Tenancy Act did apply to a case in which the pleadings were substantially the same as those in the case now before me. I accordingly overrule the appellant's contention on this point on the ground that it is concluded by authority.

In the *second* place, it is contended that the land in question in this suit is held rent free under a liability to resumption at the pleasure of the grantor, and that the finding of the lower Appellate Court to the contrary is based upon a misinterpretation of the documentary evidence *viz*, the *wajib-ul-arz* of the year 1872 A. D. In that document the land in suit is included in a specification of certain rent-free holdings in respect of which it is said that they shall continue to be held rent free, but that, if at any time the proprietor desires to get them assessed to rent, he will bring a suit for that purpose in the proper Court and will be bound by the decision of that Court. There is certainly some ambigiuty about these provisions. The learned District Judge, however, has relied

(1) 6 Ind. Cas. 425; 7 A. L. J. 818.

(2) 11 Ind. Cas. 514; 8 A. L. J. 539; 33 A. 553.

upon a decision of the Board of Revenue in a case from that same district, which seems to have been regarded as a test case, and on which the Board of Revenue held that provisions in a *wajib ul-arz* very similar to those in the document now before me did not constitute the grant resumable at the pleasure of the grantor. I am not prepared to say that the learned District Judge was wrong and I overrule this contention accordingly.

A *third* point has been argued before me, which presumably purports to be taken in the 1st, 4th and 6th paragraphs of the memorandum of appeal before me. In effect the contention is that the lower Appellate Court was not entitled, on the evidence before it, to find that the land in question was a grant which had been held rent free for 50 years and by two successors to the original grantee. The learned District Judge, while recording this finding in express terms, has not discussed the evidence upon which it is based. The memorandum of appeal before me contains no certificate that this finding in the judgment of the lower Appellate Court rests upon no evidence. It has been suggested that the learned District Judge must have presumed that a certain entry in the *wajib-ul-arz* of 1833, which was put in evidence by the defendant, referred to the whole of the land in suit, whereas if that document be attentively examined it is evident that it can refer only to a portion of the said land. I should feel some difficulty in deciding whether even a misapprehension of this sort would justify interference in second appeal; but the learned District Judge had before him oral evidence as well. I am not entitled, sitting as a Court of second appeal, to appraise that evidence myself. But having read it along with the *wajib-ul-arz* of 1833, I can only say that I feel compelled to treat the decision of the lower Appellate Court on this point as a finding of fact with which I cannot interfere.

This appeal, therefore, fails and I dismiss it accordingly with costs.

Appeal dismissed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEALS NOS. 95 OF 1913 AND 8 OF 1914.

February 1, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

THE SOUTH INDIAN EXPORT COMPANY, LIMITED—DEFENDANT—APPELLANT

versus

A. CONDIAH CHETTY—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), ss. 38, 52, 54, 83—Principal debtor entitled to avoid but not avoiding contract—Surety, whether liable for breach—Notice of arrival of goods, if offer—Failure to take delivery—Damages.

A surety cannot escape liability on the ground that the circumstances were such that the principal debtor was entitled to avoid the contract, when in fact the contract was not avoided. [p 713, col. 1.]

Where a condition in a contract that notice should be given of the arrival of the goods by a particular ship is not an essential part of the contract, failure to give such notice or a mistake in the notice given, is not a breach of contract entitling one party to avoid it for that reason nor can that notice by itself be deemed to be an *offer* of performance within the meaning of section 38 of the Contract Act. [p. 713, col. 1.]

Where on the receipt of notice of arrival of goods, one party has to apply for delivery of goods but fails to do so, he commits the breach and is liable in damages. [p. 713, col. 2; p. 714, col. 1.]

Appeal from the judgments of the Hon'ble Mr. Justice Bakewell, dated 21st October 1913 and 9th December 1913, in the Ordinary Original Civil Jurisdiction of this Court, in Civil Suit No. 165 of 1912.

Messrs. *D. Chamier*, *C. Sidney Smith* and *Branson* and *Branson*, for the Appellants.

Messrs. *M. D. Devadoss*, *Short* and *Bewer & Co.*, for the Respondent.

JUDGMENT.

SADASIVA AIYAR, J.—The defendant (the South Indian Export Company, Limited) is the appellant. The only question in this case is whether The perumal Chetty and Company, for whom the plaintiff stood surety with the South Indian Export Company, Limited, was guilty of breaches of the series of contracts (which are set out in the plaint as having taken place between the two Companies) or whether the South Indian Export Company, Limited, was guilty of the breaches. If the South Indian Export Company, Limited, committed the breaches, then the learned Judge's judgment ought to be upheld. If

it is the other way, the judgment has to be set aside and the suit has to be dismissed.

So far as I could understand the plaint, it is based upon the allegations that Theperumal Chetty would have been justified in repudiating the contracts and putting an end to the same (see paragraph 9 of the plaint) had he known some facts of which he was ignorant, and that he must be treated as having repudiated and put an end to the contracts (the plaint does not say when) and that, therefore, the South Indian Export Company, Limited, had no claim under the contracts or on the guarantee agreements against the plaintiff. It seems to me, strictly speaking, that the plaint discloses no cause of action. It is only if Theperumal Chetty had properly repudiated the contracts and actually put an end to the same that the plaintiff could argue that the South Indian Export Company, Limited, had no claim against him. Without saying that Theperumal Chetty had actually put an end to the contracts, the statement that Theperumal Chetty would have been justified in repudiating them shows no legal basis for the suit, which denies that the defendants could take advantage of the terms of the contract. However, at the trial before the learned Judge, the plaintiff seems to have been allowed to base his case on certain vague contentions, which, when crystallized, amount to this. There were certain reciprocal promises to be performed in a certain order by the South Indian Export Company, Limited, and by Theperumal Chetty. One of those promises to be performed by the South Indian Export Company, Limited, was that they should give notices of the arrival of the steamers in which the goods to be delivered by the South Indian Export Company, Limited to Theperumal Chetty had been shipped in accordance with the contracts. Those notices were, in the eye of the law, tenders or offers of performance as to delivery of goods made by and binding upon the South Indian Export Company, Limited. It was further contended that as those tenders or offers were not legally proper offers, the South Indian Export Company, Limited, committed a breach of the said reciprocal promises which they had first to perform under section 52 of the Indian Contract Act, and that hence the South Indian Export Company had no claim under the contracts against Theperumal Chetty and in consequence, against the plaintiff. (Section 54.) This contention seems to have found favour with the learned Judge.

In the *first* place, I think that none of these notices, Exhibit HL series, (I may say in passing that the obligation to give a notice is not expressly mentioned in the written contracts as one of the obligation which the South Indian Export Company has to perform) is either a tender or an offer in respect of the delivery of the goods which the South Indian Export Company was to deliver under the contracts. We shall assume, however, that one of the implied terms of the contract was that the South Indian Export Company should give reasonable notice that they were ready to deliver the goods in order that Theperumal Chetty might know when to go over to the godowns of the South Indian Export Company and apply for the performance by the South Indian Export Company of that part of the contracts which relates to the delivery of the goods. Such a notice need only have stated, "we are ready to deliver the goods according to the contract. Go over to the godowns within a reasonable time after you receive the notice and take delivery of the goods." If the notices Exhibits HL, *a*, *b*, *c*, did contain words sufficient to give notice of this kind to Theperumal Chetty, they were legally valid notices and the reciprocal promise to give such notices made by the South Indian Export Company, and which promise they had to perform (before Theperumal Chetty had to fulfil his next promise to go to the godowns, apply for and take delivery of the goods), had been properly fulfilled. (As I said, I am unable to agree with the learned Judge that these notices were in the nature of a tender or an offer under section 38 of the Contract Act.) The errors (even though deliberate) made in each notice as to the ship by which the goods intended to be delivered are said to have arrived are mere surplusage and it was not shown that such misdescriptions prevented Theperumal from fulfilling his part of the contracts and hence vitiated those notices. As Theperumal Chetty failed to apply within a reasonable time after the receipt of the notices for delivery of the goods,

he failed to fulfil his part of the contracts and he is the person to be charged with the breach of the contracts and the liability for the legal consequences of such breach. (In this view, I need not say much about the error which the learned Judge fell into in his first judgment in treating the bills, Exhibit VII series, as in the nature of tenders or offers, they not having been communicated to Theperumal Chetty.) The South Indian Export Company had, therefore, a good claim against Theperumal Chetty, and against the plaintiff as his surety, for the performance by Theperumal Chetty of his contracts with the South Indian Export Company. I would, therefore, set aside the judgment of the learned Judge and dismiss the suit with costs.

NAPIER, J.—I entirely agree. It is perfectly clear to me that the learned Judge decided this case on section 83 of the Contract Act, namely, that he thought there had been an appropriation of certain specific bales by the defendants, which appropriation had been assented to, and that appropriation was not according to the terms of the contract. I refer to the appropriation by the bills. It appears now, and the learned Judge discovered it himself when he came to deal with the later issues, that there never had been any appropriation by bills whatsoever, in that the bills had never been delivered and, therefore, could never have been assented to. The whole basis of the learned Judge's judgment, therefore, goes.

It is argued now, not that the notice is of itself an appropriation, but that, as the notice specified goods as coming out of a certain ship although the contract did not provide that the goods should come from that ship, they were bound to deliver the goods from that ship, and they were not in a position so to deliver. It is not made clear on the evidence that they were not in a position to do so, which would have of itself been a sufficient answer. But I am satisfied that there was no such contract, and that the fact that the particular ship was mentioned in the notice does not extend the liability of the defendants. In my veiw, it has not been shown that the defendants were not ready to perform their part of the contract, whereas it has amply been shown, and it is not denied, that the dealers took no steps to perform their part. It is clear, therefore, that the breach was the breach of the dealers and not the breach of the defendants. In those circumstances on the guarantee of the plaintiff the defendants were entitled to debit the plaintiff with the amount and the suit must be dismissed.

The point taken about interest was never raised in the plaint and I am of opinion that the defendants are entitled to debit the plaintiff with the interest as well as the loss from re-sale.

Appeal allowed; Suit dismissed.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS CASE No. 38 OF 1913.

August 14, 1914.

Present:—Mr. McColl, A. J. C.

DOST MAHOMED—APPLICANT

versus

C. T. P. A. S. SUBRAMANIAN CHETTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 73, O. XXXVIII, r. 2,—Money paid for specific purpose, if available for other creditors under s. 73—Money paid on arrest before judgment—Other decree-holders, right of, for rateable distribution.

Where certain money was deposited in Court under Order XXXVIII, rule 2, on the arrest of the defendant before judgment:

Held, that a lien was created on it in favour of the plaintiff from the time it was deposited and that any other creditors could not claim rateable distribution of the same, as it was money paid for a specific purpose. [p. 715, col. 2.]

Sorabji Coovarji v. *Kala Raghunath*, 11 Ind. Cas. 911; 13 Bom. L. R. 1193, 36 B. 156, followed.

FACTS.—The respondent Chetty sued one Abdul Rahman Khan for Rs. 151 and at the same time obtained an order of arrest before judgment. Abdul Rahman Khan was released on his depositing Rs. 199. Judgment was later on confessed and a decree was passed against him. In the meanwhile Dost Mahomed applied for execution of a decree against Abdul Rahman Khan and asked for payment of Rs. 199 deposited by him in Court. The Township Judge ordered rateable distribution. Against this order the Chetty applied in revision. The Additional Judge of the Judicial Commissioner's Court held that section 73

of the Code of 1908 was not the same as section 295 of the Code of 1882 and that 'assets held by the Court' meant money deposited in Court within the meaning of section 73 of the Civil Procedure Code, and that as Dost Mahomed did not apply for execution before its receipt he was not entitled to a rateable distribution. The Additional Judge, therefore, set aside the order of the Township Judge and gave a decree as aforesaid to the Chetty. Against this order Dost Mahomed applied for a review.

Mr. *L. K. Mitter*, for the Applicant.

Mr. *A. C. Mukerjee*, for the Respondent.

JUDGMENT.—This is an application for a review of my judgment in Civil Revision No. 39 of 1912. Certain money had been deposited under Order XXXVIII, rule 2, on the arrest of Abdul Rahman Khan at the instance of the respondent, who had brought a suit against him. Later the applicant filed another suit against the same person and obtained a decree against him and at once applied for execution. The respondent also obtained a decree and the Township Judge ordered a rateable distribution.

I held that section 73, Civil Procedure Code, did not apply as there were not two applications for execution before the Court, as the respondent had not applied for execution and had in fact not obtained his decree at the time the applicant applied for execution and that even in the case of attachment before judgment, though it is not necessary for the plaintiff when he has obtained a decree to apply for attachment, it is necessary for him to apply for execution.

In my previous judgment I did not go into that point because it was unnecessary, as the applicant plainly could not rely on section 73, Civil Procedure Code, as he had not applied for execution before the receipt of the money by the Court.

The *second* ground on which review is sought is that I failed to realise that though deposited in Court the money was the debtor's property and was liable to attachment. In my opinion all that the applicant was entitled to attach was the debtor's interest in the money and my view is that as soon as the money was deposited in Court a lien was created on it in favour of the respondent. It has been urged that as soon as the respondent's suit ended in a decree, the debtor could have withdrawn the money if it had not been for the applicant's application, but I think it is quite clear that he could not have done so. The money was paid into Court for a specific purpose and the words 'sufficiently to satisfy the claim' show that the money was meant to satisfy the claim if decreed. In *Sorabji Coovarji* v. *Kala Raghunath* (1) relied upon by the learned Advocate for the respondent, it was held that money paid into Court in satisfaction of a decree had the effect of releasing the property attached by the decree-holder and that such money was not available for the satisfaction of the decrees of other judgment-creditors.

If instead of paying the money into Court, the debtor had paid it to the respondent out of Court—and seeing that he made no defence but confessed judgment, he might well have done so if he had trusted the respondent to withdraw the suit—the applicant could certainly not have had any right to any portion of it and I cannot see that the payment of the money into Court with the intention that it should be paid to the respondent in satisfaction of his claim could make any difference.

In view of the ruling cited above, my decision that the money was assets held by the Court within the meaning of section 73, Civil Procedure Code, was wrong, but I am of opinion that the applicant would not have been entitled to any portion of the money even if he had obtained his decree and applied for execution before it was paid into Court.

The application is dismissed with costs.

Application dismissed.

(1) 12 Ind. Cas. 911; 36 B. 156; 13 Bom. L. R 1193.

ASAD ALI *v.* BUJRUS MEHER BIBI.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2374 OF 1913.

May 31, 1915.

Present:—Justice Sir John Woodroffe, KT., and Justice Richardson.

ASAD ALI—PLAINTIFF—APPELLANT

versus

BUJRUS MEHER BIBI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Mortgage—Suit for redemption—Civil Procedure Code (Act V of 1908), s. 66, applicability of—Old Code and new Code compared.

In a suit for redemption where it is found that an execution sale and a *benami* purchase took place in 1895, long before the passing of the present Code in 1908, and that at that time and afterwards and until the passing of the present Code the plaintiff had a vested right of redemption:

Held, that it ought not to be assumed, in the absence of any express words to that effect, that that right was taken away from him by the provisions of section 66 of the Code of Civil Procedure. [p. 716, col. 2.]

Under the old law section 66 was only applicable to the certified purchaser, but as it is now amended it applies also to persons standing in the shoes of the purchaser. [p. 716, col. 2.]

Appeal against the decree of the District Judge, Chittagong, dated the 2nd May 1913, reversing that of the Munsif, Third Court, Patiya, dated the 22nd March 1912.

Babus *Brojolal Chakravarti* and *Jatindra Nath Lahiri*, for the Appellant.

Babu *Kshitish Chandra Sen*, for the Respondents.

JUDGMENT.

WOODROFFE, J.—This was a suit for redemption which was decreed by the first Court. The lower Appellate Court has, I think, intended to affirm the findings of the first Court, but has held that the suit was barred by the provisions of section 66 of the Code of Civil Procedure, and has, therefore, dismissed the suit. Now, as regards the applicability of section 66, it is to be noted that the sale and purchase to which the defendant sought to make it applicable took place in 1895, when the old Code was in force. There is no doubt, upon the findings of fact arrived at by both the Courts, that, at that time and afterwards and until the passing of the present Code, the plaintiff had a vested right of redemption. Now, there is also no question as to that if the present Code governs the case then section 66 is applicable. However, as the law then stood the section was only applicable to the certified purchaser; as it is now amended it applies also to persons standing in the shoes of the purchaser. Formerly, according to the decisions of this Court and of the Madras High Court, it was held that section 317 applied only to suits against the certified purchaser and not to suits against persons who derived title from him, such as his assignee or heir. According to the law in this Court under the preceding Code, the appellant is entitled to succeed, but if the case comes under the present Code then he fails. As this is a suit for redemption, the plaintiff had before the passing of the present Code a vested right to redeem. We ought not to assume, in the absence of any express words to that effect, that that right was taken away from him by the provisions of section 66 of the Code of Civil Procedure. In my opinion, therefore, section 66 does not apply to this suit. Then, however, it has been said that the findings of fact are not sufficient, and it has been argued that, if, as has been found, Guran Ali was a *benamidar* for the mortgagor, the latter allowed Guran Ali for a period of 16 years to hold possession of this property or allowed it to be believed that Guran Ali was the real purchaser under the sale of 1895, and that being so, and Lal Mea being, as it is contended, a *bona fide* purchaser for value, his rights exist. The first Court has come to distinct findings upon this argument and has held that Lal Mea was a creature of the mortgagee and that the conveyance of 1911 was brought about by the contrivance of this man to prevent Guran Ali from setting up a title to the land in suit which has all along been in his possession as mortgagee. And though there is not so explicit a finding by the District Judge in his judgment, there is a finding which seems equally sufficient, namely this, that the property has never been in possession of Guran Ali or Lal Mea and it remained throughout in possession of the mortgagee. If the property had all along been in possession of the mortgagee it is not possible to hold, under the circumstances, that Lal Mea could have supposed that Guran Ali had any title to it, seeing that his certificate of purchase was in 1895, 11 years after the sale to Lal Mea, and there-

fter the property was held by the mortgagee.

Under these circumstances, I would decree this appeal, reverse the judgment and decree of the lower Appellate Court and restore those of the Court of first instance, with costs of this Court and of the lower Appellate Court.

RICHARDSON, J.—I agree.

Appeal accepted.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

January 19, 1915.

Present:—Lord Shaw, Sir George Farwell, Sir John Edge and Mr. Ameer Ali.

SHIVALINGAPPA BASAPPA SHINTRE

PLAINTIFF—APPELLANT

versus

REVAPPA AND OTHERS—DEFENDANTS—RESPONDENTS.

Review—Final judgment—Application for reception of new evidence—Sufficient reason not shown—Rejection of application, propriety of—Civil Procedure Code (Act V of 1908), *s.* 114, *O. XLVII, r.* 1.

Where an application for the reception of new evidence was made to a High Court in a case which had lasted for over three years after a final judgment had been made in the case by that Court and no sufficient reason was shown why the proposed new evidence was not timeously submitted, and the High Court rejected that application:

Held, that the rejection of the application by the High Court was correct. [p. 718, col. 1.]

Appeal from a judgment and decree of the Bombay High Court, dated April 11th, 1911, reversing those of the first Class Subordinate Judge of Belgaum, dated April 16th, 1910.

FACTS.—One Madivalappa Shintre had four sons, *viz.*, Revappa, Malappa, Gangappa and Basappa. Shivalingappa, the son of Basappa, claimed a fourth share of the family property as against the sons and heirs of his three uncles. The defence was that by partition in 1844 Basappa was given his share and that his son could claim nothing in the properties possessed by others. Some of the defendants supported the plaintiff in his claim. The defendants admitted that the plaintiff had lived in their town after the death of his father, but that he was expelled from the famity for misbehaviour. They produced certain documents which the Subordinate Judge found to be forged, one of them being regarded by him as indefinite. On appeal to the High Court the reasons for regarding the documents as forged were overruled and judgment given in favour of the defendants. Certain documents were copies and were in no way admissible in evidence. On July 8th, 1911, some three months after, the plaintiff discovered some important documents in Kolhapur which completely disproved the defendants' case. He then applied to the High Court for review of judgment, but his application was rejected without the learned Judges giving any reasons for the rejection, the suit having lasted for over three years. Appeal to the Judicial Committee of the Privy Council came in due course.

Sir *Robert Finlay, K. C.*, (with him Mr. *Arthur Grey*), for the Appellant, contended that the signature of Basappa to what purported to be the release was not proved. The conduct of the parties in living together proved that the family was never in fact divided. The evidence which was produced at the High Court at the first opportunity the appellant got ought to have been admitted, and not rejected without assigning any reason for the rejection. The respondents had not produced accounts for the first thirty years after the alleged partition. This was a fact from which an inference adverse to the respondents should have been drawn. The statement of Basappa alleged to have been made before the *mamlatdar* to the effect that the family was separate was not proved to have been made by him or that he knew the contents of the said document.

Messrs. *De Gruyther, K. C.*, and *Lowndes*, appeared for the Respondents, but were not called on.

JUDGMENT.

LORD SHAW—Their Lordships do not think it necessary to call upon the respondents.

As to the application for the reception of new evidence in this case, their Lordships are clearly of opinion that the rejection of that application was correct. The application itself was made after a final judgment in a suit which had already lasted for a period of over three years. It is enough to say that no sufficient reason appears from the affidavits themselves to show why the proposed new evidence was not timeously submitted.

KRUPASINDHU SAHU *v.* RAJA OF KALLIKOTA.

Upon the merits of the appeal, having considered the judgments in the Courts below, their Lordships are of opinion that that of the first Class Subordinate Judge of Belgaum cannot be supported. They agree with the judgment of the High Court, which appears to state correctly not only the presumptions arising from the history of the family, but also to appraise properly the documents and transactions, and particularly the releases themselves. These releases are not proved to be forgeries. On the contrary their Lordships agree with the High Court in holding that the attack upon their genuineness rests purely upon conjecture. This being so, their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant will pay the costs, including the costs of the application to postpone the hearing.

Appeal dismised.

Solicitors for the Appellant: Messrs. *Ranken Ford, Ford and Chester.*

Solicitors for the Respondents: Messrs. *T. L. Wilson & Co.*

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 267 OF 1912.

March 29, 1915.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Coutts-Trotter.

KRUPASINDHU SAHU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Sree Sree RAMACHANDRA DEVU GARU, RAJA OF KALLIKOTA AND ATTAGADA ESTATES, MINOR, BY THE COLLECTOR OF GANJAM—DEFENDANT No. 2—RESPONDENT.

Accounts—Settlement obtained under improper circumstances—Intention merely to ascertain amount actually due—Right of debtor to re-open accounts—Creditor entitled to appropriate payment to interest first in case of debtor failing to specify.

A Court will not hold a party to a settlement which has been obtained from him under improper circumstances and it will allow him to surcharge and falsify items which have been inserted erroneously and which are not really due, when what the parties contemplated was merely to ascertain what was actually due as distinct from a case in which they agreed to accept a lump sum in settlement of their differences. [p. 719, col. 1.]

M'Kellar v. *Wallace*, 5 M. I. A. 372; 8 Moo. P. C. 378; 1 Equity Rep. 309; 1 Sar. P. C. J. 453; 18 E. R. 936; 97 R. R. 62; 14 E. R. 144; *Williamson* v. *Barbour* 50 L. J. Ch. 147; 37 L. T. 698; 9 Ch. D. 529, followed.

Where the creditors and a servant of the debtor drew up a settlement of accounts in the absence of the debtor, and the debtor on return signed the settlement without carefully scrutinizing the accounts:

Held, that the debtor could not be bound by the settlement and that the accounts should be re-opened. [p. 719, col. 2.]

Where a debtor has failed to exercise his right of appropriating a payment himself it is open to a creditor to do so up to the very last date, and even in the course of the trial, unless something has happened which renders it inequitable to allow him to do so and it is always a question of the intention of the creditor to be gathered from the circumstance of the case. [p 723, col. 2.]

Cory Brothers & Co., v. *Owners of the Turkish Steamship "Mecca,"* (1897) A. C. 286; 66 L. J. P. 86; 76 L. T. 579; 45 W. R. 667; 8 Asp. M. C. 266; *Seymour* v. *Pickett*, (1905) 1 K. B. 715; 21 T. L. R. 302; 74 L. J. K. B. 413; 92 L. T. 519, followed.

An account of the creditor in which he pays in full the interest due to him on the date of settlement and applies the balance towards the principal, is a clear indication of an intention to make the appropriation towards interest in the first place. [p. 723 col. 2.]

Maharaja of Benares v. *Har Narain Singh*, A. W. N. (1905) 167; 2 A. L. J. 585; 28 A. 25, followed.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Ganjam at Berhampore, in Original Suit No. 26 of 1910.

Messrs. *L. A. Govindaraghava Aiyar* and *B. N. Sarma*, for the Appellants.

Dr. *S. Swaminadhan*, for the Respondent.

This appeal coming on for hearing on the 15th, 18th, 19th and 20th January 1915 the Court (the Chief Justice and Hannay, J.) delivered the following

JUDGMENT.—This is a suit brought by the plaintiffs, who were carrying on business at Berhampore, against the late Rajah of Kallikotta to recover certain moneys due on an alleged settlement of accounts entered into in June 1906 together with subsequent advances. The case is defended by the Court of Wards on behalf of the minor Rajah, and in the written statement they plead that this settlement of account of June 1906 was entered into in circumstances which render it not binding on the Rajah and which they characterise as fraudulent. And in paragraph 13 they take exception to various items of charge which are included in the settlement of Exhibit E. The Subordinate Judge has written a very careful judgment, but so long and so involved that it was difficult for us to understand it until

we had examined the whole of the evidence for ourselves and, therefore, was of much less assistance to the Court than it would otherwise have been.

Now there can be no doubt that the Court will not hold a party to a settlement which has been obtained from him under improper circumstances and that it will allow him to surcharge and falsify items which have been inserted erroneously and which are not really due, when what the parties contemplated was merely to ascertain what was actually due, as distinct from a case in which they agreed to accept a lump sum in settlement of their differences. These principles are well illustrated by two cases which have been cited before us, *M'Kellar* v. *Wallace* (1) and the well-known case of *Williamson* v. *Barbour* (2). The Subordinate Judge has found that the settlement effected in this case in June 1906 between the plaintiffs and the Rajah is one which is not binding upon him and we agree with that decision.

The Rajah was a hopeless spendthrift who succeeded to the *zemindari* in 1899, and within four years had not only got through the ten lakhs balance handed to him on attaining majority, but had incurred fresh debts to the extent of twenty-two lakhs of rupees, and between that and the date of the present settlement had incurred further liabilities of about eleven lakhs of rupees, which he was seeking at the time of the settlement to raise from the same English lenders who had advanced the money to meet the 22 lakhs I have already mentioned. At the time of the settlement his private affairs were largely in the hands of one Chamo Patnaik who was described as his personal assistant: and the evidence is that at this time the plaintiffs were beginning to press for payment to them and to threaten suits, and also that the Rajah was preparing a statement of his liabilities for the English lenders with a view to raising a further loan to meet his liabilities. It was quite proper in those circumstances that there should be a settlement provided it was a fair one. The evidence is that three clerks of the plaintiffs, the 1st, 2nd and 3rd witnesses for the plaintiffs, and Chamo and another, the 1st and 2nd defence witnesses on behalf of the Rajah, met at the Rajah's house in Berhampore in his absence and the accounts were produced on both sides and this account, Exhibit E, was drawn up. The Rajah who had been spending some of his time on an island returned to his residence at Rambha on the 20th June 1906, and his diary records that his personal assistant arrived there at 6 o'clock, and it is the case for the plaintiffs that the settlement was signed by the Rajah that same evening at 8 o'clock. The diary mentions that the Rajah was at that time suffering from a headache but says nothing about the settlement. Much reliance is placed by the plaintiffs on their evidence that the Rajah himself scrutinized the accounts before signing. But we attach very little importance to it, having regard to the character of the man and the disorder into which he had allowed his affairs to fall. We think that there is very little doubt that such scrutiny was merely a formal one; and that is borne out by an examination of the character of the settlement which he was induced to enter into.

The defence questions in paragraph 13 of the written statement various items in this settlement and all but one of them have been pressed before us.

The *first* point we propose to deal with and it is one of the most important—is the question of the rents due by the plaintiffs to the deceased Rajah. It is in evidence that at the time that the Rajah began to order goods from the plaintiffs, he gave them a preference over other competitors and granted them a lease of a number of his villages and they were allowed to renew this lease from year to year. Two questions arise as to this rent. In the *first* place, the defence objects that no credit at all has been given for the rent of one of these villages, the Jillunda village, for *Fasli* 13 0; and *secondly*—this is much more important—it objects that no credit is given in the accounts for the amounts of rents due by the plaintiffs as they fell due so as to go in reduction of the indebtedness of the Rajah on the other side, but that it is only the sum total that is credited at the date of the settlement at an under-value, whereas according to the defence the understanding was that these rents were to go in satisfaction

(1) 5 M I. A. 372; 8 Moo. P. C. 378; 1 Equity Rep. 309; 1 Sar. P. C. J. 453; 18 E. R. 936; 97 R. R. 62; 14 E R. 144.

(2) 9 Ch D. 529; 50 L. J. Ch. 147; 37 L. T. 698.

of the Rajah's indebtedness to the plaintiffs. The Subordinate Judge has found that the course of dealing between the parties shows that there was such an understanding between the Rajah and the plaintiffs; and on a very careful consideration of the evidence and the elaborate arguments which were addressed to us, we agree with that conclusion.

But it will be convenient in the first place to deal with the question of the rents of the Jillunda village for *Fasli* 1310. The plaintiffs' case is that the rents of that village for that *fasli* were remitted by the Rajah, and the same evidence as regards this *fasli* which goes to establish the course of dealing as to the crediting of these rents goes also, in our opinion, to confirm the story of the plaintiffs in that respect. Accordingly we are not prepared to agree with the Subordinate Judge that the plaintiffs should be debited with the rents of the Jillunda village for *Fasli* 1310.

The oral evidence of the *sheristadar*, the 3rd defence witness, as to the rents is that no attempt was made to collect these rents from the plaintiff under instructions from the Rajah, because there was an understanding that they were to go in discharge of the Rajah's debts, and this is probabilized by the facts that when Mr. Dodsworth, the agent of the European lenders, insisted that a large portion of the rents should be paid in cash to him to secure the necessary payments which had to be made by the Rajah the plaintiffs ceased to supply any further goods to the Rajah. There is also this most important and significant fact that the plaintiffs in this case have suppressed the whole of their accounts and simply put Exhibit E before the Court and refused to support it either by any documentry evidence of the 3rd plaintiff himself, who was not asked to go into the box. However, the oral evidence of the *sheristadar* is, in our opinion, entirely corroborated by the documentary evidence with regard to the Estate accounts. Each year the books were opened showing the demands and the collections for the villages constituting the *zemindari*, not only the Jillunda village but all the villages of the *zemindari*, and the duty of making these demands and collections was in the *sheristadar* and the Estate office. It appears not only from the oral evidence, but on the books also, that the Estate office never collected anything at all during these years in respect of these villages and it is impossible to come to any other conclusion than that this was in pursuance of an understanding between the parties. The case of *Fasli* 1310, the first year, is referred to in Exhibits 130, 131 and 132; and they show that the total demand for all the villages except Jillunda was Rs. 28,940-10-0 (Exhibit 130, page 322). The exclusion of any demand for the village of Jillunda is, in our opinion, a sufficient corroboration of the plaintiffs' story that there was a remission in respect of that. Then Exhibits 131, 131 (*a*), 131 (*b*) and 131 (*c*), the ledgers of the defendant, show that three successive sums of Rs. 3,000, Rs. 7,000 and Rs. 18,960, making in all Rs. 28,960, are entered as "for discharging loan debts." And Exhibit 130 (*a*) shows that a balance of Rs. 19-6-0, which is the excess of the debts over the demand for these villages, *viz.*, Rs. 28,960-10, was credited to the plaintiffs. It says "188. Pertaining to Madura Sahu for *Fasli* 1310—Attagadu Taluq. Palisara Mutah, Bajiria village—M lease, Rs. 19-6-0." This evidence, in our opinion, shows an adjustment for this *fasli*.

But the case is even clearer with regard to the subsequent *faslis*. In *Fasli* 1311, Exhibits 103 series show the demands for the villages leased to the plaintiff and no collections at all. In 1903 with a view to borrowing from these English lenders the Estate accounts were audited by a Calcutta firm, and they contain a pencil entry which is sworn to have been made, and was apparently made, by the auditor, "held against a debt due from the Rajah". So that it appears that in 1903 the Estate office gave this explanation to the auditor as the reason why no collection had been made in respect of that village.

The state of things was exactly the same with regard to *Fasli* 1312 until just before this settlement was made in June 1906. It was only when Mr. Dodsworth began to look into the Rajah's affairs that there was correspondence (Exhibits 87-*a* and 87-*b*) as regards the crediting of these amounts in April 1906. As regards *Fasli* 1313, Exhibit 85 directs the

adjustment of the rents towards the lessee's debts which was carried out about the end of that *fasli* in Exhibit 92 (page 173).

With regard to *Fasli* 1314 that was the *fasli* in which Mr. Dodsworth, the agent of the English lenders, insisted on a payment of Rs. 20,000 in cash in respect of this rent by the plaintiffs; a balance of Rs. 8,376-14-6 was adjusted on a deduction of the Rs. 20,000 actually paid to Mr. Dodsworth. As regards the rents of *Fasli* 1315, which according to the plaintiffs' own case fell due in February, no credit at all was given in this account, Exhibit E, in June 1906 though the whole rent was then due. Mr. Dodsworth had asked for Rs. 10,000, but that left a balance of Rs. 6,661 for which credit should have been given. The plaintiffs' case is that this balance was adjusted by a payment of Rs. 4,000 under a promissory note, Exhibit LLL, and a further payment of Rs. 2,000 odd at Cuttack. The Subordinate Judge has not accepted this explanation and says that it is not shown why the promissory note should have been taken from the Rajah for money which was actually due to him. The alleged payment of Rs. 2,000 is not borne out by any documentary evidence, and we are not prepared to differ from the Subordinate Judge on this point. On the whole, we have come to the conclusion that the course of dealing found by the Subordinate Judge has been proved to exist and that the plaintiffs were not pressed for payment of the rents until Mr. Dodsworth's time, because there was an understanding between them and the late Rajah that the rents should go towards the satisfaction of his liabilities to them for goods supplied and money lent; and we think that this man Chamo was perfectly well aware of this arrangement and that he was not acting honestly towards his employer when he drew up this account Exhibit E.

Dr. Swaminadhan, for the respondent, says that if the account be re-taken by debiting the plaintiffs with the amounts due from them for the rents of these villages as on the dates on which they fell due, it will show a larger sum due to his client than the Subordinate Judge has awarded him. He has not appealed from the finding of the Subordinate Judge. However that may be, if the defendant so desires the account will have to be re-opened and taken on that basis.

Coming now to the other items in Exhibit E which have been questioned before us, item No. 11 relates to a promissory note, Exhibit L, dated the 22nd March 1904, which was executed by the late Rajah in favour of the plaintiffs bearing interest at 12 per cent. The plaintiffs in this account have charged 18 per cent. on the amount which they say was paid, namely, Rs. 2,172. There is absolutely no justification for that charge. They relied upon a *hookum* of the Rajah, but no *hookum* has been produced. The defence denies that a sum of Rs. 2,172 was ever paid and says that only Rs. 1,000 was paid. Exhibit 5, dated the 21st March 1904, that is the previous day, shows that it was intended that Rs. 1,000 should be paid and Rs. 12,000 retained. The Subordinate Judge has discredited the evidence of any further payment; and no accounts are produced to show any such further payment. None such is shown in the accounts of the defendant. The oral evidence is somewhat conflicting, but we are not prepared to differ from the conclusion at which the Subordinate Judge has arrived. Then not content with charging 18 per cent. instead of 12 on what they actually advanced in this account, the plaintiffs have actually charged interests at 9 per cent. on money which they admit they never advanced at all, namely, a sum of Rs. 10,828. We are unable to accept their explanation as to this. As regards item No. 11, the actual payment should be taken to be Rs. 1,000 and it must bear interest only at 12 per cent. and the interest charged in respect of the unpaid amount must be disallowed. As to this we confirm the judgment of the Subordinate Judge.

We come next to item 20, a payment of Rs. 6,000, which is alleged to have been paid on the 30th November 1905 under a private order of the Rajah of the 26th November for the purpose of re-paying the debt due to the plaintiffs by Chamo' No order is produced nor is any receipt produced. The Subordinate Judge has found that it is unlikely that such a payment of such a large sum would have been made at the time, when the Rajah was in embarrassed circumstances and when owing to Mr. Dodsworth's action it was no longer possible for the plaintiffs to retain the rents of the villages as against the moneys advanced by them. The plaintiffs rely on the fact that in a letter, Exhibit 114, subsequent to Exhibit E, no objection

was taken to this item by the Rajah. This letter was drawn up under Mr. Dodsworth's superintendence and having regard to the character of the Rajah and his want of acquaintance with his affairs we attach no importance to it. We are not prepared to differ from the Subordinate Judge in disallowing this sum of Rs. 6,000.

Item No. 22, a payment of Rs. 1,500 a little later on the 15th December 1905, stands on the same footing. There is a receipt by Chamo, Exhibit X of the 15th of December 1905, and the plaintiffs compare it with a similar receipt, Exhibit W, for a payment on the 20th August 1905; but as pointed out for the respondent Exhibit W bears the Rajah's initials, whereas Exhibit X does not. We are not prepared to differ from the Subordinate Judge as to this item.

We now come to the last item in Exhibit E of Rs. 25,000 and a further claim for an additional Rs. 25,000, as to which we are constrained to say that the conduct of the plaintiffs is shown to have been grossly fraudulent. As I have said, this settlement was being drawn up not only to satisfy the plaintiffs, but also in order that it might be furnished to Mr. Dodsworth and the English lenders and their advisers as evidence of the further liabilities of the Rajah, which it was contemplated should be discharged by means of a fresh advance from the English lenders. Exhibit I, which was executed on the same day as Exhibit E, shows that this man Chamo had induced the Rajah to promise him a remuneration of Rs. 25,000 for his services. Come at the end of Exhibit E Rs. 25,000 is entered in the Rajah's handwriting as having been paid by his order "the other day", *i. e.*, a few days before. It is admitted that the entry made a few days before is in the Rajah's own handwriting. It is admitted that no such payment was made a few days before. The inference we draw is that that entry was put in for the purpose of inducing the lenders to advance a sufficient sum to cover not only the indebtedness of the Rajah to the plaintiffs but also this further sum of Rs. 25,000 which, according to Exhibit I, was to be paid to Chamo. Exhibit Q which is dated the next day is an order by the Rajah on the plaintiffs to pay Chamo Rs. 25,000 almost in the terms of Exhibit I. The plaintiffs' case is not that they paid Chamo at once, but the case with which they came to Court but which their Counsel was constrained to abandon was that this Rs. 25,000 entered in Exhibit E was agreed to be paid to them as bonus or compensation for some loss which they had sustained in connection with the lease, a story which is not only unfounded but in absolute contradiction with the admitted documents Exhibits I and Q. One cannot help wondering that it should have been thought worth while to put such a story before the Court, seeing that it can have no effect whatever except that it stamps the plaintiffs' case with fraud. However, that charge was not pressed before us. The plaintiffs sought to rely on an alleged subsequent payment of Rs. 25,000 to Chamo pursuant to this order Exhibit Q. We entirely agree with the Subordinate Judge that no such payment was ever made. It is not in the least likely that in the Rajah's then condition these plaintiffs would have been willing to advance such a large sum as Rs. 25,000 to Chamo. What was really intended, we doubt, was that f that sum was to be paid at all, it was to be paid out of an advance to be made by the English lenders to meet the alleged indebtedness of the Rajah to the plaintiffs. The whole thing was only a device for the purpose of getting from the English lenders the Rs. 25,000 which, it is possible, the Rajah was then willing to pay to Chamo as the remuneration for his supposed services. The receipt, Exhibit R, produced by the plaintiffs was no doubt signed by Chamo. He was summoned for the plaintiffs as well as the defendant, and was disbelieved by the Judge. The cross-examination of Chamo shows conclusively that no such sum was ever paid to him. He could not say what he had done with it or give any explanation at all. He had to admit that he was very shortly afterwards in peril of arrest and in great difficulty and he was found living in miserable circumstances when his evidence was taken on Commission. We have no hesitation whatever in agreeing with the Subordinate Judge that this sum of Rs. 25,000 was not paid as alleged by the plaintiffs. Subsequently the Rajah countermanded the order; but it is sufficient for us to find that no such pay-

ment was ever made. As I have already said, the other claim of Rs. 25,000 has not been pressed before us on appeal.

The only other item is an alleged credit payment of Rs. 4,000 by the Rajah, for which it is said the plaintiffs have failed to give him credit. There is no evidence before us of such a payment though it may have been made. There is a letter which says that such a payment was made (Exhibit 3). The recital in that letter may or may not be true, but it is certainly not legal evidence of the payment of Rs. 4,000. Therefore, we must disallow this claim. The decree must be modified by disallowing the defendant credit for that sum of Rs. 4,000.

The result is that we differ from the Subordinate Judge both as to this item of Rs. 4,000 and as to the Jillunda village and also as to the way in which the account of the rents of the villages has been taken. We think that if the defendant so desires, the account must be so re-taken crediting the defendant with the amounts of the rents for these villages as they became due. Otherwise the appeal is dismissed with costs.

This appeal having been posted to be spoken to on the 3rd, 4th and 5th of February, the Court (the Chief Justice and Hannay, J.) delivered the following

JUDGMENT.—On the minutes of decree we are of opinion first of all that the plaintiffs are entitled to be credited, as was contended before us yesterday, with interest on the goods supplied by them on the expiry of three months from the dates of their bills. As to the question of the appropriation of the amounts which we have directed to be credited to the defendant in respect of the rents due to him by the plaintiffs, namely, whether the appropriation is to be in the first place towards any interest due at the time and only subsequently in discharge of the principal we have been referred by Mr. Sarma to two decisions, one of the House of Lords in *Cory Brothers & Co.*, v. *Owners of the Turkish Steamship "Mecca"*, *The "Mecca"* (3) and the other *Seymour* v. *Pickett* (4). These cases appear to lay down as the law in England that, when the debtor has failed to exercise his right of appropriating the payment himself, it is open to the creditor to do so up to the very last date and even in the course of the trial, unless something has happened which renders it inequitable to allow him to do so. In the course of these judgments their Lordships point out that the intention of the creditor is to be gathered from his conduct, and that one way of ascertaining that intention is from accounts which he may have rendered. In the present case Mr. Sarma relies upon Exhibit E, the account which was presented to the Rajah by the plaintiffs, which we have held should be re-opened. In that account the plaintiffs show the principal and interest due to them on all the debts up to 21st March 1906 as Rs. 1,72,000. They then deduct from this the amount for which they had to give credit for the rents due by them and they subsequently charge interest on the balance due from the 21st of March until the date of the settlement *i.e.*, the 20th June. If they had appropriated the interest in the way contended for by the other side, the figures would be quite different. We think this is a sufficient indication of the intention of the creditors to make the appropriation towards interest in the first place and it is, therefore, unnecessary to consider the actual points decided in the cases I have referred to or the decision in *Maharaja of Benares* v. *Har Narain Singh* (5), which has also been cited with reference to section 61 of the Contract Act. We rule that the plaintiffs are entitled to have the payments by them appropriated in discharge in the first place of all the interest due on the date of the payment and only after that in discharge of the principal then due.

The only other question is as to the exercise of the Subordinate Judge's discretion in not giving any interest from the date of the plaint until the date of decree. In the circumstances of this case in the exercise of our discretion we are not prepared to alter the decree in that respect. The figures will be worked out on this basis and the figures arrived at will be substituted in the decree of the lower Court.

(3) (1897) A. C. 286; 66 L. J. P. C. 86; 76 L. T. 579; 45 W. R. 667; 8 Asp. M. C. 266.

(4) (1905) 1 K. B. 715; 74 L. J. K. B. 413; 92 L. T. 519; 21 T. L. R. 302.

(5) 28 A. 25; A. W. N. (1905) 167; 2 A. L. J. 585.

LAHAR PURI *v.* PURAN NATH.

This appeal having been again posted to be spoken to this day with reference to the objections of the parties to the statement of account prepared by the office the Court delivered the following

JUDGMENT.—After hearing the objections, we confirm the statement of account.

Appeal partly allowed; Decree modified.

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

March 15, 1915.

Present:—Lord Dunedin, Sir George Farwell, Sir John Edge and Mr. Ameer Ali.

Mahant LAHAR PURI—DEFENDANT—APPELLANT

versus

Mahant PURAN NATH—PLAINTIFF—RESPONDENT.

Mahant, *appointment of—Absence of rules and practice prescribed by founder—Custom or usage—Practice—Suit for possession of* math *and its property—Burden of proof—Election*—Dasnam bhik, *election of* mahant *by, when valid.*

In case the founder of a *math* prescribes no rules or practice to be followed in the selection and appointment of the future *mahants*, the selection and appointment of a person to be the *mahant* of the *math* on a vacancy occurring in the *mahantship* must depend on the custom or usage and the practices which have prevailed in the appointment of *mahants* of that *math*. [p. 725, col. 2.]

The plaintiff sued the defendant for the possession of a temple and the properties appertaining to it alleging that he was the only *sadhak* (disciple) of the deceased *mahant* and that he was duly elected *mahant* and was appointed with the usual ceremonies. The defendant who was the general attorney and storekeeper of the deceased *mahant* also claimed to have been duly elected *mahant* in succession to the deceased *mahant* and was in possession of the temple and of the property appertaining to it:

Held, that it was for the plaintiff to prove his right to the *mahantship* which, if proved, would carry with it the right to possession of the temple and of the property appertaining thereto, and that as the plaintiff failed to prove that he was the duly elected *mahant* of the *math*, his suit would fail and it would be immaterial to consider whether the defendant was or was not the *mahant* of the *math* or whether he had or had not any better title to the temple and the property appertaining to it than a title of mere possession. [p. 726, cols. 1 & 2.]

An election by *dasnam bhik* of a *mahant* to be a valid and effectual election must be by a majority of the *dasnam bhik* assembled for that purpose. A separate election by a faction of the *dasnam bhik* is not a valid and effectual election. [p. 728, col. 2.]

Appeal from a judgment and decree of the Allahabad High Court, dated March 11th, 1912, reversing those of the Subordinate Judge of Saharanpur, dated November 29th, 1909.

FACTS.—The *math* called Akhara of Bawa Sarwan Nath was established by Sarwan Nath some sixty years ago. Of the two orders of Goshains, Girhast and Nihang, *i. e.*, those who practised celebacy, this belonged to the Nihang sect. The founder had laid down no rule of succession. The principal temple was situated at Hardwar, but there were two subordinate temples at Thaneswar and Pitwa. The election always took place in the temple at Hardwar. The electors were the *dasnam bhik*, *i. e.*, ten classes of *fakirs*, *viz.*, Gir, Sagar, Sarsuti, Aram, Ashram, Parbat, Ban, Tirath, Bharti and Puri. On the thirteenth day of the death of the *mahant* succession used to take place. The appellant alleged that he was a disciple as well as *mukhtar* of the late *mahant* and so entitled to succeed him and was elected by the *dasnam bhik*, but when he went out to bathe in the Ganges prior to the completion of ceremonies in the temple, the respondent took advantage of his absence, closed the doors of the temple and got those who were left behind to sign a *mahantinama* for him. The respondent denied this and alleged that he alone was elected to the *mahantship*. The Subordinate Judge held that the respondent was supported by the Niranjani Akhara and was uncommonly shrewd and cunning. He was a Municipal Commissioner and could easily collect a posse of witnesses and although the invitation to the *bhandara* was printed in three languages and distributed among a large number of persons, not a single copy was produced in Court. The *ikrarnama* by the *dasnam bhik* bore the date of February 18th, 1905, but the election was supposed to have taken place on the 24th of February, *i. e.*, some days after—a circumstance which proved machi-

nation on the part of respondent. This document was recently executed and not attested by any respectable person. Having held that according to custom *sadhaks* always succeeded to the *gaddi*, he regarded the whole of the respondent's case as fictitious, got up with the help of his friends and helpers. On appeal to the High Court this judgment of the Subordinate Judge was reversed. The appellant then appealed to His Majesty in Council in due course.

Sir *E. Richards*, *K. C.*, and Mr. *Parikh*, for the Appellant, contended that the appellant was the *sadhak* of the late *mahant* and, therefore, entitled to succeed. This custom was established by the election of preceding *mahants*. He was elected by the *dasnam bhik* and before completion of the ceremony he went to have a bath in the Ganges. On return he found the doors of the temple closed. Therefore the Police were informed, who took no steps. The ceremonies were, however, performed in the house of the Rani of Landhaura. The *mahantinama* was duly executed and he was presented with *alphi*, *topi*, *saili*, *kundal*, *hal*, *nad* and *janeo*. The electors then gave him *bhabhut ka gola* or ball of ashes. They also put a *chadar* on him thus completing the ceremony, *bhang ka pyala* or cup of *bhang* being drunk at the same time. The *mahantinama* of preceding *mahants* conclusively proved appellant's case. The whole case rested upon evidence, which proved that the respondent had played a trick with the appellant in order to get control of the property attached to the temple.

Messrs. *DeGruyther*, *K. C.* and *Dube*, for the Respondent, contended that the respondent was elected by the majority of the *dasnam bhik* while the appellant only by a small discontented minority. All the ceremonies were duly performed in the temple before any other person was elected. The late *mahant* had also nominated the respondent to succeed him and had in fact sent a telegram while on his death-bed. On the third day of the death of the *mahant* all people assembled and decided to elect respondent as successor. In the mutation proceedings also the name of respondent was entered in the Collectorate. No custom existed as to the rule of succession. The founder had laid down none and, therefore, the appellant to succeed must prove that he alone was entitled to succeed.

Reference was made to *Genda Puri* v. *Chatar Puri* (1)

Sir *E. Richards*, in reply.

JUDGMENT.

SIR JOHN EDGE.—This is an appeal from a decree of the High Court of Judicature at Allahabad, dated the 11th March 1912, which reversed a decree of the Subordinate Judge of Saharanpur, dated the 29th November 1909, and dismissed the suit with costs. The suit was brought on the 12th January 1909 by Lahar Puri, who is the appellant, against Puran Puri, who is the respondent. The dispute between the parties to this appeal relates to the title to the *mahantship* of the Hindu *math*, or temple, at Hardwar, known as the Akhara Baba Sarwan Nath, and to the property appertaining to the *math*.

The *math* was founded by one Baba Sarwan Nath, who was a *sunniyasi rukhar fakir* and died in 1849. Since his death there have been several *mahants* of the *math* in succession. It does not appear that Baba Sarwan Nath, in founding the *math*, prescribed any rules or practice to be followed in the selection and appointment of the future *mahants*. Consequently, the selection and appointment of a person to be the *mahant* of the *math* on a vacancy occurring in the *mahantship* must depend on the custom or usage and the practices which have prevailed in the appointment of *mahants* of this *math*, and on that principle this suit has been fought in the first Court, in the High Court, and before this Board.

The dispute as to the title to the *mahantship* arose in February 1905, on the death in that month of Jhandu Nath, who was the *mahant* of the *math*, and had succeeded Tej Nath in the *mahantship* in 1897. In this suit the plaintiff alleges that he was the only *sadhak* (disciple) of the deceased *Mahant* Jhandu Nath, and being the only *sadhak* of *Mahant* Jhandu Nath, he was the only one of the mendicant fraternity of the temple who was qualified for election to the *mahantship*; that he was duly elected *mahant* by the ten classes of mendicants (*dasnam bhik*) on the 24th February 1905; and that he was appointed with the usual ceremonies. On the other side the defendant

(1) 9 A. 1 (P. C.); 13 I. A. 100; 4 Sar. P. C. J. 726.

denies that the plaintiff had ever been the *sadhak* of *Mahant* Jhandu Nath, or was qualified for election to the *mahantship*, or was elected *mahant*. The defendant's case is that it is not necessary that the *sadhak* of the last *mahant* should be elected as the *mahant*. He alleges in his written statement that :—

"The *sadhak* or a co-disciple, or the *sadhak* of a co-disciple of the deceased *mahant* is appointed a *mahant*, and failing these or in the event of none of these being a fit person, the mendicants of all the ten classes (*dasnam bhik*) have the power to make any fit person the *sadhak* of the *gaddi* and appoint him a *mahant*."

The defendant further alleges that he was a *sadhak* of *Mahant* Tej Nath, who preceded *Mahant* Jhandu Nath on the *gaddi* of the temple, and as such *sadhak* was qualified for election to the *mahantship*, and that he was duly elected and with the usual ceremonies was appointed *mahant* by all the ten classes of mendicants (*dasnam bhik*) on the 24th February 1905. It is not disputed that the defendant was a *sadhak* of *Mahant* Tej Nath. It is common ground that the time for the election of a successor in the *mahantship* of this temple is the *terhwin*, the thirteenth day ceremony, after the death of the deceased *mahant*, which in this case fell on the 24th February 1905. It is also common ground that on the death of a *mahant* of this temple the election of his successor takes place at Hardwar, and that the election and appointment of the new *mahant* is by the ten classes of mendicants (*dasnam bhik*) assembled at Hardwar for that purpose. From the evidence their Lordships infer that the usual place at which the *dasnam bhik* assemble for the purpose of electing a *mahant* of this temple and at which they elect a *mahant* is at the temple. Another common ground is that on the election and appointment of a *mahant* of this temple a *mahantinama* is drawn up and is witnessed by those who were present at the election, and is registered.

The defendant, who was the general attorney and storekeeper of the deceased *mahant*, is in possession of the temple and of the property appertaining to it. Consequently it is for the plaintiff to prove his right to the *mahantship*, which, if proved, would in the case of this temple carry with it the right to the possession of the temple and of the property appertaining thereto. If the plaintiff has failed to prove that he is the duly elected *mahant* of the *math* his suit must fail, and in that event it would be immaterial to consider whether the defendant is or is not the *mahant* of the *math*, or whether he has not any better title to the temple and the property which appertains to it than a title of mere possession.

Much evidence has been led by each side. The documentary evidence is not, in their Lordships' opinion, conclusive in favour of either side. The oral evidence is, as the High Court observed, extraordinarily conflicting, even for a case of this kind. Some of the material witnesses, who, if their evidence was true, must have been in a position to contradict or explain much of the evidence of the other side as to the events of the 24th February 1905, were examined and were cross-examined at great length, but were allowed to leave the witness-box without their attention having been directed to the case of the other side. As the case was treated in the Court of the trial Judge, it was an important question whether there were on the 24th February 1905 two elections of a *mahant* by the *dasnam bhik*, or one election only, or no real election at all. As the learned Judges of the High Court observed in their judgment in the defendant's appeal before them:

"The witnesses for the respondent (the plaintiff) say nothing about the election of the appellant (the defendant), and the witnesses for the appellant, with one or two exceptions, say nothing about the election of the respondent," and yet it is alleged that there were two elections on the morning of the 24th February 1905 by the *dasnam bhik* then assembled at the temple.

The Subordinate Judge found as a fact that the plaintiff was the *sadhak* of *Mahant* Jhandu Nath. The learned Judges of the High Court, after reviewing the evidence bearing on that question, and not overlooking the fact that it was a strong point in favour of the view which the Subordinate Judge had taken, that a number of *fakirs* who were unlikely to choose a complete outsider had joined in the so-called election of the plaintiff as *mahant*, were on the whole unable to say that the evidence that the plaintiff

had been duly appointed a *sadhak* was satisfactory. As the plaintiff had failed to satisfy the Judges of the High Court that he had been a *sadhak* of *Mahant* Jhandu Nath, and as he had neither alleged nor proved that he was in any other way qualified for election as *mahant* of the *math*, they might have allowed the appeal and have dismissed the suit without going into the question as to whether he was or was not elected. However, they did no dispose of the appeal before them on that point; they decided the appeal on the question as to whether the plaintiff had or had not been duly elected the *mahant*. In the view which their Lordships take of this case it is not necessary for them to decide whether or not the plaintiff had been a *sadhak* of *Mahant* Jhandu Nath.

The evidence as to the so-called elections on the 24th February 1905 is most conflicting. Each party claims to have been elected *mahant* by the *dasnam bhik* on that day. That there were, in fact, two factions amongst the *dasnam bhik*—one faction desirous of electing the plaintiff as *mahant*, the other faction desirous of electing the defendant as *mahant*—is on the evidence obvious. The Subordinate Judge found that it was satisfactorily proved that the plaintiff was duly elected *mahant* by the *dasnam bhik* on that day, and that the alleged election of the defendant as *mahant* was a fictitious transaction. The High Court found it proved that the defendant was elected on the 24th February 1905 by a large gathering of qualified persons and that the election of the plaintiff was:—

"A hole-and-corner affair in comparison with that of the appellant (the defendant), and seems to have been carried out hurriedly by a discontented minority" of the *dasnam bhik* which had assembled at the temple on the morning of the 24th February 1905.

There is evidence to support each of these contradictory findings. If their Lordships were to confine their attention to the evidence as to what took place on the 24th February 1905, it might be difficult to come to a conclusion as to the side on which the truth is to be found. The plaintiff's case is that he was elected at the temple that morning by the *dasnam bhik*, and that, having gone with his supporters to the Ganges to bathe before the completion of the ceremonies, they found on their return from bathing that the doors of the temple were closed, and they were obliged to complete the ceremonies at the *haweli* of the Rani of Landhaura, where he was installed, and that the *bhandara*, the customary feast on such occasions, took place at the Rani's *haweli*.

The plaintiff represented that he had been deceived by the defendant, and had believed until he returned from bathing that the defendant was favourable to his election. He represented that before he went to bathe, the defendant had at the temple handed to him the ceremonial robes to be used at his installation, and given him the *mahantinama* of *Mahant* Jhandu Nath as a precedent upon which his own *mahantinama* should be drawn up. The defendant's case was that he and he alone had been elected by the *dasnam bhik* at the temple on the morning of the 24th February 1905, and that the ceremonies for the completion of his appointment as *mahant* had taken place at the temple.

Mahant Jhandu Nath, being ill, went to Lahore and died there on the 12th February 1905. There is some evidence, which their Lordships see no reason to doubt, that when at Lahore, *Mahant* Jhandu Nath nominated the defendant as a fit person to succeed him in the *mahantship*. It is not suggested that *Mahant* Jhandu Nath had any power to appoint anyone as his successor, but his nomination would probably have weight with the *dasnam bhik*. The plaintiff, even assuming for the moment that he was a *sadhak* of *Mahant* Jhandu Nath, had no experience in the management of the affairs of the *mahant* or of the property appertaining to the temple. On the other hand the defendant, who undoubtedly had been a *sadhak* of *Mahant* Tej Nath and a co-disciple of *Mahant* Jhandu Nath, had been for years the general attorney of *Mahant* Jhandu Nath and the storekeeper of the temple. On the death of *Mahant* Jhandu Nath the defendant was early in the field preparing to secure his own election as *mahant* in succession to *Mahant* Jhandu Nath. The defendant and some supporters of his executed an agreement on the 18th February 1905 by which they settled between them that the defendant should be the *mahant* and should be installed on the *gaddi* of Baba Sarwan Nath. The defendant before the 24th

February 1905 took a step which must have been notorious as indicating that he claimed to succeed *Mahant* Jhandu Nath; he filed an application in the Revenue Court in which he prayed that his name should be entered in the Revenue papers in respect of the property of the temple in place of that of the late *Mahant* Jhandu Nath. When the defendant was examined in this suit as to his application to the Revenue Court for mutation of names he, in answer to the pertinent question:—

"How did you file an application for mutation of names when you had not been elected a *mahant*?"

replied—

"We had settled the matter amongst ourselves."

In reply to the interrogative observation on that answer:—

"The *dasnam bhik* had not settled the question up to that time?"

the defendant said:—

"When Jhandu Nath was elected to the *gaddi* the *dasnam bhik* said that Puran Puri (the defendant) would be appointed *mahant* after Jhandu Nath; and on the *tija* day also the *panches* settled that Puran Puri would be appointed *mahant*."

It was the defendant who sent out the invitations to the *mahants* and other people to attend on the *terhwin*, the thirteenth day ceremony, when a *mahant* should be elected. None of the invitations have been produced, but from some of the replies which have been put in evidence it may be inferred that the invitations were to attend for the election of the defendant as *mahant*. It was the defendant who made the preparations for the *bhandara*, the customary feast, which was to take place at the temple on the day of the election of the *mahant*. That *bhandara* was held at the temple, and it is not pretended that the plaintiff and his supporters took part in it. The *bhandara* in which the plaintiff and his supporters took part was held at the *haweli* of the Rani of Landhaura. The plaintiff had then no money, but after he had been placed on the *gaddi* at the Rani's *haweli* he borrowed some money from one Swami Shimboo Gir and sent two Brahmans into the *bazar*, who bought the things which were required for his *bhandara*.

According to some of the plaintiff's witnesses, the defendant was present at the temple when it was settled by the *dasnam bhik* that the plaintiff had a right to the *mahantship* and should be appointed *mahant*, and did not object or claim that he, and not the plaintiff, should be elected *mahant*. Having regard to the facts to which their Lordships have referred, it is impossible to believe that the defendant was assenting to the election of the plaintiff. There is a large body of evidence in support of the defendant's case that he was elected *mahant* on the morning of the 24th February 1905.

The High Court has found that the majority of the persons present on the morning of the 24th February who were qualified to elect a *mahant* of this temple were in favour of the defendant; that in point of numbers and of influence the defendant received more support than the plaintiff did; that the election of the defendant must have taken place before that of the plaintiff; and that there was no attempt on the part of the defendant to conceal the arrangements which he had made for the 24th February 1905. It has not been shown to their Lordships that the High Court came to a wrong conclusion on any one of these points. An election by *dasnam bhik* of a *mahant* to be a valid and effectual election must be by a majority of the *dasnam bhik* assembled for that purpose. A separate election by a faction of the *dasnam bhik* is not a valid and effectual election. Their Lordships have come to the conclusion that the plaintiff has failed to prove that he was elected a *mahant*.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs of this appeal.

Appeal dismissed.

Solicitor for the Appellant: Mr. *E. Dalgado.*

Solicitors for the Respondent: Messrs. *Barrow, Rogers* and *Nevill.*

MADRAS HIGH COURT.

FIRST CIVIL APPEALS NOS. 315 OF 1912 AND 44 OF 1913.

April 16, 1915.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Tyabji.

IN A. S. NO. 315 OF 1912

MANJERI KARNAMULPAD KOVILAGATH VALIA MANAVIKRAMAN—DEFENDANT NO. 1—APPELLANT

versus

KOZHIKOTE KIZHAKKE KOVILAGATH VALIA THAMBURATTI AVERGAL, BY VIYATHAN SREEDEVI, AND ANOTHER—PLAINTIFF AND DEFENDANT NO. 2—RESPONDENTS

IN A. S. NO. 44 OF 1913

KOZHIKOTE KIZHAKKE KOVILAGATH VALIA THAMBURATTI AVERGAL, BY VIYATHAN SREEDEVI—PLAINTIFF—APPELLANT

versus

MANJERI KARANAMULPAD AVERGAL, BY NAME MANAVIKRAMAN, AND ANOTHER—DEFENDANTS—RESPONDENTS.

Forest land—Proof of possession—Acts of ownership quite essential to determine title—Nature of evidence to prove title and possession.

Where the defendants are shown to be in possession of certain forest land, the plaintiff in order to establish his claim to it must prove definite acts of ownership exercised by him on the land from time to time. [p. 730, col. 2]

A sketch prepared by one of the parties at a time when the Government attempted to take up these lands under the Land Acquisition Act before any controversy as to the boundary of these lands arose is strong cogent evidence to prove ownership. [p. 730, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge, Calicut, in Original Suit No. 19 of 1910.

FACTS.—The dispute was about certain hills in the Nilambur Taluk, Malabar District, each of the rival *jenmies* (Kilakka Kovilagam and Manjeri Kovilagam) owning hills in the neighbourhood. An elephant being trapped and falling into a pit, a dispute arose between the parties as to who was entitled to the elephant. The defendants took possession of the elephant. Thereupon the plaintiff sued to recover possession of the hill and of the elephant. The Subordinate Judge of Calicut after examination of the different plans and survey records came to the conclusion that the hill belonged partly to the plaintiff and partly to the defendants, but that the portion where the elephant was trapped belonged to the defendants. Both parties appealed to the High Court.

Mr. *C. V. Anantha Krishna Aiyar*, for the Appellant, in Appeal Suit No. 315 of 1912 and for the Respondents in Appeal Suit No. 44 of 1913.

Mr. *T. R. Ramachandra Aiyar* (with him Mr. *A. S. Venku Aiyar*), for the Respondents in Appeal Suit No. 315 of 1912 and for the Appellant in Appeal Suit No. 44 of 1913.

JUDGMENT.—These are cross-appeals from the decision of the Subordinate Judge of Calicut in a suit brought by the plaintiffs who belong to the Kizhakke Kovilagam, claiming to recover certain lands from the defendants as part of their Nedunchuri Malavaram. The defendants on the other hand say that the suit lands belong to their Vennakote Malvaram. The Subordinate Judge in a very careful judgment has found that the real boundary is not as claimed by either side, but runs along the stream Koyakkadanthodu which in the plan Exhibt A divides the plots B series from the C series. This is a wild hilly country and as observed by the Subordinate Judge, until the decision of the case of *Secretary of State for India in Council* v. *Vira Rayan* (1) the Government claimed to be the owner of all these waste forest lands; and that, as well as the wild condition of the land, may account for the indefiniteness of the boundaries. A long series of documents have been put in on both sides which have been analysed by the Subordinate Judge. It is sufficient to say that we agree with his conclusion that the plaintiffs, whose admitted lands are to the south, claimed from early times that their boundary extended as far northwards as the Kurunhithodu; and we agree with the Subordinate Judge that the story of the defendants that another stream far to the south was also known as Kurunhithodu is altogether unworthy of acceptance For one thing it is abundantly proved that the plaintiffs have always been the owners of the plot F which intervenes between what is admitted by the defendants to be the plaintiffs' land

(1) 9 M. 175.

and the suit lands, plots C. We also agree with the Subordinate Judge that it is not shown that the plaintiffs beyond asserting their claim exercised any acts of ownership in the plots B series, that is to say, to the north of the plots C series. Then turning to the defendants' case we find more difficulty in ascertaining what was the real boundary claimed by the defendants, because there is no such clear boundary as the Kurunhithodu. But on the whole we see no reason to differ from the main conclusions of the Subordinate Judge as to the position at any rate of the western boundary, a stone called the Anamarippan Kallu. The defendents are anxious to bring that stone down south and place, it if anything, rather to the south-east at the point E3, so that a line drawn from that stone up to the Utratan Puzha would make a sort of south-western boundary whereas in the earlier documents they gave that as the western boundary. If we place the stone where the Subordinate Judge has placed it, it would form a very fairly accurate western boundary for the defendants' lands. This is the boundary in Exhibit 87 which was mainly relied on by the defendants.

On the east that boundary starts from a certain point in that boundary which is now clearly in the Government forest reserve plot G. But what appears likely is that both the forest reserves G series really at one time belonged to the defendants and the plaintiffs respectively, and we find that even to this day there are plots of cultivation which belong to the defendants in the plots G series and the defendants' boundary as given in Exhibit 87 starts from a point D4 in the reserve. Two other points are then mentioned to mark the boundaries but unfortunately they are not identifiable and throw no light on the case. The boundary is then said to go westwards towards the Anamarippankallu. In the absence of identification of those two points it is impossible to say exactly merely from Exhibit 87 how that boundary line really ran between these two points. In any view we have this state of things, that the defendants claim a boundary which runs clearly to the south of the boundary claimed by the plaintiffs. The defendants' ownership of some plots of land to the south of the boundary line contended for by the plaintiffs is sufficient to prevent the plaintiffs' contention being accepted in its entirety. One claim has to be set off against the other. It cannot be said that the plaintiffs have established, in the absence of any proof of exercise of ownership, their right to lands which are shown to have been claimed by and in possession of the defendants. There is just one piece of evidence as to which we differ from the Subordinate Judge and which we think is of great assistance in enabling us to decide the case, and that is as to the position of a certain hill belonging to the defendants, that is the Muthappankallu. It is shown, not claimed, that the defendants possessed a hill of that name, but the Subordinate Judge finds that it is situated in what is now Government reserve plot G. On the other hand the defendants rely upon a rough sketch which was drawn up in the year 1871 when there was a question of acquiring part of this plot G for Government, and this is, in our opinion, valuable evidence, because it dates back to a period when this dispute had not arisen. It shows the boundary stones which admittedly run down along the boundary. Between A and G that boundary runs north to south and then runs for a short space down to B4 from west to east, then turns again and runs from north to south. That is also marked upon this Exhibit 84. We see there the boundary stones running down to south and then west to east and then again north to south. This plan contains a plot 13, which appears from the key which is Exhibit 85 to bear the name of Muthuppankallu and to belong to the defendants; and it is shown in this plan as extending as far down as the Koyakkadamthodu, which is also the southern boundary of D5 and proves, in our opinion, that the defendants' lands include B5. That is exceedingly important because it is an answer to both the appeals. For it shows that the defendants' appeal claiming that the plots C series belong to them as including Muthappankallu is unfounded. It also shows that the boundary of the defendants' land extends as far as that Koyakkadanthodu.

We have nothing on the other side but the fact that the plaintiffs claimed the lands as far as the Kurunhithodu. That is not enough when we find a similar claim by

the other side supported by better evidence. The Subordinate Judge proceeded to some extent, though he is not very definite about it, on the view that the plaintiffs' lands did really extend at one time as far as the Kurunhithodu and that they have lost some of them by adverse possession on the part of the defendants. But we think it much more likely that having regard to the nature of these lands and the rival claims of Government their respective rights were very vaguely conceived by both sides and that the plaintiffs put forward a claim to northern boundary to which they never had any real claim.

On behalf of the defendants there is some evidence not only of the exercise of ownership as regards these plots B series, but as we have said B5 would appear to have been taken to be theirs without any question in this investigation in 1871. The Judge has relied upon a certain deposition in another suit which is not evidence, and he has also relied upon certain criminal proceedings evidently between persons claiming under the plaintiffs and the defendants respectively; but as it is not shown with regard to what exact spot the dispute arose, we are unable to attach any importance to that evidence. Again the leases, or *karars*, allowing timber to be cut do not specify where the timber was to be cut, and are, therefore, useless. Then he relies upon certain forest passes which were issued by the forest officer to persons claiming under the defendants authorising them to take the wood which they cut through the forest reserve G. We have taken a good deal of trouble to try and extract something out of the study of these passes. It is quite clear that there was a place called Alakkal, which is Exhibit 4, and it is clear that there was a drive through the forest marked H along which timber used to be taken. Of course it may have been taken through the plot A which is admittedly defendants' or through the land in dispute B. But that drive H is called in Exhibit 70 Allakkal, Ellikkal or Allakkal drive so that it gets its name from the place where it starts from. In the same document there is a reference to Chundiyanhal Elukal and it seems to us exceedingly probable that H is that Elakkal, because it is clear from these passes that there was some place called Chundiyanhal in the defendants' land where they stored their timber. It seems to me very likely—I cannot put it higher—that H is the Chundiyanhal Ellikkal and that it starts from a point bearing that name in B series. If so, the evidence of the passes strongly supports the defendants' claim to the plots B series. But even putting it aside and without relying on the adverse possession of the defendants as the Subordinate Judge has done, the proper conclusion upon the evidence is that the plaintiffs, though they claimed the lands as far north as the Kurunhithodu, have failed to prove that they were in possession of lands north of the C series. As I have said the plan, Exhibit 84, is very strong evidence, in our opinion, that B5 belonged to the defendants. If that is so, no better identification of the boundary of the defendants' lands can be afforded than by taking this Thodu, as the Subordinate Judge has taken, as the boundary as far as it goes. The result is that both the appeals fail and are dismissed with costs.

Appeals dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 462 OF 1913.

March 16, 1914.

Present:—Mr. Justice Rattigan.

MUHAMMAD BAKHSH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BALKISHAN—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11, O. II, r. 2 - Res judicata—*Relinquishment of relief—Relief claimed but not granted—Direction to file separate suit for it—Objections to attachment and sale of immoveable property rejected summarily—Suit for recovery of property sold—Limitation Act (IX of 1908), Sch. I, Arts.* 11, 144.

Where a Court expressly declares (rightly or wrongly) that it is not competent in a particular suit to grant a specific relief claimed therein and

directs the plaintiff to take separate proceedings to achieve his purpose, his subsequent suit to get that relief is neither barred by the rule of *res judicata* under section 11 nor by rule 2 of Order II of the Code of Civil Procedure, 1908. [p. 733, cols. 1 & 2.]

Parsotam Gir v. *Narbada Gir*, 26 I. A. 175; 3 C. W. N. 517; 21 A. 505 (P. C.); 1 Bom. L. R 700; 7 Sar. P. C. J. 538; *Bhola Singh* v. *Gurdit Singh*, 66 P. R. 1884 and *Devi Ditta* v. *Nathu*, 15 Ind. Cas. 930; 56 P. R. 1912; 245 P. W. R. 1912; 251 P. L. R. 1912, followed.

Musammat Prab Devi v. *Harkishen Das*, 47 P. R. 1884; *Musammat Parmeshri* v. *Vasdeo*, 35 P. R. 1885; *Piari* v. *Khiali Ram*, 3 A. 857 and *Ram Sewak Singh* v. *Nakched Singh*, 4 A. 261 (F. B.), followed.

Article 11 of Schedule I of Act IX of 1908 does not apply where objections to the sale of the property are not investigated but are summarily rejected by the Executing Court, and a suit for recovery of the property thus illegally sold in execution of a decree can be brought at any time within 12 years under Article 144 of the Act from the date on which the cause of action accrued. [p. 733, col. 2.]

Venkapa v. *Chenbasapa*, 4 B. 21; *Krishnaji Vithal* v. *Bhaskar Rangnath*, 4 B. 611 and *Karsan* v. *Gampatram*, 22 B. 875 at p. 882, followed.

Second appeal from the decree of the Divisional Judge of the Hoshiarpur Division, dated the 6th December 1912, reversing that of the Munsif, first Class, Hoshiarpur, dated the 19th July 1912, decreeing claim.

Sheikh *Umar Bakhsh*, for the Appellant.

Bakhshi *Tek Chand*, for the Respondent.

JUDGMENT.—One Gandu (or Gulla) obtained a simple money-decree against two non-proprietors, Hukmi and Devi Dass, and in execution had the houses occupied by them attached and sold. The property was purchased by Balkishan, defendant No. 1, and subsequently plaintiff, who is the proprietor of the site on which the houses stand, objected to the sale and asked for the release of the houses. His objections were disallowed on the ground that they were time-barred, and on the 14th May 1910, he instituted a suit to establish his right. In that suit the heading of the plaint described it as one for a declaration that the suite under the houses was not capable of attachment and sale, but in the final paragraph the plaintiff asked for a declaration regarding the site and also for an order directing that the purchaser be ejected by removal of the materials (*malba*).

The Court of first instance dismissed plaintiff's suit, but the Divisional Judge on appeal granted him a declaration to the effect "that only the materials of the huts and not the site were capable of attachment and sale." This decree was dated the 26th of May 1911. Subsequently the plaintiff applied for a review and amendment of the decree, and prayed that an addition should be made to the decree in the form of an order directing the purchaser to remove his materials within a specified time. This petition was rejected by the Divisional Judge on the 19th of October 1911 on the ground that plaintiff's suit was for a declaration regarding the site, that he had been granted the said declaration, and that an order requiring the removal of the materials could not be added, the order concluding with the words "The petitioner must take separate proceedings to achieve his purpose." On the 21st of March 1912, plaintiff instituted a second suit in which he prayed for an order directing the ejectment of the purchaser and the removal of his materials. The Munsif granted him a decree for dispossession of the purchaser who was directed to remove the materials within two months and vacate the site. The purchaser appealed to the Divisional Judge, who was the same officer who decided the appeal in the previous suit and his appeal was accepted on the ground that the present suit was barred by time and also by the rules of *res judicata* and by Order II, rule 2, of the Civil Procedure Code.

Plaintiff has appealed from the decree of the Divisional Judge and I have heard arguments at some length, but I must confess that I find it difficult to follow the learned Judge's reasoning. In his judgment he admits that it is possible that in deciding the previous appeal, he examined only the heading of the plaint and overlooked the final prayer for relief, and he adds that in any event he could not have granted the consequential relief prayed for on the ground of action there alleged. Upon those admissions it is not easy to see how the present suit can be barred either by the rule of *res judicata* or by Order II, rule 2, of the Code. Mr. Tek Chand, for respondents, argues that Explanations (4) and (5) of section 11 of the Code apply to the case, that plaintiff in the former suit might and should have attacked defendant's right to remain in possession; that it must, therefore, be taken that defendant's right to possession was a matter directly and substantially in issue in that suit, and that plaintiff's claim in the plaint to eject him

must be deemed to have been refused as it was not granted. But it is clear that plaintiff by asking for defendant's ejectment did attack the latter's right to remain in possession, and though this matter was not expressly put in issue, it must be deemed to have been directly and substantially in issue in that case. The Divisional Judge, however, held in that suit (as he explains in his judgment in the present case) that such relief could not be given in a suit for a declaratory decree. His order rejecting the petition for review makes this abundantly clear, as in that order he stated in express terms that he could not in that suit grant the relief claimed and that plaintiff must take "separate proceedings" to obtain that relief. When a Court expressly declares that it is not competent in a particular suit to entertain a specific prayer, it is impossible to hold that its decision acts as *res judicata* in respect of the matter covered by that prayer [*See Parsotam Gir* v. *Narbada Gir* (1); *Bhola Singh* v. *Gurdit Singh* (2) and *Devi Ditta* v. *Nathu* (3)]. To such a case the provisions of section 11 of the Code are inapplicable, and I hold, therefore, that the present suit is not barred by any rule of *res judicata*. The next question is whether Order II, rule 2, of the Code applies to the present case. This rule provides that every suit shall include the whole of the claim which the plaintiff is *entitled* to make in respect of the cause of action; that if a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished and that a person entitled to more than one relief in respect of the same cause of action may sue for all or any such reliefs but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

This section cannot possibly bar the present suit. In the first place, the Divisional Judge in the former suit held (rightly or wrongly), that plaintiff was not entitled to claim dispossession of the defendant, and in the second place, plaintiff as a matter of fact (though this was overlooked by the learned Judge when deciding the appeal in that case) did claim dispossession of defendant and did ask for that relief. If, in the first suit, plaintiff asked for a relief to which he was not entitled in that suit, he cannot be debarred from subsequently asking for such relief in a second suit [*Musammat Prab Devi* v. *Harkishen Das* (4); *Musammat Parmeshri* v. *Vasdeo* (5); *Ram Sewak Singh* v. *Nakched Singh* (6); *Piari* v. *Khiali Ram* (7)]. But it is unnecessary to dilate upon this point, as plaintiff actually put forward a claim to dispossess defendant and prayed for that relief.

The final ground upon which the present suit has been dismissed is that it is time-barred. Unfortunately the learned Judge has not discussed this part of the case or referred to the Article of the Limitation Act which bars the suit. Mr. Tek Chand urges that it is Article 11 and contends that the present suit should have been brought within one year from the date of the Court executing the decree, which disallowed plaintiff's objections to the attachment of the property. The present suit was admittedly not brought within one year from such date, but I cannot agree that Article 11 is applicable. Plaintiff's objections were not investigated but were summarily dismissed as time-barred, and there is ample authority for holding that to such a case Article 11 of the Act is not applicable and that a suit can be brought for the recovery of immoveable property at any time within twelve years from the date when the cause of action accrued [See *Venkapa* v. *Chenbasapa* (8), *Krishnaji Vithal* v. *Bhaskar Rangnath* (9) and *Karsan* v. *Ganpatram* (10)]. I accordingly hold that the present suit is not barred either by time or by the rule of *res judicata* or under Order II, rule 2 of the Code and accepting this appeal, I remand the case to the Divisional Judge under Order XLI, rule 23, for decision of the appeal before him on the merits.

(1) 21 A. 505; 26 I. A. 175; 3 C. W. N. 517; 1 Bom. L. R. 700; 7 Sar. P. C. J. 538.
(2) 66 P. R. 1884.
(3) 15 Ind. Cas. 930; 56 P. R. 1912; 245 P. W. R. 1912; 251 P. L. R. 1912.
(4) 47 P. R. 1884.
(5) 35 P. R. 1885.
(6) 4 A. 261.
(7) 3 A. 857.
(8) 4 B. 21.
(9) 4 B. 611.
(10) 22 B. 875 at p. 882.

KANCHAN MANDAR *v.* KAMALA PROSAD.

Court-fee stamp to be refunded, costs to abide the event.

Appeal accepted; Case remanded.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL No. 439 OF 1911.

August 10, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

KANCHAN MANDAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

KAMALA PROSAD CHOWDHURY AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Fraudulent transfer—Estoppel, principle of—Duty to speak—Purchaser at execution sale, if can question transferability—Auction-purchaser equally bound with judgment-debtor—Co-sharer landlord, power of, to raise question of transferability—Non-transferable occupancy holding, sale of, effect of.

Where there is nothing to show that a transferor intended a sale of his immoveable property as a cloak or device for his own protection and where the *bona fides* of the transfer cannot be doubted, the transfer cannot be impeached as fraudulent. [p. 735, col. 1.]

Hakim Lal v. *Mooshahar Sahu*, 34 C. 999; 6 C. L. J. 410; 11 C. W. N. 889, followed.

The case, where the person against whom the estoppel is sought to be applied is under no duty to speak, is not covered by the principle that where a person, by his words or conduct, wilfully causes another to believe the existence of a certain state of things and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter that a different state of things existed at the time. [p. 735, col. 2.]

A purchaser at an execution sale is not entitled to raise the question of transferability of the holding and is bound by the same rule of estoppel as the judgment-debtor. [p. 735, col. 2; p. 736, col. 1.]

Debendra Nath Sen v. *Mirza Abdul Samed*, 1 Ind. Cas. 264; 10 C. L. J. 150; *Mahomed Mozuffer Hossein* v. *Kishori Mohun Roy*, 22 C. 909; 22 I. A. 129 and *Dayamoyi* v. *Ananda Mohan Roy*, 27 Ind. Cas. 61; 18 C. W. N. 971; 20 C. L. J. 52, followed.

A co-sharer landlord having a three-fourths share is entitled to raise the question of transferability of the holding. [p. 736, col. 1.]

Dilbar Sardar v. *Hosein Ali Bepari*, 26 C. 553, followed.

The purchaser can be evicted by any of the co-sharer landlords to the extent of his own share, in a sale of a non-transferable occupancy holding, and if possession of the entire holding has been acquired by some of the co-sharers the other co-sharers are entitled to joint possession thereof. [p. 736, col. 1.]

Appeal against the decree of the Subordinate Judge of Bhagalpur, dated the 28th August 1911.

Mr. *Caspersz*, Babus *Jogesh Chunder Roy* and *Surendra Kumar Bose* and Moulvi *Khurshed Hossein*, for the Appellants.

Babus *Umakali Mookerjee*, *Jogendra Chunder Ghose* and *Smritis Chunder Ghose*, for the Respondents.

JUDGMENT.—The subject-matter of the litigation which has culminated in this appeal is an agricultural holding owned by the members of a family of Mandars under the plaintiffs and the defendants as their landlords. The plaintiffs are interested to the extent of a fourth share and the defendants to the extent of a three-fourths share in the superior interest. The Mandars had mortgaged the holding to the defendants who sued to enforce their security, obtained a decree thereon, and took steps to bring the holding to sale in execution. On the 17th February 1908, the Mandars transferred the holding to the plaintiffs under a conveyance for Rs. 1020 which was paid into Court in satisfaction of the mortgage-decree held by the defendants. The defendants had, prior to these proceedings, instituted a suit against the Mandars for arrears of rent payable in respect of their three-fourths share. An *ex parte* decree was at first obtained and was subsequently set aside; finally, on the 20th February 1908, a decree for rent, which could operate only as a decree for money, was made in favour of the defendants. On the 16th June 1908, the defendants in execution of that decree purchased the right, title and interest of the Mandars in the holding in dispute. They obainted delivery of possession through Court and thus dispossessed the plaintiffs. On the 29th July 1910, the plaintiffs instituted the present suit for declaration of their title by purchase and for recovery of possession. The defendants contended that the holding was non-transferable and that the plaintiffs had consequently acquired no title under their purchase. The Subordinate Judge has not allowed evidence to be given upon the question of the existence of a custom of transferability of occupancy holdings in the locality, on the authority of the decision in *Haro Chandra Poddar* v. *Umesh Chandra Bhattacharjee* (1).

(1) 5 Ind. Cas. 39; 11 C. L. J. 20; 14 C. W. N. 71

He has found on the merits in favour of the plaintiffs and has made a decree for possession and for determination of mesne profits.

In the present appeal by the defendants, the decree of the Subordinate Judge has been assailed substantially on four grounds; namely, *first*, that the conveyance by the Mandars in favour of the pl intiffs was fraudulent and did not pass title to them; *secondly*, that the plaintiffs are estopped to deny the validity of the title of the defendants, as with full knowledge of the rent decree and of the execution proceedings thereon they did not raise any objection; *thirdly*, that the defendants in their character as purchasers at an execution sale were entitled to raise the question of transferability of the holding; and, *fourthly*, that the defendants in their character as co-sharer landlords were entitled to resist the claim of the plaintiffs to the extent of a three-fourths share.

In support of the *first* ground, it has been contended that at the time when the conveyance was executed by the Mandars in favour of the plaintiffs on the 17th February 1908, the transferors as well as the transferees were aware of the pendency of the suit for arrears of rent, and that the transfer was consequently a device to defeat the claim of the defendants as landlords. There is clearly no foundation for this contention. There is nothing to show that the transferors intended the sale as a cloak or device for their own protection; and on the principle explained by this Court in the case of *Hakim Lal* v. *Mooshahar Sahu* (2), the transfer cannot be impeached as fraudulent. The *bona fides* of the transfer cannot be doubted, because during the pendency of the execution proceedings on the basis of the mortgage, the transferors intimated to the Court that they intended to satisfy the mortgage-decree by sale of some of their properties, though they did not specify the particular properties they intended to sell. There was a valid decree against them, and the sale for consideration effected in these circumstances cannot be deemed fraudulent. The first ground thus fails.

In support of the *second* ground, it has been urged that the transferors and the transferees were both aware of the rent suit, that it was their duty to intimate to the Court that the property which the defendants sought to bring to sale in execution of their decree for rent had already been transferred by the conveyance of the 17th February 1908 and that their omission to do so estopped them now, on the principle recognised in *Pickard* v. *Sears* (3). That case has plainly no application here. It is well settled that where a person, by his words or conduct, wifully causes another to believe the existence of a certain state of things and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter that a different state of things existed at the time. But this principle has no application where the person against whom the estoppel is sought to be applied is under no duty to speak. Here, it has not been established that the plaintiffs were under any duty to speak and that by reason of their failure to warn the defendants, the position of the latter has been altered. The second ground consequently cannot be sustained.

In support of the *third* ground, it has been argued that the defendants in their character as purchasers at an execution sale were entitled to raise the question of transferability of the holding. This contention cannot possibly be supported in view of the principle laid down by the Full Bench in *Dayamoyi* v. *Ananda Mohan Roy* (4). As between the plaintiffs and their transferors, no question of transferability could be raised, because the transferors were bound by the doctrine of estoppel not to question the title of their transferees. As between the transferors of the plaintiffs and the defendants, there was no estoppel, because the defendants were purchasers at an execution sale. It was, accordingly, open to the Mandars to impeach the title of the defendants after the sale or to take objection before the sale if they had timely intimation of the execution proceedings. But that stage has been passed and the Mandars have not objected to the validity of the execution sale. Consequently, as between the Mandars and the defendants, it must be held that the defendants are the purchasers

(2) 34 C. 999; 6 C. L. J. 410; 11 C. W. N. 889.

(3) (1837) 6 A. & E. 469; 2 N. & P. 488; 45 R. R. 538; 112 E. R. 179.

(4) 27 Ind. Cas. 61; 20 C. L. J. 52; 18 C. W. N. 971.

of the right, title and interest of their judgment-debtors, and are bound by the same estoppel as binds their judgment-debtors. Upon this question, there has been some fluctuation of judicial opinion, but, as was explained in the case of *Debendra Nath Sen* v. *Mirza Abdul Samed* (5), upon a review of the authorities, it is now well-settled that a purchaser at an execution sale is bound by the same rule of estoppel as the judgment-debtor, on the principle that the former has purchased merely the right, title and interest of the latter and does not consequently occupy a position of greater advantage. This view is supported by the decision of the Judicial Committee in *Mahomed Mozuffer Hossein* v. *Kishori Mohun Roy* 6) The inference follows that the defendants, viewed in their character as purchasers of the right, title and interest of the Mandars, are not entitled to raise the question of transferability of the disputed holding. The third ground accordingly fails

In support of the *fourth* ground, it has been urged that the defendants, in their character of co-sharers in the superior interest to the extent of a three-fourths share, are entitled to raise the question of transferability of the holding. This contention is clearly well-founded on principle and is supported by the decision in *Dilbar Sardar* v. *Hosein Ali Bepari* (7). In the event of sale of a non-transferable occupancy holding, the purchaser can be evicted by any of the co-sharer landlords to the extent of his own share, and if possession of the entire holding has been acquired by some of the co-sharers, the other co-sharers are entitled to joint possession thereof. Consequently the question of transferability was material for the purposes of the decision of the case, and the fourth ground taken by the appellants must prevail.

It has been argued, however, on behalf of the plaintiffs-respondents, that even if the holding is not proved to be transferable by custom or local usage, the defendants are estopped by their conduct, and that as they have taken the purchase-money in satisfaction of their mortgage dues, they cannot question the title of the plaintiffs under their conveyance. Upon the materials on the record it is not possible for us to give effect to this contention. No doubt, after the purchase by the plaintiffs had been completed, the defendants took the money deposited in Court; but, this by itself does not estop them. Yet, it may be possible for the plaintiffs to establish by evidence that the conduct of the defendants, before the sale was completed and during the stage of negotiation, was such as to estop them. This must be determined by the Court below along with the question of transferability of the holding.

The result is that this appeal is allowed in part. The decree of the Subordinate Judge will stand confirmed in respect of an one-fourth share, but will be set aside in respect of the remaining three-fourths share. To this extent, the case will be remanded in order that the title of the plaintiffs may be investigated on the basis of their purchase. The question of transferability raised by the defendants as well as the question of estoppel raised by the plaintiffs will be open for investigation, and both parties will be at liberty to adduce evidence. The plaintiffs-respondents are entitled to one-fourth of the costs of this appeal, and three-fourths of the costs will abide the result.

Appeal partly allowed; Case remanded.

(5) 1 Ind. Cas. 264; 10 C. L. J. 150.
(6) 22 C. 909; 22 I. A. 129.
(7) 26 C. 553.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 195 OF 1913.

March 5, 1913.

Present:—Mr. McColl, A. J. C.

MAHOMED AMIN—APPELLANT

versus

C. T. P. A. M. NACHIAPPA CHETTY—RESPONDENT.

Upper Burma Land and Revenue Regulation, s. 53 (2) (ii), whether ultra vires—*Suit regarding State lands between private individuals—Jurisdiction of Civil Courts*

Section 53 (2) (*ii*) of the Upper Burma Land and Revenue Regulation is *ultra vires* of the Legislature, even in respect of suits regarding State lands between private individuals. [p. 737, col. 2.]

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' Consequently a suit for a decree declaring that a house situate on Government land is not liable to be sold in execution is cognizable by a Civil Court. [p. 740, col. 1.]

Mr. *A. C. Mukerjee*, for the Appellant.

Mr. *R. G. Aiyangar*, for the Respondent.

JUDGMENT.—The plaintiff-appellant sued for a decree declaring that a house was not liable to be sold in execution of a mortgage-decree obtained by the defendant-respondent against one Maung Khan. The house is admittedly situated on State land of which Government granted a 30 years' lease to one Ma Mya in 1903. The lease was subsequently transferred to Maung Po Sin and then to Maung Khan by Revenue Officers.

The defendant respondent contended, that he had acquired a mortgage lien on the house and ground before they were transferred to the plaintiff appellant.

The Court below did not consider the question of jurisdiction at all but agreed in dismissing the suit on the merits.

The plaintiff-appellants have appealed and the preliminary question of jurisdiction has been argued at length.

Section 53 (2) (*ii*), Upper Burma Land and Revenue Regulation, declares that a Civil Court shall not exercise jurisdiction over any claim to the ownership or possession of any State land or to establish any lien upon or in other interests in such land. Now the present claim is not a claim to the house as so much building, material but to the house as it stands and it includes the land on which it is situated and that is admittedly State land. The plaintiff-appellant claims to be the owner of the house and to be entitled to the possession of the house and of the ground on which it stands and he denies the lien set up by the defendant-respondent. Section 53 (2) (*ii*), Upper Burma Land and Revenue Regulation, therefore, clearly debars Civil Courts from entertaining the claim, but it is contended that this clause is *ultra vires* of the Legislature and, therefore, invalid.

The point is one of very great importance. The validity of the clause in question has, I believe, never been questioned before and for a great many years Civil Courts have refused to exercise jurisdiction in such suits and they have been disposed of by Revenue Officers. The first reported case is *Maung Aung Byi* v. *Maung Yan Byo* (1). That was apparently a case in which a State tenant sued a sub-tenant for rent of State land. The Civil Courts apparently refused to exercise jurisdiction, but it was held by the late Mr. Burgess that as the defendant had attorned to the plaintiff, he could not deny his title and the question of jurisdiction should not have been raised as the defendant was not concerned with any question of title between the plaintiff and the State. It is to be noted, however, that section 53 (2) (*ii*), Upper Burma Land and Revenue Regulation, debars Civil Courts from trying suits for rent of State land.

The next published case is *Maung Tha Aung* v. *Maung San Ke* (2). That was a suit for the redemption of a usufructuary mortgage of State land and Mr. Burgess held that the jurisdiction of the Civil Court was barred.

Next, in the unpublished case *Maung Myat Le* v. *Ma Po Kin* (3) Mr. Burgess considered whether in a case concerning State land between two private persons it would be feasible for the Civil Court to decide questions of fact and the rights of the parties *inter se* and leave it to the Revenue Courts to accept and act upon such findings if they thought fit, and it was decided that this plan would not work and accordingly in *Maung Nut* v. *Ma Mi* (4) Mr. Burgess held that although the parties were private individuals, all such claims were cognisable by the Revenue Courts only.

Then another difficulty arose.

Section 53, Upper Burma Land and Revenue Regulation, debars a Civil Court from trying any question as to the limits of any State land and, therefore, from deciding whether any particular piece of land is State land or not. Consequently when in a civil suit the plea was raised that the land claimed was State land the question was, what the Civil Court was to do. It was accordingly held in *Maung Ke* v. *Maung Po Ni* (5) that it was for the Civil Court to decide whether it had jurisdiction or not and that it must, therefore, decide the question whether the land in suit was State or not, but that its decision must be based on the view taken by the Revenue Authorities.

(1) U. B. R. (1892-96) II, 634.

(2) U. B. R. (1897-1901) II, p. 207.
(3) Civil Appeal No. 192 of 1897.
(4) U. B. R. (1897-1901) II, p. 209.
(5) U. B. R. (1897-1901) II, p. 211.

The heading of this ruling, I think, is unfortunate. What was really laid down was that the Civil Courts had to try not the question whether the land was State land or not, but whether the Revenue Authorities had up till then regarded it as State land.

Since then this has been the rule followed, but in practice it entails many disadvantages apart altogether from fundamental rights.

In *J. Moment* v. *Secretary of State* (6), it was held by the majority of a Full Bench of the Lower Burma Chief Court that section 41 (*b*) of the Lower Burma Town and Village Lands Act, which is a similar provision to section 53 (2) (*ii*) of the Upper Burma Land and Revenue Regulation, was *ultra vires* of the Legislature because it contravened the provisions of section 65, Government of India Act, 1858. This was the Statute by which the Crown took over the Government of India from the East India Company and section 65 provides amongst other things that all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council as they could have done against the said Company. The Legislative Council of the Governor-General derive their legislative powers from section 22, Indian Councils Act of 1861, which contains a proviso that the Governor-General in Council shall not have the power of making any laws or regulations which shall affect any provisions of the Government of India Act of 1858.

The Chief Court held that section 51 (*b*), Lower Burma Town and Village Lands Act did affect a provision of section 65 of the Government of India Act, 1858, inasmuch as it purported to take away the right which was possessed by every one prior to 1858 of bringing suits for land against the East India Company in the ordinay Courts.

The judgment of the Chief Court was upheld by the Privy Council in *Secretary of State* v. *J. Moment* (7).

The Upper Burma Land and Revenue Regulation is a regulation made for Burma by the Governor-General in Council under the provisions of section 1 of the Government of India Act, 1870, which does not give power to override any provisions of section 65, Government of India Act, 1858. Consequently so far as section 53, Upper Burma Land and Revenue Regulation, withdraws suits brought by or against the Secretary of State regarding State land from the jurisdiction of the ordinary Courts, the section is in accordance with the Privy Council's ruling clearly *ultra vires*, and if this case were on all fours with the Lower Burma case, I should merely have to follow that ruling and it would be unnecessary to say anything further.

But that was a suit brought by a private person against the Secretary of State. The present suit is one between private individuals. It is, therefore, urged the two cases are quite different, that though the Government of India had no power to enact that certain suits against the Secretary of State for India should be withdrawn from the jurisdiction of the ordinary Courts, it had and has the power to enact that a particular class of suits between private individuals should not be cognisable by the ordinary Civil Court but should be tried by Revenue Courts. It is urged that all that section 53 (2) (*ii*), Upper Burma Land and Revenue Regulation, did was *to change the forum.*

I would point out that if Civil Courts had power to decide claims to land as against Government but not claims arising out of State land between private individuals, the position would be rather anomalous and just the opposite to the one originally laid down by the late Mr. Burgess. A difficulty would arise if a private individual wished to sue both the Secretary of State in Council and a private individual in respect of the same land: he would apparently have to sue each separately in a different forum and the result might well be confusion.

Moreover, as I read section 53, Upper Burma Land and Revenue Regulation, the reason for debarring the Civil Court from determining a question to the possession of State land even between two individuals is that such a decision might affect the rights of Government, but as it has now been laid down that the ordinary Civil Courts are to have the power of determining those rights, there can no longer exist any reason for withdrawing suits between private persons from the jurisdiction of the ordinary Courts.

But whether the reason for barring the jurisdiction of the Civil Courts has ceased to

(6) 8 Ind. Cas. 1129; 5 L. B. R. 163.

(7) 18 Ind. Cas. 22; 11 A. L. J. 49; 13 M. L. T. 53; 17 C. W. N. 169; (19 3) M. W. N. 45; 15 Bom. L. R. 27; 17 C. L. J. 194; 6 Bur. L. T. 1; 24 M. L. J. 459; 40 C. 391; 40 I. A. 48; 7 L. B. R. 10.

exist or not and however anomalous the position may be, unless the portion of section 53 (2) (*ii*) which applies to the present case can be shown to be *ultra vires* of the Legislature, effect must be given to it.

Now the concluding part of section 22, Indian Councils Act, 1861, lays down that the Governor-General in Council shall not have power to make any law or regulation which shall, in any way, affect any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom.

I take it that what this means is, no laws shall be made contravening the fundamental principles on which British civilization is based *e. g.*, freedom of the person, freedom of religion, equality before the law, etc.

Now section 53, Upper Burma Land and Revenue Regulation, seems to be clearly an attempt to introduce in a mild way into Burma what is known in France as the "*droit administratif.*"

Dicey says that this scheme is based on the privilege of the State and of its officers and on its supposed necessity for a separation of powers:—"The second of these characteristics is that the ordinary judicial tribunals which determine ordinary questions, whether they be civil or criminal, between man and man, must, speaking generally, have no concern whatever with matters at issue between a private person and the State, *i. e.*, with questions of administrative law, but that such questions, in so far as they form at all matter of litigation (*contentieux administratif*), must be determined by Administrative Courts in some way connected with the Government or the administration." (Dicey's Law of Constitution, 7th Edition, page 335). "The Judicial Courts had, speaking generally, no concern with administrative law, or, in other words, with cases in which the interest of the State or its servants was at issue" (page 336). "They (*i. e.*, ordinary Judges) are even now, as a rule, without jurisdiction in matters which concern the State. They have no right to determine, for instance, the meaning and legal effect in case it be seriously disputed, of official documents" (page 338).

This is one of the points taken by the learned Advocate for the respondent, *viz.*, that it is obviously inequitable that the terms of a lease granted by Government should be determined by the Government and not by the Civil Court.

Now it appears that the "*droit administratif*," though it exists in many countries, is fundamentally opposed to English ideas. To quote Dicey again: "That 'rule of law', then, which forms a fundamental principle of the (English) constitution has three meanings, or may be regarded from three different points of view. . . . . It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals; there can be with us nothing really corresponding to the 'administrative Law' (*droit administratif*) or the 'administrative tribunals" (*tribunaux administratifs*) of France. The notion which lies at the bottom of the 'administrative law' known to foreign countries is, that affairs or disputes in which the Government or its servants are concerned are beyond the sphere of the Civil Courts and must be dealt with by special and more or less official bodies. This idea is utterly unknown to the Law of England, and indeed is fundamentally inconsistent with our traditions and customs" (page 198.)

I think it is clear that section 53 (2) (*ii*), Upper Burma Land and Revenue Regulation, does affect one of the unwritten laws referred to in section 22, Indian Councils Act, and is, therefore, *ultra vires*. It may well be that in a backward country, the advantages of the "*droit administratif*" may far outweigh its disadvantages and that it may, therefore, be worth while to introduce such a scheme and the introduction could hardly be taken as a hardship to persons who lived under the old Burmese regime, and in the course of time as the people became more enlightened the operation of the scheme might be gradually restricted as is happening at present in France, but I think it is clear that such a scheme could be introduced by the British Parliament alone.

I accordingly hold that section 53 (2) (*ii*), Upper Burma Land and Revenue Regulation,

is *ultra vires* of the Legislature and that the present suit was cognizable by the Civil Courts and I direct that the appeal be now heard on the merits.

Ordered accordingly.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 58 OF 1914.

November 9, 1914.

Present:—Sir Henry Drake-Brockman, KT., J. C.

MANYA—DEFENDANT—APPELLANT

versus

DIWAKAR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 102, 115—Second appeal, maintainability of—Orders passed in execution of decree—Revision, erroneous view of law if ground for.

Section 102, Civil Procedure Code, applies no less to orders passed in execution than to a decree itself.

An erroneous view of the law would not justify interference under section 115 of the Civil Procedure Code.

Second appeal against an order of the District Judge, Nagpur, dated the 7th November 1913, reversing that of the Munsif, Ramtek, dated the 15th August 1913.

Mr. *V. G. Joshi*, for the Appellant.

Mr. *B. G. Pandit*, for the Respondent.

JUDGMENT.—This is a second appeal from an order passed in execution of a decree. The appellant is the judgment-debtor and he sought in the Court of first instance to obtain release from attachment of a house, which the decree-holder desired to have sold in execution of the decree. The suit in which the decree was passed was brought to recover Rs. 57 on a simple money-bond executed by the present appellant's father, and he was made liable to the extent of his father's estate. The first Court released the house, but in appeal the District Judge restored the attachment and ordered sale of the property. It is clear on the authorities that no second appeal lies, section 102, Civil Procedure Code, applying no less to orders passed in execution than to the decree itself: see *Lala Kandha Pershad* v. *Lala Lal Behary Lal* (1); *Din Dayal* v.

(1) 25 C. 872.

Patrakhan (2); *Narayan* v. *Nagindas* (3) and *Mavula Ammal* v. *Mavula Maracoir* (4).

I am asked to treat the memorandum of appeal as an application for revision. The District Judge's decision is based on two findings, one that the appellant inherited the house from his grandfather and the other that property so inherited is by the Hindu Law liable as ancestral assets for his father's debts. It is said that this view of the law is erroneous. Such an error, however, would not justify interference under section 115, Civil Procedure Code.

The appeal is dismissed with costs. In the lower Court costs will be paid as already ordered.

Appeal dismissed.

(2) 18 A. 481; A. W. N. (1896) 160.
(3) 30 B. 113; 7 Bom. L. R. 641.
(4) 30 M. 212; 17 M. L. J. 376.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 122 OF 1914.

April 16, 1915.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

R. M. A. SUBRAMANYA PILLAI—PETITIONER—APPELLANT

versus

AMMAYEE AMMAL *alias* PIRAMU AMMAL AND ANOTHER—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), s. 19—Minor, appointment of guardian for—Father available—Other person, when appointed guardian.

Where a father is available as guardian no other guardian can be appointed unless he is in the Courts' opinion unfit for appointment.

Appeal against the order of the District Court of Tinnevelly, dated the 2nd January 1913, in O. P. No. 534 of 1913.

Mr. *T. R. Venkatarama Sastri*, for the Appellant.

Mr. *C. V. Ananthakrishna Aiyar*, for the Respondents.

JUDGMENT.—The learned District Judge has dealt with the petition only with regard to the welfare of the minor, although under section 19, Guardians and Wards Act, when the minor's father is living no other

guardian can be appointed unless he is in the Courts' opinion unfit for appointment. Vide *Audiappa Pillai* v. *Nallendran Pillai* (1). We must set aside the decision and ask the District Judge to re-admit the petition and dispose of it again in the light of the foregoing after considering and recording a finding as to the fitness of the petitioner, the minor's father for the guardianship. Costs to date will be costs in the case.

Decision set aside.

(1) 29 Ind. Cas. 4; 26 M. L. J. 442; (1915) M. W. N. 30; 17 M. L. T. 389.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 330 OF 1914.

February 18, 1915.

Present:—Mr. McColl, A. J. C.

MI KIN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MI SAN ME AND OTHERS—RESPONDENTS.

Buddhist Law—Inheritance—Nearer relatives exclude more remote—Great-grand-daughter, whether can oust her grand-aunts.

In Buddhist Law the nearer relatives exclude the more remote even in the case of inheritance by direct descendants. [p. 741, col. 2.]

An out-of-time grand-daughter of a predeceased son cannot inherit at all in competition with a daughter. [p. 741, col. 2; p. 742, col. 1.]

A widow has no claim to inherit when her husband dies without acquiring any vested rights in the property. [p. 741, col. 2.]

A great-granddaughter is not entitled to inherit in the presence of her grand-aunts. [p. 742, col. 1.]

Mr. *C. G. S. Pillay*, for the Appellants.

Mr. *Dutt*, for the Respondents.

JUDGMENT.—The second plaintiff-appellant, Ma Saw Heik, is the posthumous daughter of Maung Shwe Tha, who is the only son of Maung Lu Gaung, the only son of Ma San U. Maung Lu Gaung died first, then Maung Shwe Tha died and lastly Ma San U died in 1273.

Ma Saw Heik is thus Ma San U's great-grand-daughter. She and her mother Ma Kin, widow of Maung Shwe Tha, brought a suit for a 1/6th share of the state left by Ma San U. The defendants were Ma San Me and Ma San Di, daughters of Ma San U and Ma Pwa Zon, sister of Maung Shwe Tha.

The plaintiff-appellant Ma Kin obviously has no claim, as her husband Maung Shwe Tha had not acquired any vested right when he died.

The Courts below have also agreed on the authority of *Maung Nyo* v. *Ma Hla Kyu* (1) that the second plaintiff-appellant has no claim to inherit either, and the only question now to be decided is whether this decision is correct. It is urged that if Maung Shwe Tha had been alive he would have been entitled as the eldest son of the eldest son to the same share as Ma San Me and Ma San Di, and that there is no reason why Ma Saw Heik should not get her share or at any rate a portion of it in accordance with the texts in section 86 of U Gaung's Digest. These texts are substantially the same and it will be sufficient to cite one. The text from the Vannadhamma runs: "There are four classes of heirs, namely children, grandchildren, great-grandchildren and great-grandson's children. When partition of inheritance is made amongst them, those standing in close relationship to the ancestor shall get two shares and those distantly related one share. There shall be equal partition among those standing in the same degree of relationship."

The case of an out-of-time grandchild getting ¼th of what his father would have got and the case of the eldest son of an *awratha* son are exceptions to this rule.

The rule, moreover, does not seem to me to help Ma Saw Heik. As explained in *Ma Hmaw* v. *Ma On Bwin* (2) there is a principle in Buddhist Law that the nearer relatives exclude the more remote even in the case of inheritance by direct descendants. The rule now cited is an exception to this general rule, but I do not think the exception should be extended further than the language of the texts actually justifies.

If the only person competing with Ma Saw Heik had been Ma Pwa Zon, then these texts might be good authority for giving Ma Saw Heik half as much as Ma Pwa Zon got, but I do not think the texts are an authority for holding that an out-of-time granddaughter of a predecessed son can inherit at all in

(1) 2 L. C. 226.
(2) 2 L. C. 124.

competition with a daughter. If an out-of-time granddaughter gets only ¼th of what her aunts get, it would be absurd to suppose that her daughter or rather the daughter of an out-of-time grandson would be given a half. In the present case I think Ma Saw Heik must be held to be excluded by Ma San Me and Ma San Di. This is apparently the view taken by Mr. Burgess in *Ma Gun Bon* v. *Maung Po Kywe* (3) as well as in the ruling relied upon by the Courts below.

Section 33 of the 10th Book of the Manukye has also been cited, but that merely lays down that the non-partition of an estate for three generations shall not be a bar to a claim to inheritance but beyond that it shall be.

The texts collected in section 88 of the Digest appear to cover the present case. The one from the Manutye is as follows: "The rule of partition of the greatgrandfather's estate between his great-grandchildren on the one part and their grand-uncle on the other follows the ordinary rules of partition *according as their grand-parents predeceased or survived the owner of the estate.* Under this rule and under similar conditions even great-grandchildren's children are entitled to share with their great-grand-uncle the estate of the latter's father."

The text from the Manu runs: "In the case of partition of the great-grandfather's estate between great-grandchildren and their grand-uncle, the heirs should see whether the great-grandchildren are entitled to inherit or not and then make the partition."

This clearly indicates that in some circumstances the great-grandchildren are not entitled to inherit at all, and I take that to be when their grandfather died before obtaining a vested interest.

The text from the Cittara perhaps makes the matter clearer still: "The rule of partition of the great-grandfather's estate between great-grandchildren on one part, and their grand-uncle on the other, is that the two parties should share the estate equally if the former's grand-parents survived the owner of the estate."

In the present case Mg. Lu Gaung predeceased Ma San U and, therefore, Ma Saw Heik in competition with her grand-aunts can get nothing.

The appeal is dismissed with costs.

Appeal dismiss d

(3) U. B. R. (1897-1901), II, p. 66 at p. 75.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2958 OF 1913.

May 24, 1915.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice N. Chatterjea.

MOHESH CHANDRA MUKHERJEE AND OTHERS—DEFENDNATS NOS. 1 TO 6—APPELLANTS

versus

UMESH CHANDRA GHOSAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Possession, suit for—Party interested in the equity of redemption not made party in suit on mortgage, right of—Decree to be conditinal on payment of mortgage-money

Where, in a suit for recovery of possession by the plaintiffs, it appeared that they, being interested in the equity of redemption in the property, were omitted from the previous suit whereby the defendants enforced their mortgage:

Held, that the defendants were not entitled to so omit the plaintiffs but that the plaintiffs could not get a decree for possession without any provision as to payment of what may be due under the mortgage to the defendants. [p 742, col. 2.]

Appeal against a decree of the Officiating District Judge of Birbhum, dated the 27th of June 1913, confirming that of the Munsif, Rampurhat, dated the 19th of July 1912.

Babus *Ram Chandra Mozumdar* and *Chandra Sekhar Banerjee*, for the Appellants.

Dr. *Dwarka Nath Mitter* and Babus *Jitendra Lal Banerjee* and *Bhudar Haldar*, for the Respondents.

JUDGMENT.—This is a suit for recovery of possession by the plaintiffs, who allege with truth that being interested in the equity of redemption in the property they were omitted from the suit whereby the appellants-defendants Nos. 1 to 6 enforced their mortgage. Defendants Nos. 1 to 6 have given us an explanation how they came to omit the plaintiffs. Indeed they go so far as to contend that they were entitled to omit them. We are unable to accept that argument. But, on the other hand, we think that the decree which grants the plaintiffs possession without any provision as to payment of what may be due under the mortgage to the defendants Nos. 1 to 6 cannot be supported. We, therefore, set aside the decree of the lower Appellate Court and send back the case to the Court of first instance in order that it may be there determined what, having regard to all the circumstances in the case, is a proper sum to be paid by the plaintiffs for the pur-

pose of redeeming their share in the property in suit.

We think that the costs of the two appeals, that is, in the lower Appellate Court and in this Court must be borne by the plaintiffs, but the costs of the suit already incurred and the costs yet to be incurred are left to the discretion of the Judge by whom the case will be heard.

Decree set aside ; Case remanded.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 555 OF 1914.

May 14, 1915.

Present:—Mr. Justice Fletcher and Mr. Justice Richardson.

Srimati SABITRI THAKURAIN—OBJECTOR—DEFENDANT—APPELLANT

versus

F. A. SAIN, EXECUTOR TO THE ESTATE OF LATE WOOGRA MOHAN THAKUR—PETITIONER—PLAINTIFF—RESPONDENT.

Succession Act (X of 1865), s. 50—Will—Valid execution, what is.

Where the respondent applied for Probate of a Will and it appeared that the Will was wholly in the handwriting of the deceased and bore his signatures on the various pages thereof, and alongside his signature on the top left-hand corner of the 1st page were the signatures of four witnesses and on each of the other three pages the signatures of two out of those four persons:

Held, (1) that the signature of the testator on the first page was the operative signature by which he intended to make the document an effective one; [p. 744, col. 2.]

(2) that the witnesses put their signatures *animo attestandi* and the Will was properly executed by the deceased in the manner required by the Indian Succession Act. [p. 745, col. 1.]

Appeal against the decree of the District Judge, Bhagalpur, dated the 13th of November 1914.

Mr. *Pugh*, Babus *Buldeo Narain Singh* and *Baidyanath Narain Singh*, for the Appellant.

Mr. *N. Sarkar*, Babus *Sailendra Nath Palit* and *Chandra Sekhar Prasad Singh*, for the Respondent.

JUDGMENT.

FLETCHER, J.—This is an appeal by the appellant against a judgment of the learned District Judge of Bhagalpur dated the 13th November 1914. The respondent in the present appeal presented for Probate to the learned Judge a document which, he alleged, was the last Will of one Woogra Mohan Thakur, the alleged Will bearing date the 10th May 1913. The deceased died on the 29th January 1914 childless, leaving the present appellant him surviving who is his widow. The respondent to the present appeal is one of the executors named in the Will, the other executor having renounced Probate thereof. The alleged Will had been deposited by the deceased with the Sub-Registrar of Assurances. It is not denied that the Will which is a holograph Will is, in fact, wholly in the handwriting of the deceased and it bears many of his signatures on the various pages thereof. The only question raised in this appeal is, whether the Will has been executed in the manner provided by section 50 of the Indian Succession Act, which section has been incorporated into the Hindu Wills Act. We have been given by Mr. Pugh, who appears for the appellant, many cases which turn on the Statute of the English Wills Act, 1837; but the requisites for a valid Will under the English Wills Act differ substantially from the provisions of section 50 of the Indian Succession Act. In express terms, section 9 of the English Wills Act requires that both the witnesses should be present at the same time and that they should both see the deceased execute the document as his Will. Section 50 of the Indian Succession Act, on the other hand, makes different provisions. It is provided by section 50 of the Indian Succession Act, *first* of all, that the testator shall sign or affix his mark to the Will or that the Will shall be signed by some other person in the presence of the testator and by his direction. The *second* requisite is that the signature or mark of the testator or the signature of the person signing for him shall be so placed that it shall appear that it was thereby intended to give effect to the writing as a Will; and *thirdly*, it is provided that the attestation should be made either on the testator signing the document in the presence of the two witnesses or acknowledging his signature; but it is expressly provided on the

terms of the Act that it is not necessary that both the witnesses should be present at the same time. Substantially the third clause relating to attestation takes the law back to what it was the law as to attestation of Wills under the Statute of Frauds. It is not necessary for the witnesses to be present at one and the same time. Then what is the custom in India relating to Wills executed, at any rate, outside the Presidency towns by Indian testators? There cannot be the slightest doubt that, at any rate, in the Wills in the vernacular, the ordinary place for execution is the top of the document. The English system of executing the document at the foot does not obtain usually amongst Indians. Their custom is to execute the document at the top. Ordinarily the signature of the executant of a document appears at the top right-hand corner, and when he executes the document himself, and not by an attorney, is accustomed to write "by my own pen." That is the ordinary practice. Now, what do we find in the present case? The deceased Woogra Mohan Thakur was a man of wealth and he was also, to a certain extent, a man of education. He spent some years in England and he was acquainted with the English language. That is manifest from the fact that this holograph Will shows that the deceased knew English fairly well. He made former Wills and this Will that he deposited on the 10th May 1913 with the Sub-Registrar of Assurances is clearly written throughout by the testator, Woogra Mohan Thakur. The document itself is engrossed on foolscap papers in the manner in which an English document would be engrossed. The document consists of four pages, on each of which the signature of the deceased appears. At the top left-hand corner of the first page the signature is "W. M. Thakur. By my own pen." On the second page, it is signed "W. M. Thakur." On the third page also it is signed "W. M. Thakur." On the fourth and the last page at the end there appears the signature "Woogra Mohan Thakur, dated the 10th of May 1913 in the year one thousand nine hundred and thirteen only." Against the signature or alongside the signature of the testator on the margin of the first page, four persons are said to have attested the Will and on each of the other three pages there appear the signatures of two of the four persons whose names appear on the first page as the attesting witnesses. The only question is first of all, "which is the operative signature of the deceased"? I feel no doubt that the operative signature is on the first page, "W. M. Thakur. By my own pen." It seems to me clear that the signature of the testator placed there is the signature by which he intended to make the document an effective one. Then the next point is, "Has it been shown that these signatures on the margin of the first page of the persons who are alleged to be the witnesses were subscribed by at least two of these persons *animo attestandi*, namely, attesting the Will of the deceased"? One of the signatures that appears on each of the four sheets is the signature of the wife of the deceased. She says that these signatures were obtained from her on the ground that they related to some totally different transaction and that the deceased then wrote his Will on the blank sheets of paper on which she had affixed her signatures. There is no evidence to show that that story is true. But it is highly probable that the deceased wished to get the signature of his wife somehow or other to this Will, on the ground that the provisions made therein for the wife were extremely small having regard to the value of the estate. But there is other evidence on which, in my opinion, it cannot be doubted that this Will was properly executed by the deceased in the manner required by section 50 of the Indian Succession Act. The first witness on behalf of the plaintiff, the petitioner for Probate, is Balbhadra Thakur. He is a clerk. His evidence is that he having read the Will did, at the request of the deceased, affix his signature to all the pages as a witness. It seems to me obvious that he duly attested the Will. The next witness is Surja Prosad. He is the Government Pleader of Bhagalpur. He is a man of position and his statement is that, on the morning of the 10th May 1913 before going to the Registration Office, the deceased brought the Will to him, that he read it and suggested that the deceased ought to make more a liberal provision for his wife but that the deceased refusing to do so, he subscribed his name to the Will as an attesting witness. The last witness is Harendra

Krishna Bagchi. He is also a Pleader. He was consulted by the deceased with reference to the Will before its execution. He says that he suggested alterations, by way of making a further provision for the wife, but that the deceased declined to listen to those suggestions. The Will was brought to him also on the morning of the 10th of May 1913 and the testator having acknowledged his signature, Harendra Krishna attested the Will as an attesting witness. It seems to me that that amply satisfies the provisions of section 50 of the Indian Succession Act. The view put forward by the learned Counsel who appears for the appellant that some other course is required than what has been adopted in this case seems to me to be open to doubt on the wording of section 50. One has not got to comply with the provisions of the third part of section 50 down to the semicolon and then having done that start afresh from the semicolon. That has been decided in the case of *Mukta Nath Roy Chowdhuri* v. *Jitendra Nath Roy Chowdhuri* (1). On the wording of the section it seems to be amply clear that that is not what is required, I think, whatever be the view we may take as to how the signature of the wife was obtained, there cannot be any doubt on the clear evidence—evidence that cannot be doubted—that the deceased did acknowledge this document as his last Will in the presence of those persons whose names appear in the margin of the first page of the document purporting to be his Will, and that they then at his request subscribed their names as witnesses to the fact of the Will. That is amply sufficient to satisfiy the terms of the section 50. The fact that the deceased took the document and deposited it himself with the Sub-Registrar of Assurances, having endorsed on the cover that it contained his Will bearing date the 10th May 1913, also seems to me to show that the deceased had taken considerable care that his Will was in due order. I think the learned Judge on the evidence in this case came to the only conclusion that was possible, namely, that the deceased did, in fact, execute this Will in manner required by section 50 of the Indian Succession Act. That is the only issue involved in the case. That being so, I am of opinion that we should dismiss the present appeal and direct the appellant to pay to the respondent his costs of this Court. We assess the hearing fee at one thousand rupees.

RICHARDSON, J.—I agree.

Appeal dismissed.

(1) 27 Ind. Cas. 677.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 47 OF 1915.
CIVIL MISCELLANEOUS PETITION No. 237 OF 1915.
March 26, 1915.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

HANSRAJ SOWCAR—DEFENDANT No. 5—PETITIONER

versus

S. M. *Sheik* MOHIDEEN ROWTHER AND OTHERS—PLAINTIFF AND DEFENDANTS Nos. 1 TO 4—RESPONDENTS.

Execution—Decree comprising property outside jurisdiction—Right to sell such property—Undervaluation, whether material irregularity—Civil Procedure Code (Act V of 1908), s. 115.

The fact that all the property is not situated within the jurisdiction of the Court which passed the decree, does not affect its jurisdiction to sell the property comprised in the decree. [p. 746, col. 1.]

Tincouri Debya v. *Shib Chandra Pal Chowdhury*, 21 C. 639, followed.

An undervaluation of property in the proclamation of sale is not a material irregularity within the meaning of section 115 of the Civil Procedure Code. [p. 746, col. 1.]

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Subordinate Judge of Tinnevelly, in Revision Execution Petition No. 105 of 1914, in Original Suit No. 42 of 1913 and Petition praying that, in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue an order directing stay of sale of immoveable properties in execution of the decree in Original Suit No. 42 of 1913, on the file of the Court of the Subordinate Judge of Tinnevelly, pending disposal of the above Civil Revision Petition No. 47 of 1915.

Mr. *B. Sitarama Rao*, for Mr. *T. V. Gopalasami Mudaliar*, for the Petitioner.

ABHURAM SIL *v.* HARA CHAND DAS.

Messrs. *M. D. Devadoss* and *Lukes*, for the Respondents.

JUDGMENT.—The fact that all the property is not situated within the jurisdiction of the Court which passed the decree does not affect its jurisdiction to sell the property comprised in the decree. *Tincouri Debya* v. *Shib Chandra Pal Chowdhury* (1). The alleged undervaluation of the property in the proclamation for sale is not a material irregularity within the meaning of section 115 of the Code of Civil Procedure.

The civil revision petition is dismissed with the costs of the 1st respondent. The petition for stay of sale also is dismissed with costs.

Petitions dismissed.

(1) 21 C. 639.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 902 OF 1915.

March 3, 1913.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Richardson.

ABHURAM SIL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HARA CHAND DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Suit for redemption—Mortgagee, whether can question mortgagor's title—Equity of redemption, vesting of—Attornment of mortgagee to superior landlord, effect of.

A mortgagee cannot be permitted to resist a claim for redemption on the ground that the mortgagor had no title to the property included in the mortgage. [p. 746, col. 2.]

Tasker v. *Small*, 3 Myl. & Cr. 63 at p. 70: 45 R. R. 212; 5 L. J. Ch. (N.S.) 321; 6 Sim. 625; 40 E. R. 848; *Wroe* v. *Clayton*, 9 L. J. Ch. 107: *Roberts* v. *Clayton*, 3 Anst. 715; 145 E. R. 1016; *Mahomed Abdool Ruzzak* v. *Sadik Ali*, 3 Agra H. C. R. 142, referred to.

But the mortgagee may establish that the title of the mortgagor has expired since the creation of the mortgage; in other words, that the equity of redemption is no longer vested in him so as to entitle him to redeem the mortgage. [p. 747, col. 1.]

Nakchedi Bhagat v. *Nakchedi Misr*, 18 A. 329; A. W. N. (1896) 90; *Ammu* v. *Ramakishna*, 2 M. 226, referred to.

As between a mortgagor and a mortgagee the attornment by the latter to the superior landlord cannot in any way prejudice the rights of the former. [p. 747, col. 2.]

Appeal against the decree of the Officiating Subordinate Judge, second Court, Mymensingh, dated 28th November 1912, affirming that of the Munsif, Iswargunj, dated 12th September 1911.

Babu *Birendra Kumar Dey*, for the Appellants.

Babu *Kali Kinkar Chakravarti*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for redemption of a mortgage by way of conditional sale. The mortgage was granted on the 14th October 1889 by the predecessor-in-interest of the plaintiffs to a lady named Anandamoyee, now represented by the defendants. The mortgagee entered into possession under the terms of the contract, which entitles her to apply the profits partly in payment of the dues of the superior landlord and partly in satisfaction of the interest on the mortgage. The mortgage-deed further provided that the mortgagor would be entitled to redeem the security on payment of the principal sum of Rs. 65 at any time. The present suit was commenced on the 25th June 1910. The defendants have successfully resisted the claim of the plaintiffs, on the ground that the mortgagor had no right in the property mortgaged by her. In our opinion, it was not competent to the defendants to urge that the mortgagor had no title to the property given by way of security, and the view taken by the Courts below is erroneous.

There is no room for controversy that a mortgagee cannot be permitted to resist a claim for redemption on the ground that the mortgagor had no title to the property included in the mortgage. Cottenham, L. C., enunciated this principle in *Tasker* v. *Small* (1) in these terms: "A mortgagee can never refuse to restore to his mortgagor, or those who claim under him, upon repayment of what is due upon the mortgage, the estate which became vested in him as mortgagee. To him it is immaterial, upon repayment of the money, whether the mortgagor's title was good or bad. He is not at liberty to dispute it, any more than a tenant is at liberty to dispute his landlord's title". The Lord Chancellor reiterated the same principle in *Wroe* v. *Clayton* (2) affirm-

(1) 3 Myl. & Cr. 63 at p. 70; 45 R. R. 212; 5 L. J. Ch. (N. S.) 321; 6 Sim. 625; 40 E. R. 848.

(2) 9 L. J. Ch. 107.

ing the decision in *Wroe* v. *Clayton* (3): "The mortgagee after admitting the title of the mortgagor, by taking the mortgage, was precluded from raising any objection to the mortgagor's right of redemption on the ground that his title was defective," *Roberts* v. *Clayton* (4). The principle has been applied in this country in the case of *Mahomed Abdool Ruzzak* v. *Sadik Ali* (5). It cannot be disputed, however, that the mortgagee may establish that the title of the mortgagor has expired since the creation of the mortgage, in other words, that the equity of redemption is no longer vested in him so as to entitle him to redeem the mortgage. This is illustrated by the cases of *Nakchedi Bhagat* v. *Nakchedi Misr* (6) and *Ammu* v. *Ramakishna* (7). Consequently in the case before us, it was not open to the representatives of the mortgagee to prove that the mortgagor had lost all right to the holding, the subject-matter of the mortgage transaction, by abandonment before the mortgage was granted. It has been found that on the 11th June 1877 a *kabulyat* was executed, on behalf of the mortgagor and her co-sharers, by Rameswar in favour of the superior landlord, and that after Rameswar had left the village, the landlord made a settlement with Durga Charan on the 22nd June 1883. It is plain that Durga Charan has disappeared from the scene, but under what circumstances, has not been explained in this case. The fact is incontestable that on the 14th October 1889, when the mortgage in suit was executed, the mortgagor was in possession and transferred possession of the mortgaged property to her mortgagee. It is consequently not open to the mortgagee to prove that at the commencement of the mortgage transaction under which she obtained possession of the premises, the mortgagor had no title to the property, though it is open to her to show that the title of the mortgagor has terminated since the creation of the mortgage. This has not been established. All that has been proved is that on the 4th May 1895 the mortgagee, while in possession as mortgagee, attorned to the superior landlord in derogation of the rights of her mortgagor. This clearly cannot, on the principle explained in *Rakestraw* v. *Brewer* (8), affect the title of the mortgagor as between the mortgagor and mortgagee. We are not here concerned with the rights of the landlord who is not a party to this litigation, but as between the mortgagor and mortgagee, it is plain that the attornment by the latter to the superior landlord cannot, in any way, prejudice the rights of the former.

The result is that this appeal is allowed, the decree of the Court below set aside and the suit decreed with costs in all the Courts. A redemption decree will be drawn up in accordance with rule 7 of Order XXXIV of the Code of Civil Procedure and the plaintiffs will be allowed three months from the date when the decree is actually drawn up to deposit in this Court the amount due.

Appeal allowed.

(3) 8 L. J. Ch. 356; 9 L. J. Ch. 107; 4 Jur. 82.
(4) 3 Anst. 715; 145 E. R. 1016.
(5) 3 Agra H. C. R. 142.
(6) 18 A. 329; A. W. N. (1896) 90.
(7) 2 M. 226.
(8) 2 P. Wms. 511; Sel. Ch. Ca. 58; Mosely 189; 2 Eq. Ca. Ab. 162; 24 E. R. 839.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 813 OF 1914.

February 23, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

K. VELLAYAPPA ROWTHEN—PLAINTIFF—APPELLANT

versus

K. BAVA ROWTHEN AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 55 (2)—Knowledge of vendor's defective title, whether bar to recovery of purchase-money.

A vendee is entitled to rely on section 55 (2) of the Transfer of Property Act. His knowledge that the vendor's title was defective will not preclude him from suing for recovery of his purchase-money if he is deprived of the property sold. [p. 748, col. 1.]

Subbaraya Reddiar v. *Rajagopala Reddiar*, 23 Ind. Cas. 570; 15 M. L. T. 240; (1914) M. W. N. 376; *Thekkemannengath Raman* v. *Kakkesseri Pazhiyot Manakkal Karnavan*, 27 Ind. Cas 989; 28 M. L. J. 184; 2 L. W. 433, followed.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Coimbatore, in Appeal Suit No. 61 of 1913, preferred against that of the District

Munsif of Erode, in Original Suit No. 1566 of 1911.

Mr. *T. Rangaramanuja Chariar*, for the Appellant.

Mr. *V. Visvanatha Sastri*, for the Respondent.

JUDGMENT.—Under Exhibit A the respondents purport to convey full title in the suit property and the appellant is entitled to rely on section 55 (2) of the Transfer of Property Act. His knowledge that the title was defective will not in such circumstances preclude him from suing for recovery of his purchase-money. Vide *Subbaraya Reddiar* v. *Rajagopala Reddiar* (1) and *Thekkemannengath Raman* v. *Kakkesseri Pazhiyot Manakkal Kurnavan* (2).

The decree of the Subordinate Judge is set aside and the appellant (plaintiff) will be given a decree for Rs. 538-4-0 with subsequent interest at 6 per cent.

Each party will bear its own costs throughout.

Appeal allowed.

(1) 23 Ind. Cas. 570; (1914) M. W. N. 376; 15 M. L. T. 240.

(2) 27 Ind. Cas. 989; 28 M. L. J. 184; 2 L. W. 433.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2024 OF 1910.

July 29, 1912.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Richardson.

BEHARI LAL ROY CHAUDHURI—PLAINTIFF—APPELLANT

versus

HARA KUMAR DUTTA AND OTHERS—DEFENDANTS—RESPONDENTS.

Principal and agent—Kabuliat *hypothecating property for defalcation executed by agent—Dismissal of agent—Re-appointment, defalcation after—Limitation Act (IX of 1908), Sch. I, Art. 89, applicability of.*

In a suit for accounts by the principal against his agent, a *kabuliat* was executed in 1305 B. S. by an agent in favour of his principal to the effect that certain immoveable property hypothecated therein would be answerable for any defalcation made by the agent or any damages suffered by the principal through his negligence. The agent was dismissed in 1306 but he was re-appointed in 1307:

Held, that his position in 1307 was not governed by the *kabuliat* of 1305 but that by the ordinary rules applicable between the principal and the agent, and that Article 89, Schedule I, of the Limitation Act, applied to the suit. [p. 748, col. 2; p. 749 col. 1.]

Babu *Abinas Chandra Guha*, for the Appellant.

Babu *Bhupendra Chandra Guha*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for accounts for a certain period against an agent. Both the Courts below have dismissed the suit as barred by limitation, evidently under Article 89 of Schedule I of the Indian Limitation Act. It is contended before us that the lower Courts are wrong and that Article 132 and not Article 89 is applicable to the case. It is true that the *kabuliat* of the agent hypothecated cert in immoveable property which would be answerable for any defalcation made by him or any damages suffered by the principal through his negligence, and there is conflict of authorities with regard to the applicability of Article 89 to a suit of this kind in such a case. In the case of *Hafezuddin Mondal* v. *Jadu Nath Saha* (1), it was held that in a case where there is a hypothecation bond of this kind, Article 132 is the right Article to be applied. In the subsequent case of *Jogesh Chandra* alias *Dhalu Ghose* v. *Benode Lal Roy Choudhry* (2), it was held that in a similar case, Article 116 was the right Article to be applied. That question, however, does not seem to arise in this case. The finding of the lower Appellate Court is that the appointment of defendant No. 1 ceased in 1306 and that he was re-appointed in 1307 after his dismissal in 1306. The terms of the *kabuliat* of 1305 were binding on him in the sense that if any defalcation had been made during this period, recourse might be had to the hypothecated property in due course of law. In the present case the alleged defalcation and the default were made in 1307 and 1308, that is after the defendant No. 1 had been dismissed in 1306 and re-appointed in 1307. His position in 1307 was, therefore, not governed by the *kabuliat* of 1305 but by the ordinary rules applicable between the principal and

(1) 7 C. L. J. 279; 35 C. 298; 12 C. W. N. 820.

(2) 5 Ind. Cas. 59; 14 C. W. N. 122.

the agent. Article 89 was, therefore, the right Article to be applied and the lower Courts are right.

It is true there is a claim for the papers of 1305, and there is a dispute as to whether the claim as to that is barred by limitation or not. The first Court with regard to the papers says, "There is absolutely no evidence on the plaintiff's side that these papers were not submitted", and the lower Appellate Court says that the reasons given by the learned Munsif are very convincing. This we take as a confirmation of the view of the Munsif with regard to the papers.

The result is that the appeal is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 922 OF 1914.

June 10, 1915.

Present:—Mr. Justice Piggott.

PACHKAURI RAUT AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RAM KHELAWAN CHAUBE—PLAINTIFF—RESPONDENT.

Hindu Law—Joint family—Alienation by father—Attestation by major son—Legal necessity—Karta—Suit by minor son to set aside alienation, maintainability of—Consent—Attestation.

P and his two sons *G* and *R* constituted a joint Hindu family, *G* being major and *R* minor. *P* alienated joint family property and the sale-deed was attested by *G*. In a suit by *R* to set aside the alienation:

Held, that there being no legal necessity for the sale, the son could contest the alienation and that though the powers of a Hindu father as manager of a joint family were extensive, they did not extend to the alienation of joint ancestral family property otherwise than for legal necessity and that it was doubtful whether consent could rightly be inferred from mere attestation in the absence of other evidence. [p. 750, col. 1.]

Second appeal from the decision of the Additional District Judge of Gorakhpur, dated the 16th March 1914.

FACTS of the case fully appear from the judgment.

Mr. *Jawa'ir Lal Nehru* (with him Mr. *Shyam Nath Mushran*), for the Appellants:—All the adult members of the family being parties to the transaction, the suit should have been decreed. The father had executed the sale-deed and the elder brother had consented to it. I rely on *Hori Lal* v. *Nimman Kunwar* (1), *Mohabeer Pershad* v *Ramyad Singh* (2).

Mr. *Parmeshor Dayal* (with him Mr. *Iswar Saran*), for the Respondent:—The elder brother had not consented to the transaction. He had merely attested the sale-deed and mere attestation could not amount to an expression of consent.

No legal necessity having been proved in this case, the suit was rightly dismissed. I rely on *Chandradeo Singh* v. *Mata Prasad* (3).

If any portion of the consideration be found for legal necessity, that much could be allowed. I rely on *Deputy Commissioner of Kheri representing the Court of Wards* v. *Khanjan Singh* (4).

The appellants having appealed to the lower Appellate Court and not having made Gajadhara party, they cannot make him a party in second appeal. I rely on *Niaz-ud-Din* v. *Abdul Aziz* (5).

Mr. *Shyam Nath Mushran*, in reply:—The question of legal necessity arises when the alienation is by a co-parcener.

Here the father is the man who has alienated. A father represents the family and his alienation must be binding on all.

JUDGMENT.—This was a suit by a Hindu son to contest an alienation made by his father during the minority of the plaintiff. It appears that there was a joint family consisting of Ganesh Prasad and his two sons, Gajadhar Prasad and Ram Khelawan. On 30th June 1905 Gajadhar Prasad being at the time a major and Ram Khelawan a minor their father, Ganesh Prasad, executed a deed of sale purporting to convey a 6-pies share in certain *zemindari* property to *Musammat* Ram Kali, the predecessor-in-title of the defendants-appellants. The share thus conveyed was part of the ancestral property of the joint undivided family consisting of Ganesh Prasad and his two sons. The deed of sale was signed by Gajadhar Prasad as an attesting witness. The latter did not, however, join in executing the deed, which is and purports to be a conveyance by Ganesh Prasad alone. Both the Courts be-

(1) 15 Ind. Cas. 126; 34 A. 549; 9 A. L. J. 819.
(2) 20 W. R. 192.
(3) 1 Ind. Cas. 479; 31 A 176; 6 A. L. J. 263 (F.B).
(4) 29 A. 331; 5 C. L. J. 344; 11 C. W. N. 474; 4 A. L. J. 232; 2 M. L. T. 145; 17 M. L. J. 233; 9 Bom. L. R. 591; 10 O. C. 117 (P. C.); 34 I. A. 72.
(5) 2 Ind. Cas. 552; 31 A. 521; 6 A. L. J. 643.

low have held that the plaintiff, Ram Khelawan, is entitled to contest the alienation, the finding being that there was no legal necessity for the sale. In second appeal to this Court it is contended that this was an alienation by a manager of a joint Hindu family acting as such and that all the members of the family are bound by the sale. The powers of a Hindu father as manager of a joint family are extensive; but they do not extend to the alienation of joint ancestral family property otherwise than for legal necessity. Those cases of this Court in which it has been held that in certain suits the whole of the joint Hindu family may be effectively represented by the *karta* or manager of the same have no bearing on the point now in question and in no way affect the correctness of the principle above stated.

In the *second* place, the appellants ask the Court to treat the sale in question as an alienation by all the adult members of the joint family and, therefore, binding upon the plaintiff, Ram Khelawan, who was at the time a minor member of the said family. To this it is a sufficient answer that the alienation purports to be by Ganesh Prasad alone, that Gajadhar Prasad does not join in making the same and that his mere attestation of the sale-deed can have no effect upon the plaintiff's rights. A further plea has been added to the effect that the sale should not have been set aside without a declaration that the purchase-money is binding as a charge on the share of Gajadhar Prasad whose attestation of the sale-deed makes him, it is contended, a consenting party to the sale. I should have been inclined to doubt, if I had to determine this question as against Gajadhar Prasad, whether consent could rightly be inferred from mere attestation in the absence of the evidence; but the question does not arise, in view of the fact that the defendants-appellants have not made Gajadhar Prasad a party to this appeal. The plaintiff, Ram Khelawan, very properly impleaded Gajadhar Prasad along with the successors-in-title of the vendee. When the suit had been decreed by the Court of first instance and the vendees' successors carried the matter in appeal to the District Judge, they did not make Gajadhar Prasad a party to their appeal. What they really contended for in the lower Appellate Court was a finding that there was legal necessity for the transfer, in that the consideration had gone towards paying off antecedent debts incurred by the vendor, Ganesh Prasad. If this could have been established the plaintiff could, of course, have been bound by the alienation. The finding of both the Courts below has been in favour of the plaintiff on this point. I do not find any force in the legal pleas now taken before this Court and I dismiss this appeal with costs, including fees on the higher scale.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 2338 OF 1914.

April 15, 1915.

Present:—MR. Justice Shadi Lal.

IMAM DIN—DEFENDANT—APPELLANT

versus

KAMAL—PLAINTIFF—RESPONDENT.

Muhammadan Law — Betrothal contract — Girl breaking betrothal on attaining majority—Non-liability of her guardian for damages.

A Muhammadan girl, after attaining the age of majority, is at perfect liberty to marry any man she likes; and if she then breaks her betrothal contract made by any of her guardians during her minority, neither the guardian nor his representative-in-interest is liable for any damage on account of the breach. [p. 751, col. 1.]

Musammat Golabi v. *Santa*, 7 P. R. 1880 and *Gandu* v. *Ishar Das*, 197 P. R. 1882, distinguished.

Second appeal from the decree of the Divisional Judge, Ferozepur Division, dated the 9th June 1914, reversing that of the Munsif, second Class, Zira, dated the 20th December 1913, dismissing the claim.

Lala *Rama Nand*, for the Appellant.

Mr. *Badruddin Kureshi*, for the Respondent.

JUDGMENT.—The learned Divisional Judge has granted the plaintiff a decree for Rs. 100 as damages for the breach of the betrothal contract. He has found that the betrothal between the plaintiff and *Musammat* Umri was effected by the latter's parents since deceased and that the defendant, Ghulam, who died during the pendency of the suit, as grandfather of the girl was her lawful guardian and, therefore, responsible for marrying her to the plaintiff. As he did not carry out contract, the lower Appellate Court has made his son and representative, Imam Din, liable for damages for the breach

of the contract. This finding is based upon the proposition of law laid down in two judgments of this Court, reported as *Musammat Golabi* v. *Santa* (1), *Gandu* v. *Ishar Das* (2), but it will be observed that in both those cases the girl was minor at the time of the marriage.

In the present case it is clear from the allegations in the plaint and other evidence on the record that *Musammat* Umri had attained the age of majority on the 25th June of 1913, when her marraige with her cousin, the son of the defendant, Imam Din, was solemnized. It is manifest that neither Ghulam nor Imam Din, nor anybody else could be her guardian for marriage and she was at perfect liberty to marry any person she liked. Under these circumstances there is no doubt that the defendant neither entered into the contract of betrothal nor committed a breach thereof. This aspect of the case has been overlooked by the lower Appellate Court, and it seems to me clear that the defendant-appellant cannot be legally held liable for any damages. The result is that I accept the appeal and setting aside the decree of the lower Appellate Court, dismiss the suit of the plaintiff with costs throughout.

Appeal accepted.

(1) 7 P. R. 1880.
(2) 197 P. R. 1882.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1481 OF 1912.

May 12, 1915.

Present:—Mr. Justice Chevis and Mr. Justice Shadi Lal.

FAKIRA MAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

NABBU AND OTHERS—DEFENDANTS—RESPONDENTS.

Sale—Mortgagee selling mortgaged land—Covenant to transfer another land if vendee dispossessed by redemption—Statutory prohibition of transfer of land—Vendee, right of—Damages—Punjab Alienation of Land Act (XIII of 1900), s. 3—Contract Act (IX of 1872), ss. 2, cl. (g), 65.

The defendant sold certain mortgaged lands to the plaintiff under the impression that the mortgagor would not redeem it, and covenanted that in the event of the plaintiff losing the plot by redemption at the instance of the mortgagor, he would transfer to the plaintiff an equal area out of his own proprietary holdings. The mortgagor sued for redemption and recovered possession of the land from the plaintiff. The plaintiff sued the defendant for possession of an equal area and in the alternative for damages:

Held, that the covenant to transfer other land in lieu of the mortgaged property did not amount to an alienation *in præsenti*, but constituted an agreement to transfer in future the property specified therein on the happening of a certain contingency. [p. 752, col. 1.]

Held, further, that as the plaintiff was precluded by the Punjab Alienation of Land Act since coming into force from obtaining the land in suit in pursuance of the contract, the agreement became void, but that they were entitled to compensation. [p. 752, col. 1.]

Second appeal from the decree of the Divisional Judge, Multan, dated the 21st May 1912, affirming that of the District Judge, Multan, dated the 1st November 1911, decreeing the claim in part.

Lala *Balwant Rai*, for the Appellants.

Mr. *Badr-ud-din Kureshi*, for Mr. *Fazl-i-Elahi*, for the Respondents.

JUDGMENT.—The facts of this case which are relevant to the point arising in this second appeal are simple and may be stated in a few words. By a registered deed, dated the 18th October 1879, the ancestors of the defendants Nos. 1 to 5 sold to the father of the plaintiffs, who are appellants in this Court, certain plots of land aggregating 87 *bighas* 15 *marlas* in area for Rs. 3,490. One of the plots, measuring 36 *bighas* 3 *kanals* and 17 *marlas*, was held by the vendors as mortgagees by way of conditional sale for a period of 35 years and it appears that they thought that the mortgagor would not redeem the land, and they consequently purported to transfer proprietary rights therein. At the same time a covenant was entered in the sale-deed providing that in the event of the vendee losing the plot by redemption at the instance of the mortgagor, the vendors would transfer to the vendee an equal area out of their proprietary holding. After the expiry of nearly 30 years from the date of the sale, the mortgagor's representative instituted a suit for redemption and recovered possession of the mortgaged land from the plaintiffs on the 29th August 1909. Having been thus deprived of a part of the land sold to them, the plaintiffs instituted the present suit for possession of an equal area and in the alternative for the recovery of Rs. 3,000 by way

of damages. The Courts below have dismissed the suit *qua* the land but have awarded Rs. 450 by way of damages. The plaintiffs have preferred to this Court a second appeal and after hearing Counsel on both sides, we are of opinion that the amount of damages decreed by the lower Courts is inadequate and must be enhanced.

Now it is quite clear that in the absence of the restrictions imposed by the Punjab Alienation of Land Act, the stipulation in the deed, which forms the basis of the present suit and which is otherwise valid in law, would have been enforcible. But section 3 of the aforesaid Act prohibits a permanent alienation of agricultural land by a member of an agricultural tribe to a person who is neither a member of the same tribe nor a member of a tribe in the same group unless the alienation is sanctioned by the Deputy Commissioner. The question then arises whether the deed of 1879 effected an alienation of the land in dispute. On that point we have no hesitation in holding that the covenant to transfer other land in lieu of the mortgaged property did not amount to an alienation *in præsenti*, but constituted an agreement to transfer in future the property specified therein on the happening of a certain contingency. This contingency occurred in 1909 and it was then that the right to enforce the agreement accrued to the plaintiffs. But the Alienation of Land Act had then come into force and the agreement could not be enforced and consequently became void, *vide* section 2, clause (*g*), of the Indian Contract Act.

The plaintiffs are accordingly precluded by a law from obtaining the land in suit in pursuance of the contract but they are, we think, entitled to compensation. The Courts below have awarded Rs. 450, the money deposited by the mortgagor on redemption, as compensation to the plaintiffs. This award is, in our opinion, based upon an erroneous view of the obligations of the defendants. It is tantamount to a finding that the vendee purchased, not the proprietary rights, but only the rights of the mortgagees in the land, which in the face of the special stipulation referred to above is wholly untenable. Now the rule contained in section 65 of the Indian Contract Act is to effect that the person who has received any advantage under an agreement which becomes void is bound to restore it or make compensation for it. The measure of compensation in the case is the price which the defendants' ancestors received for 36 *bighas* 3 *kanals* and 17 *marlas*, and in the absence of anything showing difference in the qualities of the different parcels of land we must presume that they are of the same quality. The proportionate price amounts to Rs. 1,480 in round figures and we assess that sum as the proper compensation awardable to the plaintiffs.

For the reasons specified above we accept the appeal to this extent that in modification of the decrees of the lower Courts, we grant the plaintiffs a decree for Rs. 1,480 with interest at 6 per cent. per annum from the date of the institution of the suit to the date of realisation. We note that Rs 450 are already in deposit in Court and the plaintiffs may, if so advised, recover that money in part satisfaction of their decree. As to costs we direct that the defendants pay one-half of the costs incurred by the plaintiffs in all the Courts.

Appeal partly accepted.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 251 OF 1911.

August 17, 1914.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.

RAGHORAM SINGH—DEFENDANT No. 3—APPELLANT

versus

RAJANI KANTA BANERJEE AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage—Representation—Mitakshara *family—Redemption, equity of, member of* Mitakshara *family having interest in—Failure to produce that member before Court, effect of—Transfer of Property Act* (*IV of* 1882), *s.* 85, *scope of.*

The principle laid down by the Judicial Committee in the case of *Sheo Shankar Ram* v. *Musammat Jaddo Kunwar*, 24 Ind. Cas. 504; 18 C. W. N. 968; 16 M. L. T. 175; (1914) M. W. N. 593; 1 L. W. 695; 12 A. L. J. 1173; 16 Bom. L. R. 810 (P. C.); 20 C. L. J. 282; 36 A. 383, is to be applied in preference to that adopted in *Lala Suraj Prosad* v. *Golab Chand*, 28 C. 517; 5 C. W. N. 640, in cases where the doctrine of representation is properly applicable to the facts and where the mortgagee is found to be not aware of the existence of a member of a joint *Mitakshara* family as interested in the equity of redemption and so does not bring him before the Court in the mortgage suit. [p. 753, col. 2.]

RAGHORAM SINGH v. RAJANI KANTA BANERJEE.

Appeal against the decree of the Subordinate Judge of Shahabad, dated the 31st May 1911.

Babus *Lakshmi Narayan Singh* and *Raghu Nath Singh*, for the Appellant.

Babus *Mahendra Nath Ray*, *Biraj Mohan Mojumdar*, *Manmatha Nath Mukerjee* and *Satindra Nath Mukerjee*, for the Respondents.

JUDGMENT.—This is an appeal by the third defendant in a suit for partition of joint property. The predecessor-in-interest of the plaintiff purchased shares in the properties in suit in execution of a decree on the basis of two mortgages granted in his favour on the 5th April 1888 and the 24th June 1896. The mortgages were executed by one Sobhnath Singh, the head of a joint *Mitakshara* family, and his four adult sons. The mortgagee sued on the 13th January 1903 to enforce his security. At that time, Sobhnath Singh as also two of his sons were dead. The mortgagee joined as defendants the two surviving sons and also brought on the record the infant sons of the mortgagors in so far as their existence was known to him. A decree was made in due course and the mortgaged properties were sold in execution. In answer to the present claim, it has been urged by the third defendant, who is a grandson of Sobhnath Singh, that as he was not joined as a party to the mortgage suit, his right of redemption has not been affected and that the plaintiff is not entitled to a decree for partition. The Subordinate Judge has overruled this contention. He has found that the mortgagee was not aware of the existence of the third defendant who, if his case be true, was at the time an infant nine months old; and he has held that the decree made against the representatives of the family was operative against the third defendant and vested in the purchaser his interest in the property.

In the present appeal by the third defendant, it has been argued that the Subordinate Judge should have held on the evidence that the mortgagee was aware of his existence and yet deliberately omitted to join him as a party to the mortgage suit. This contention is clearly unfounded, and we see no reason to disagree with the Subordinate Judge in his estimate of the evidence on this point. It is worthy of note that the mortgagee joined as parties defendants to the mortgage suit other infants, sons of some of the mortgagors and grandsons of Sobhnath Singh. It is inconceivable that if the mortgagee was aware of the existence of the third defendant, he should omit to join him as a party defendant. We must, therefore, hold in concurrence with the Subordinate Judge that the mortgagee was not aware of the existence of the third defendant when he instituted the mortgage suit. Consequently no question arises as to the applicability of section 85 of the Transfer of Property Act. In these circumstances, the principle laid down by the Judicial Committee in the case of *Sheo Shankar Ram* v. *Musammat Jaddo Kunwar* (1), which affirmed the decision of the Allahabad High Court in *Jaddo Kuar* v. *Sheo Shanker Ram* (2), applies. It has been argued, however, on behalf of the appellant that this view is contrary to the decision of this Court in the case of *Lala Suraj Prosad* v *Golab Chand* (3). In our opinion, in cases where the doctrine of representation is properly applicable to the facts and where it is established that the mortgagee was not aware of the existence of a member of a joint *Mitakshara* family as interested in the equity of redemption and consequently did not bring him before the Court in the mortgage suit, the principle laid down by the Judicial Committee in the case of *Sheo Shankar Ram* v. *Musammat Jaddo Kunwar* (1) must be applied in preference to that adopted in *Lala Suraj Prosad* v. *Golab Chand* (3). In the present case there can be no doubt that the interest of the present defendant was sufficiently represented by the persons who were joined as parties to the mortgage suit, namely, his father and his uncles. We are accordingly of opinion that the Subordinate Judge has correctly held that he has no defence to the suit.

(1) 24 Ind. Cas. 504; 20 C. L. J. 282; 36 A. 383; 18 C. W. N. 968; 16 M. L. T. 175; (1914) M. W. N. 593; 1 L. W. 695; 12 A. L. J. 1173; 16 Bom. L. R. 810.
(2) 7 Ind. Cas. 902; 33 A. 71; 7 A. L. J. 945.
(3) 28 C. 517; 5 C. W. N. 640.

ISHWAR SINGH *v.* HARKISHEN LAL.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs. We assess the hearing fee at five gold *mohurs*.

Appeal dismissed.

PUNJAB CHIEF COURT.

MISCELLANEOUS REVISION PETITION No. 574 OF 1914.

April 19, 1915.

Present:—Mr. Justice Shah Din.

ISHWAR SINGH—PETITIONER

versus

HARKISHEN LAL—RESPONDENT.

Probate—Partial revocation, when allowable—Co-executor appropriating large portion of sale-proceeds of property—Liquidation of testator's debts—Probate and Administration Act (V of 1881), s. 50.

The fact that a co-executor appropriated as legatee the whole or major portion of the sale-proceeds of a part of the estate before liquidating the testator's debts as provided in the Will is not sufficient to a partial revocation of the Probate as regards one of the executors, where the remaining assets far exceed the liabilities and particularly where none of the creditors has come forward to object to the acts of the said co-executor. [p. 754, col. 2; p. 755, col. 1.]

Miscellaneous petition in the goods of Sardar Amrik Singh of Gujranwala under section 50 of the Probate and Administration Act, V of 1881.

Mr. *B. Beran Petman* and Lala *Rama Nand*, for the Petitioner.

Rai Bahadur Pandit *Sheo Narain* and Sheikh *Umar Bakhsh*, for the Respondent.

JUDGMENT.—By order of this Court, dated the 26th February 1912, Probate of the Will of the late Sardar Amrik Singh of Gujranwala, dated the 1st September 1911, was granted to Messrs. Harkishen Lal and Ganpat Rai, Barristers-at-Law, Lahore, who are two out of the three executors named in the Will. By a subsequent order, dated the 2nd December 1912, the third executor, Sardar Ishwar Singh, was also included in the grant as one entitled to the grant of Probate jointly with the other two executors.

The said third executor, Sardar Ishwar Singh, has filed two applications in this Court, one dated 29th October 1914, and the other dated 7th December 1914, in which he alleges certain facts which, according to him, show that his co-executor Mr. Harkishen Lal is not administering the estate of the deceased in a proper manner according to the provisions of Act V of 1881. One of the matters complained of is that Mr. Harkishen Lal has sold certain agricultural land situate in *Chak* No. 51, Gujranwala District, for Rs. 80,155 and has not paid the sale-proceeds towards the liquidation of the debts of the deceased testator. According to the applicant, the debts due by the estate to the People's Bank, Lahore, on the 30th September 1913, amounted to Rs. 2,50,861 and besides this amount the Liquidators of the said Bank have made a demand against the estate for payment of Rs. 32,000 on account of shares. The applicant's Counsel urges that the debts due to the People's Bank should be paid before Mr. Harkishen Lal appropriates any portion of the sale-proceeds of the property which he can claim as a legatee under the provisions of the Will. The learned Counsel further says that the amount of the debts due by the estate is so large that the estate is hardly sufficient to meet them. The last allegation is not borne out by the papers before me. The schedules of the assets and the liabilities annexed to the application for Probate, dated the 22nd January 1912, show that the assets exceeded the liabilities by about Rs. 2,61,241. It is also noteworthy that whereas in the schedule of assets the value of the land, *Chak* No. 51, which has now been sold by Mr. Harkishen Lal, was put down as Rs. 56,000, the price for which the *Chak* is stated to have been sold is Rs. 80,155. This shows that at any rate a large part of the estate left by the testator, which consists of agricultural land, is probably worth more than the amount shown in the schedule as its probable value at the date of application. It would thus appear that there is no possibility of the estate ultimately proving insufficient for the liquidation of the debts of the testator.

The third clause of the Will shows that Mr. Harkishen Lal is one of the creditors of the estate, and I find from a statement on the record, dated the 3rd January 1914, which sets forth the state of accounts between the deceased testator and Mr. Harkishen Lal,

that the amount due to the latter on the 30th June 1913 was Rs. 48,705. No doubt the correctness of this account is not admitted by the applicant, but that is a matter which has to be settled separately between the co-executors. Besides the said amount, it is admitted before me that Mr. Harkishen Lal has paid upwards of Rs. 17,000 towards the debts of the testator; and Pandit Sheo Narain, who appears for Mr. Harkishen Lal, gives an assurance that his client is exerting his utmost to secure the best terms from intending purchasers of portions of the estate and to pay off the debts due to the creditors. The learned Advocate says that the Liquidators of the People's Bank have no objection to the manner in which Mr. Harkishen Lal is administering the estate; and it is worthy of note that the Liquidators have made no complaint to this Court against Mr. Harkishen Lal for his not having paid the sale-proceeds of *Chak* No. 55 towards the debts due by the testator to the Bank. By clause 11 of the Will, *Chak* No. 51 in Tahsil Khangah Dogran and *Chak* No. 236 in Tahsil Lyalpur were declared to be the property of Mr. Harkishen Lal, and he was empowered to take proprietary possession of the two *chaks* and to make good out of his own pocket any deficiency that may occur in the event of the rest of the estate proving insufficient for the liquidation of the People's Bank, to whom by far the largest amount of debts is due. As the Liquidators of the Bank have made no objection to the manner in which Mr. Harkishen Lal is administering the estate, it is reasonable to infer that there is no apprehension of the rest of the estate being found insufficient for the liquidation of the debts due to creditors. It seems that, for certain reasons best known to himself, the applicant is not pulling on well with other executors. This is much to be regretted as the estate must be administered by the executors, all of whom are legatees under the Will, to the best advantage of the estate and of themselves.

The prayer that Mr. Harkishen Lal is unfit to remain as an executor and that the grant of Probate to him be revoked was not seriously pressed, and it could not well be pressed, for assuming that a partial revocation of the grant as regards one of the executors is permissible, the acts attributed to Mr. Harkishen Lal are, in my opinion, not such that he can be held to have administered the estate in an improper manner. I dismiss both the applications with costs.

Applications dismissed.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST APPEAL No. 424 OF 1914.

January 5, 1915.

Present:—Mr. Justice Le Rossignol.

NARPAT RAI—DECREE-HOLDER—APPELLANT

versus

DEVI DAS AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Execution of decree for partition of property based on award—One of the properties mortgaged by one of the parties to the decree—Separate suit to determine liability on mortgage, maintainability of.

Where an award and the decree based thereon for partition of immoveable property make no mention of the encumbrance created thereon by one of the parties who are father and sons and where the mortgagees are no party to the proceeding, the executing Court is not competent to decide in execution of the decree, the respective liabilities of the parties as regards the mortgage. Such a question is a fit subject for a regular civil suit to be brought by the aggrieved party. [p. 756, col. 1.]

Miscellaneous first appeal from an order of the Additional District Judge, Lahore, dated the 23rd January 1914, ordering the house in dispute to be divided in accordance with the terms of the decree.

Lala *Hukam Chand*, for the Appellant.

The Hon'ble Mr. *Muhammad Shafi*, K. B., Messrs *Beechey*, *Nihal Chand Mehra* and Bhagat *Gobind Das*, for the Respondents.

JUDGMENT.—This appeal arises out of an order passed in execution proceedings by the lower Court. The appellant, under a decree issued in accordance with an arbitrator's award, was entitled to a 1/6th share of the house in dispute.

The aforesaid house was, however, subject to an encumbrance created by the appellant in favour of the Co-operative Bank, Lahore, and the appellant in his application for execution asks for possession of his 1/6th share free of encumbrance, on the ground that he has deposited his share of the mortgage-debt with the creditor Bank.

The lower Court came to no clear decision on the point whether the encumbrance was a burden on all the co-sharers in the property, though it expressed an opinion that it should be so regarded.

However, it refused to define the responsibility of each co-sharer, for the Bank was no party to the proceeding and it contented itself with ordering that appellant should be placed in possession of his one-sixth share.

The decree-holder has appealed to this Court; he accepted the lower Court's view that he is liable in respect of only 1/6th of the mortgage-debt and he prays that in this execution an account of the Bank's claim shall be taken, the appellant's present liability be determined and his share in the house be handed over to him free of the mortgage. In other words, in this execution to which the Bank is not a party, he wishes to redeem a portion of the property, to get possession of that portion, and to secure a declaration of non-liability in respect of the remaining 5/6ths.

I hold that in execution of the decree, the question of liability on the mortgage which is not mentioned either in the award or in the decree, does not arise.

The only matter before the lower Court was the placing of appellant in possession of his 1/6th share. To that the judgment-debtors-respondents offered no resistance, though they demurred, as they were entitled to do, to the decision in execution proceedings of their liability on a mortgage which they absolutely repudiated.

The respondents in cross-objections have objected to the lower Court's expression of opinion that they were liable for 5/6ths of the mortgage-debt and I uphold their objection. The lower Court, I hold, has arrived at the correct conclusion, *viz.*, that appellant is entitled to nothing more than possession of his decreed share and that the determination of the several liabilities of the party for the mortgage-debt must be decided by separate suit.

This appeal is dismissed with costs.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 12 OF 1915.

May 6, 1915.

Present:—Mr. Justice Twomey and Mr. Justice Ormond.

MAUNG PO HMAN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MAUNG TIN—PLAINTIFF—RESPONDENT.

Burmese Buddhist Law—Inheritance—Orasa *child.*

Under the Burmese Buddhist Law a daughter no less than a son may be an *orasa* child but there cannot be an *orasa* daughter as well as an *orasa* son in the same family. An *orasa* daughter's position is merely presumptive and is liable to be displaced by an *orasa* son of competent age. [p. 757, col. 1.]

Po Zan v. *Maung Nyo*, 20 Ind. Cas. 327; 6 Bur. L. T. 105; 7 L. B. R. 27; *Ma Saw Ngwe* v. *Ma Thien Zin*, 2 L. C. 210, referred to and followed.

Mr. *Ginvalla*, for the Appellants.

JUDGMENT.

TWOMEY, J.—The parties are related to one another as shown in the following table:—

U THET=MA BWIN

Ma Shwe Ein,	Po Hman=Ma Ngwe Bwin, defendants.
Maung Tin (adoptive son), plaintiff.	

U Thet died about 1906. His wife, Ma Bwin, died about three years earlier. Ma Shwe Ein their eldest child, died about 1899 leaving an adoptive son, the plaintiff, Maung Tin. Po Hman, the only son of U Thet and Ma Bwin, was about 24 years old when his father died and about 17 years old when his sister, Ma Shwe Ein died.

The lower Courts have directed that Maung Tin is to share the estate of U Thet and Ma Bwin equally with his uncle Po Hman, on the ground that Ma Shwe Ein was an *orasa* child and that Maung Tin is, therefore, entitled under the texts cited in section 163 of the Kinwun Mingyi's Digest to a share equal to that of his mother's youngest sister. It is true as remarked by the Divisional Judge that a daughter no less than a son may be an *orasa* child. But the learned Judge did not sufficiently consider how her position was affected by the existence of a brother who was nearly grown-up at the time of her death and who survived both the parents.

The facts in this case resemble those of a case decided by this Court in 1912, *Po Zan* v.

Maung Nyo(1). It was then held that when there is or has been an *orasa* son the texts giving the eldest daughter's children especial treatment at the time of partition do not apply. This is in accordance with the decision in *Ma Saw Ngwe* v. *Ma Thein Zin*(2), that there cannot be more than one *orasa* child in the same family. For example, there is no authority for treating one son as the *orasa* entitled to claim a fourth share on the death of the father and in the same family allowing the children of an elder son or daughter, who predeceased the parents, special treatment at the time of ultimate partition. Nor can it be held that the children of an eldest son or daughter who predeceased the parents are entitled to a preferential share, except when such eldest son or daughter at the time of his or her death was the *orasa* child, *i. e.*, had attained the complete status of *orasa*. The texts cited in *Po Zan* v. *Maung Nyo* (1) are sufficient to show that even if the plaintiff Maung Tin's adoptive mother, Ma Shwe Ein, was an adult when her brother Po Hman was born, her status as *orasa* child was merely presumptive and that when Po Hman reached a competent age he displaced her as *orasa*. There can be no doubt that Po Hman, who was 24 years old when his father died and who was the only son born to U Thet and Ma Bwin, was the *orasa* son and for reasons given in *Po Zan* v. *Maung Nyo* (1) there cannot be an *orasa* daughter as well as an *orasa* son in the same family.

The decree of the lower Courts should, in my opinion, be set aside and instead the plaintiff as an out of time grandchild should be awarded a decree for an eighth share of the property specified in the decree of the District Court. It is agreed that the case is one in which the estate should bear the costs of litigation, that is to say, the defendants should give to the plaintiff his full one-eighth share less one-eighth of his costs in all Courts.

ORMOND, J.—I concur.

Decree set aside.

(1) 20 Ind. Cas. 327; 7 L. B. R. 27; 6 Bur. L. T 105.
(2) 2 L. C. 210.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1057 OF 1914

June 14, 1915.

Present:—Mr. Justice Piggott.

Musammat KAZMI JAN—PLAINTIFF—APPELLANT

versus

Pandit SHIB CHARAN—DEFENDANT—RESPONDENT.

Mortgage, suit on—Money-decree—Purchase by prior mortgagee—Subsequent mortgage by heir—Suit for sale by subsequent mortgagee—Suit for declaration that house was not saleable by prior mortgagee, maintainability of.

A creditor of a deceased Muhammadan cannot follow his estate into the hands of a *bona fide* purchaser for value to whom it has been alienated by an heir-at-law, whether the alienation had been by an absolute sale or by a mortgage. [p. 758, col. 2.]

One *A* mortgaged a house to the predecessor-in-title of the plaintiff. On *A's* death, his widow, *J*, mortgaged the same house to the defendant. The plaintiff brought a suit on his mortgage impleading the present defendant as a subsequent mortgagee, but he got only a simple money-decree in execution of which he put the house to sale and purchased it on 23rd June 1913. In the meantime the defendant had brought a suit upon his mortgage and obtained a decree for sale of the house on the 24th September 1912. The plaintiff then brought the present suit for a declaration that the house was not saleable in execution of the defendant's decree:

Held, that the plaintiff, by his auction purchase, acquired no title to the house which could override the rights of the defendant under his mortgage or under his decree. [p. 758, col. 2.]

Bhola Nath v. *Makbul-un-nissa*, 26 A. 28; A. W. N. (1903) 184, referred to.

Second appeal from the decision of the Additional Judge of Moradabad, dated 21st April 1913.

Mr. *Muhammad Ishaq Khan*, for the Appellant.

Mr. *Mohan Lal Sandal*, for the Respondent.

JUDGMENT.—It appears that one Imdad Ali mortgaged, in the year 1897, a house to a person whose heirs subsequently transferred their rights under the mortgage to the present plaintiff-appellant. Imdad Ali died and his widow, *Musammat* Iradatunnissa, in the year 1907, mortgaged the same house to the present defendant-respondent. The plaintiff brought a suit upon his mortgage impleading the present defendant as a subsequent mortgagee of the property in suit. For reasons which have not been made apparent, the Court gave the plaintiff a simple money-decree enforceable against the assets of Imdad Ali in the hands of any of the defendants. In execution of this

decree the plaintiff attached the house in question, brought it to sale, and purchased it himself obtaining possession on June the 23rd, 1913. In the meantime the defendant had brought a suit upon his mortgage against *Musammat* Iradatunnissa, and on the 24th of September 1912 had obtained a decree for sale of a fractional share in the said house representing the share which came to *Musammat* Iradatunnissa by inheritance. The present suit was one for a declaration that the house in question is not liable to sale in execution of the defendant's decree. The suit was decreed by the Court of first instance; but on appeal the learned District Judge came to the conclusion that the suit for a declaration was not maintainable and he dismissed it accordingly. Acting, however, on some admission made before him by the defendant he has given the plaintiff a simple money-decree for Rs. 50, which appears to be the amount of his decree without interest. The plaintiff appeals to this Court contending, in the *first* place, that the suit for a declaration should have been decreed and *secondly*, that if any money-decree was passed it should have included interest up to date. In so far as any argument has been addressed to me in support of the appeal based upon the fact that the defendant was a party to the plaintiff's suit upon his mortgage, I find no force in the contention. The suit as brought upon the mortgage of 1897 was dismissed. Whatever defence was set up in that case by the defendant Shib Charan it must have completely succeeded, for he was in no way affected by the decree actually passed. Even if by some oversight the simple money-decree was left to stand as a joint decree against all the defendants, the fact that it is recoverable only out of the assets of Imdad Ali in the hands of such defendants would in itself free Shib Charan from all liability thereunder. The real contention pressed on behalf of the appellant is that the debt due to the plaintiff as a creditor of Imdad Ali must have priority over the debt due to the defendant Shib Charan as a creditor of one of Imdad Ali's heirs. In support of this contention I have been referred to certain general principles laid down in Wilson's Digest of Muhammadan Law and also to the case of *Bhola Nath* v. *Maqbul-un-nissa* (1). The whole trend of the argument for the appellant overlooks the fact that Shib Charan's position is not merely that of a creditor of *Musammat* Iradatunnissa, but of a transferee of a portion of Imdad Ali's estate from one of his heirs. The general principle that a creditor of a deceased Muhammadan cannot follow his estate into the hands of a *bona fide* purchaser for value to whom it has been alienated by an heir-at-law, whether the alienation had been by an absolute sale or by a mortgage, was re-affirmed by the learned Judges of this Court who decided the case of *Bhola Nath* v. *Maqbul-un-nissa* (1) (*Vide* page 32 of the report). It is also laid down clearly in those passages of Mr. Saiyed Ameer Ali's book on Muhammadan Law which are referred to in the judgment of the lower Appellate Court. In my opinion the plaintiff by his auction-purchase acquired no title to the house in question which could override the rights of the defendant Shib Charan under his mortgage of 1907 or under his decree of 1912. The house in question or rather *Musammat* Iradatunnissa's share in the same is liable to sale under the defendant's decree and no declaration to the contrary can be made. The plaintiff has obtained a money-decree in his favour which could not, in my opinion, have been passed except on the admission of the defendant. I presume it to have been validly passed, as it is not challenged by way of appeal or cross-objections on the part of the defendant but I certainly cannot add to it by allowing interest as contended for in the last plea in this memorandum of appeal. The result is that I dismiss this appeal with costs, including fees on the higher scale.

Appeal dismissed.

(1) 26 A. 28; A. W. N. (1903) 184.

DEVI DASS *v.* NARPAT RAI.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 94 OF 1913.

CIVIL APPEAL No. 1181 OF 1911.

January 5, 1915.

Present:—Mr. Justice LeRossignol.

DEVI DASS AND OTHERS—DEFENDANTS—PETITIONERS

versus

NARPAT RAI—PLAINTIFF—RESPONDENT.

Appeal to Privy Council—Execution of decree in suit of value of Rs. 10 lakhs — *Subject-matter of dispute—Civil Procedure Code (Act V of 1908), s.* 110.

Where in execution of a decree in a partition suit involving property of the value of rupees ten *lakhs*, the applicants disputed their liability to 4/6ths of an item of Rs. 11,709:

Held, that such a case did neither satisfy both the conditions set forth in the 1st clause of section 110 of Act V of 1908, nor did it fulfil the conditions mentioned in the second clause of that section, and that consequently permission to appeal therefrom to their Lordships of the Privy Council could not be granted. [p. 759, col. 2.]

Mulkah Do Alum Nowab Tajdar Bohoo v. *Mirza Jehan Kudr*, 10 M. I. A. 252; 2 W. R. (P. C.) 55; 1 Suth. P. C. J. 554; 2 Sar. P. C. J. 106; 19 E. R. 967; *Bhugwat Sahay* v. *Rai Pashupati Nath Bose*, 10 C. W. N. 564; 3 C. L. J. 257, *Royal Insurance Co.*, v. *Akhoy Coomar Dutt*, 6 C. W. N. 41 and *Nawab Moozhatoodowlah Abbas Hossain Khan* v. *Ishan Chandra Mukerjee*, 1 C. W. N. lxxviii, distinguished.

Petition, under Order XLV, rule 2, Civil Procedure Code, for leave to appeal to his Majesty in Council against the judgment of the Chief Court dated the 2nd January 1913, passed in civil appeal noted above.

The Hon'ble Mr. *Muhammad Shafi*, K. B., and Kanwar *Dalip Singh*, for the Petitioners.

Mr. *Nihal Chand Mehra* and Lala *Hukam Chand*, for the Respondent.

JUDGMENT.—This is an application for leave to appeal to His Majesty in Council against this Court's order, dated 2nd January 1913.

This Court's order does not affirm that of the Court below and the main point argued before me is whether the appealable value of the dispute to be submitted to their Lordships of the Privy Council is Rs. 10,000 and upwards, and if that question is answered in the negative whether the order involves directly or indirectly some question respecting a claim to property of that value.

The facts of the case are that the plaintiff-respondent was by decree entitled to 1/6th of a sum aggregating Rs. 97,857-12-7, the remaining 5/6ths being payable as to 4/6ths to the present applicants, sons of Narpat Rai plaintiff-respondent, and as to 1/6th to Daulat Ram, who in view of the fact that he took sides with the plaintiff was a formal defendant in the case.

Of this sum of Rs. 97,847-12-7, Rs 10,000 consisted of a Fixed Deposit Receipt, which plaintiff had hypothecated to one Mul Chand, and this Court's order decreed that the parties should each get 1/6th of Rs. 97,847-12-7 less Rs. 11,709-9-0, the amount paid to Mul Chand by the plaintiff.

The parties were at one as to the partition of Rs. 97,837-12-7, and the only dispute turned on the point whether the applicants' share of that sum was to be reduced by 4/6ths of 11,709-9-0 *i. e.*, a sum less than Rs. 8,000. This Court's order then affected the applicants in a sum inferior to Rs. 8,000 and this is the value of the dispute which they desire to lay before their Lordships in Council. Consequently, I must hold that this case does not satisfy both the conditions set forth in the first clause of section 110 of the Code.

But it is urged that, in any case, the conditions of the second clause of that section are fulfilled. Further I am referred by the applicant to certain authorities which, it is claimed, establish the doctrine that the value of the whole original claim is the value to be considered in this connection.

They are—

Mulkah Do Alum Nowab Tajdar Bohoo v. *Mirza Jehan Kudr* (1), but leave in this case was granted on the ground among others that the value of the suit for fiscal purposes was less than its real value.

Bhugwat Sahay v. *Rai Pashupati Nath Bose* (2), claim for share of an estate.

Royal Insurance Co. v. *Akhoy Coomar Dutt* (3), not in point.

Nawab Moozhatoodowlah Abbas Hossian Khan v. *Ishan Chandra Mukerjee* (4). In this case it was held that the case involved a claim to an estate of over Rs. 30,000 in value.

The cases quoted all admit of differentiation from that now under consideration. This Court's order adjudicates merely on

(1) 10 M. I. A. 252; 2 W. R. (P. C.) 55; 1 Suth. P. C. J. 554; 2 Sar. P. C. J. 106; 19 E. R. 967.
(2) 10 C. W. N. 564; 3 C. L. J. 257.
(3) 6 C. W. N. 41.
(4) 1 C. W. N. lxxviii.

the applicants' liability to pay their *pro rata* share in a certain sum of money; I cannot see that directly or indirectly it involves any claim to or question respecting any other property. The applicants contend that there is a dispute between the parties in respect of a mortgage of a certain house and the *ratio decidendi* of this Court's order might be applied to and affect that dispute, but that litigation is still *in gremio futuri* and may never materialize, moreover this Court's final order refers in no way to the mortgage above mentioned. It was merely an order in execution proceedings touching only a part of the original decree.

For these reasons I hold that leave to appeal cannot be granted and no case at all for a special certificate has been made out. The application is dismissed with costs.

Application dismissed.

LOWER BURMA CHIEF COURT.

CIVIL REVISION NO. 36 OF 1915.

May 31, 1915.

Present:—Mr. Justice Young.

K. R. V. VELLIAN CHETTY—APPELLANT

versus

WOOMIDY YIRAMAH—RESPONDENT.

Negotiable Instruments Act (XXVI of 1881), s. 37—Pro-note—Joint promisors, liability of—Evidence Act (I of 1872), s. 92—Contract Act (IX of 1872), ss. 44, 134.

The executants of a pro-note should be regarded as principal debtors under section 37 of the Negotiable Instruments Act, 1881, in the absence of a contract to the contrary. In such a case section 44 of the Contract Act applies and the plaintiff's relinquishment of his claim against one does not involve a discharge of the other.

Shamsh-ul-Jahan Begam v. *Ahmad Wali Khan*, A.W. N. (1903) 64; 25 A. 337, referred to.

Mr. *M. C. Naidu*, for the Appellant.

Mr. *Villa*, for the Respondent.

JUDGMENT.—In this case the plaintiff sued two defendants on a joint and a several pro-note. On being examined by the Court preparatory to the framing of issues, the plaintiff stated that one of the defendants was a surety and that he relinquished his claim against the other as he was a man of straw. The learned Judge heard the case and dismissed the suit relying on Contract Act, section 134; holding that section 39 of the Negotiable Instruments Act did not apply. In my opinion the learned Judge should not have asked these questions and could not in his judgment rely on the answers. The judgment must be based on facts duly proved, Evidence Act, section 165. The parties had reduced their contract to a written document and under section 37, Negotiable Instruments Act, were principal debtors in the absence of a contract to the contrary. According to the note each promised to pay jointly or severally. It was on the note that the suit was brought and under section 92 of the Evidence Act it was impossible to travel outside it, *C. P. Harek Chand Babu* v. *Bishun Chandra Banerjee* (1). No evidence to contradict the note being admissible by virtue of Evidence Act, section 92, the learned Judge cannot base his judgment on such. In *Shamsh-ul-Jahan Begam* v. *Ahmad Wali Khan* (2) the decision, as is shown by a reference to the case which it followed, *Mulchand* v. *Madho Ram* (3), turned upon the fact that section 92 relates to suits between parties to instruments while the Court construed as meaning the opposing parties; while both the Allahabad cases were between co-parties and not adverse parties.

In the present case, however, this is not so and both defendants in accordance with the pro-note should be regarded as principal debtors. In such a case, section 44 of the Contract Act applies and saves plaintiff. The decree of the Small Cause Court must be set aside and the case remanded to be tried on its merits. Costs costs in the cause. The Court-fee paid by the applicant must be refunded under the Court Fees Act, section 13.

Decree set aside; Case remanded.

(1) 8 C. W. N. 101.
(2) A. W. N. (1903) 64; 25 A. 337.
(3) 10 A. 421; A. W. N. (1888) 127.

CHANDA SINGH *v.* MUKAND SINGH.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 174 OF 1912.

April 21, 1915.

Present:—Justice Sir Donald Johnstone, KT., and Mr. Justice LeRossignol.

CHANDA SINGH—DEFENDANT—APPELLANT

versus

MUKAND SINGH—PLAINTIFF—RESPONDENT.

Alienation—Custom—Mortgage of ancestral property—Necessity—Suit by after-born son—Other reversioner existing before not suing—Limitation—Strict proof of necessity, when not required—Legal necessity—Advances taken for defending a criminal case and for payment of revenue, if for legal necessity—Interest on just debt, whether necessity—Pleadings.

The validity of a mortgage screened by time from attack cannot be questioned by a reversioner on the ground that it has been merged into a subsequent mortgage or sale to challenge which the suit is within limitation. [p. 761, col. 2.]

Khiali Ram v. *Gulab Khan*, 11 Ind. Cas. 392; 190 P. L. R. 1911; 70 P.W.R. 1908; 33 P.R. 1911, followed.

When time once begins to run against a reversioner for contesting the validity of an alienation of ancestral property no subsequent disability to sue on the ground of minority of another reversioner can bar its flow. [p. 761, col. 2.]

In the absence of any clear proof of reckless extravagance or immoral waste on the part of the alienor of ancestral property, strict proof of necessity for ordinary debts is not required, particularly where the income of the estate does not appear to be quite sufficient to meet the family expenses and the alienor has sons or does not expect to be sonless. [p. 762, cols. 1 & 2.]

Interest on a just debt is also a necessity. So is the money due on account of produce where the mortgagor holds the land as a tenant of the mortgagee and enjoys the whole produce himself and allows the rent to mount up against him provided the validity of the mortgage cannot be questioned. [p. 762, col. 1.]

Payment of revenue is also an act of necessity. [p. 762, col. 2.]

Money spent on defending a criminal case can be validly charged on ancestral property. [p. 762, col. 2.]

A plea not raised in either of the Courts below cannot be entertained for the first time in further appeal to the Chief Court. [p. 761, col. 2.]

Second appeal from the decree of the Divisional Judge, Ludhiana Division, dated the 21st December 1911, modifying that of the Munsif, first Class, Ludhiana, dated the 3rd July 1911, decreeing the claim.

Rai Bahadur Pandit *Sheo Narain*, for the Appellant.

Mr. *Nand Lal*, for the Respondent.

JUDGMENT.—The minor plaintiff sues for possession of his father's land, of which the defendant is in possession, and asserts that he is the mortgagee under the following deeds:—

	Rs.
Mortgage of 23rd March 1904 ...	2,180
Additional charge, deed, 23rd June 1906 ...	500
Total ...	2,680

The first Court decreed for the plaintiff on the condition that he should pay Rs. 1,228 to the defendant, and the Divisional Court merely enhanced the figure to Rs. 1,237-4-6.

In further appeal the first argument is that though at the time of the mortgage of 1904 one Sunder, a collateral, was alive the plaintiff could not maintain this suit, inasmuch as he was born after the execution of the 1904 mortgage-deed, unless he could show that the land alienated was ancestral to Sunder, and it was argued that this had not been definitely established.

This objection, however, must be overruled, for it was not taken in either of the Courts below; on the contrary the plaint alleged that the land was ancestral and the collaterals who were alive at the time had not ratified the alienation. Defendant's reply was that they had ratified it, thereby admitting that they were competent to challenge it. We cannot permit the plaintiff to be surprised on this point now.

The main elements of the mortgage-money of March 1904 are the following:—

(1) A mortgage by plaintiff's father Badna, dated 19th June 1897, for Rs. 500.

(2) A mortgage by plaintiff's uncle Basawa of the same date for Rs 500.

(3) Bond, dated 11th March 1904, for Rs. 974-12. As for the first two mortgages (of 1897) we must hold, adopting the principle laid down in *Khiali Ram* v. *Gulab Khan* (1) that they are screened by time from attack. Sunder could have attacked them within 12 years of 1897 and as time began to run against Sunder in 1897, it continued its flow against the plaintiff who derived no advantage from his minority Accordingly we hold that this sum of Rs. 1,000 must stand.

As for the item of Rs. 974-12 it has been rejected *in toto* by the Courts below, on the grounds that the *bahi* entries are

(1) 11 Ind. Cas. 392; 33 P. R. 1911; 70 P. W. R. 1908; 190 P. L. R. 1911.

unreliable, and many of the items are on account of interest; others are for litigation.

The appellant-defendant contends th t the *bahi* entries are genuine, that the indebtedness of plaintiff's father and uncle was gradual, that whatever allegations are now made against the character of plaintiff's father Badna, there are none against that of his uncle Wasawa, who had also mortgaged his land in 1897 and even earlier than that date, that most of the consideration for the bond of Rs. 974 consisted of interest and that Badna who h d altogether four sons had no reason to waste his estate.

Plaintiff-respondent has put in a cross-appeal in which he urges that neither necessity nor consideration for any of the mortgages is proved. His Counsel has in vain tried to distinguish *Khiali Ram* v. *Gulab Khan* (1) from the present case in any material point

He points to the oral evidence that Badna was at enmity with Sunder and threatened to waste his property in order to defeat Sunder's expectations.

To this evidence we attach little importance in view of the fact that Badna from time to time had four sons in whose interest he was likely to preserve his estate.

One son Arjan died only a few days before the mortgage in dispute and Badna had clearly no idea of dying without issue, for he married a second wife and by her had the pl intiff, who was born a day after his father's death.

It remains to consider the items which form the grand total of Rs. 974-12.

The dealings start in *Sambat* 1956=1899 with a bond for Rs. 198, now said to have been taken for bullocks. The remaining items consist almost entirely of interest on the account and interest on the mortgages of 1897. In 1902 come some items aggregating about Rs. 150 for a law suit and the rest consists of interest.

It appears in fact that after 1897 the defendant-appellant lent very little money to Badna, that Badna instead of paying rent for which as the mortgagee's tenant he was liable enjoyed the whole produce and allowed the rent to mount up against him. The mortgagee could not recover that rent without provoking a breach and that course he was not bound to adopt.

It is true that after the death of Wasawa in 1900-01 Badna had the whole estate to himself, but we have seen that even the unencumbered estate was insufficient to keep the brothers out of the hands of the money-lenders and judging by the land revenue assessed on the land, it is hard to believe that the brothers were ever in comfortable circumstances.

For these reasons we hold that there is no clear proof of reckless extravagance or of immoral waste on the part of Badna and the items representing rents and interest thereon must stand good.

Similarly the items advanced to him for his defence in the criminal case must be passed, as also those for payment of revenue, but cash advances for which no necessity is specified might well be rejected were they taken by Badna alone. But as the learned Divisional Judge shows, almost all the cash advances included in this bond of Rs. 974-12 were made to Badna and Wasawa jointly.

As for the second mortgage for Rs.500 of 23rd June 1906, we there see the same influences in operation. The main item of Rs. 312-12 is made up of numerous petty cash advances, swollen by interest of Rs. 100 for rent and of two minor items.

No doubt a good manager would have paid his rent out of produce, but the brothers evidently were not good managers; they enjoyed their estate and made no attempt to stem the rising tide of debt, but deliberate extravagance and waste are not established.

For these reasons we hold that no good cause has been shown for interfering with the mortgages. Accordingly we accept the defendant's appeal and set aside the decree of the Court below and dismiss the plaintiff's suit, but having regard to the fact that plaintiff is a minor and that defendant has made a very good thing out of his dealings with plaintiff's family we direct parties to bear their own costs throughout.

Appeal accepted.

MAHARAJAH OF VIZIANAGARAM *v.* NARASINGA RAO.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 165 OF 1913.

March 12, 1915.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Tyabji.

Sri RAJAH CHITTI BABU VIZIARAMA GAJAPATI RAJU *alias* POOSAPATI VIZIARAMA GAJAPATHI RAJU, *Maharajah* MANYASULTAN BAHADUR OF VIZIANAGARAM, BY HIS *Muktyar*, G. APPAYYA—DEFENDANT—APPELLANT

versus

D. V. NARASINGA RAO—PLAINTIFF—RESPONDENT.

Legal Practitioners Act (XVIII of 1879), *ss.* 27, 28—*Legal Practitioner, fees recoverable by, from his own client—Suit for remuneration for work done—Discretion of trying Court not to be interfered with—"Costs of suit," meaning of—Limitation Act (IX of* 1908), *Sch. I, Art.* 84.

The Legal Practitioners Act does not impose any limitation upon the fees which are recoverable by practitioners from their own clients. [p. 763, col. 2.]

Section 27 of the Act refers only to the fee which is to be paid to the adversary Pleader. [p. 765, col. 1.]

Where the fees are not settled before hand, and the suit is one for remuneration for work done, the Court in assessing the amount, performs the functions of the Taxing Officer in England and when he assesses the remuneration at a certain amount, having regard to the local conditions and the nature and responsibility of the work done by the Pleader, an Appellate Court should be very slow to interfere with his discretion. [p. 763, col. 2: p. 764, col. 1.]

Such a suit is governed by Article 84, Schedule I, of the Limitation Act (IX of 1908). The word "costs" in that Article is not confined to "out of pocket expenses alone" of the Practitioner but includes also the remuneration payable to him. [p. 763, col. 2; p. 765, col. 2.]

Appeal against the decree of the Court of the Temporary Subordinate Judge of Vizagapatam, in Original Suit No. 21 of 1911.

Mr. *S. Srinivasa Aiyangar*, for the Appellant

Messrs. *S. T. Srinivasa Gopalachariar* and *T. R. Ramachandra Aiyar*, for the Respondents.

JUDGMENT.

WALLIS, C. J.—This is an appeal from the decree of the Subordinate Judge of Vizagapatam in a suit brought by the plaintiff, D. V. Narasinga Rao, a Vakil, to recover remuneration for work done by him for the defendant, the Maharaja of Vizayanagaram, in connection with the suits questioning the defendant's right to the *zemindari* and also for other miscellaneous work about which there is no question in this appeal.

Mr. Srinivasa Aiyangar for the defendant-appellant has questioned the amount awarded by the Subordinate Judge. Two legal objections were raised but not very seriously pressed. It was said that the plaintiff could not claim remuneration at a higher scale than is made payable by a party in respect of his adversary's Advocate, Pleader, Vakil or Attorney under the Legal Practitioners Act. Both on the language of the Act and on the decisions of this Court it seems to me impossible to contend that the Legal Practitioners Act imposes any limitation upon the fees which are recoverable by practitioners from their own clients. It is not alleged that there was any agreement such as is contemplated by section 28 of the Act between the plaintiff and the defendant: and in the absence of such an agreement the Court has to discharge what is the function of the Taxing Officer in suits in the English Courts and to decide what is a fair and reasonable remuneration for the work done.

Next, it was suggested that the suit was barred by limitation. The contention was that the case was not governed by Article 84 which relates to suits "by an Attorney or Vakil for his costs of a suit or a particular business, there being no express agreement as to the time when such costs are to be paid," and that the present claim could not be said to be a claim for costs of a suit, because it was said the expression 'costs of a suit' must be limited to out of pocket expenses incurred by the Practitioner. We do not think that there is any foundation for that contention. It must be taken, therefore, that the suit was not barred by limitation.

Now the plaintiff has undoubtedly recovered a very large amount by the decree of the Subordinate Judge; but it must be remembered at the same time that the suit was a very big one, one of the most important suits that have been tried in the Presidency for many years, and the plaintiff's services were spread over a period of about five years. Before going into this question I think that, following the practice of the English Courts as regards decisions

of the Taxing Officer, we ought to be slow to interfere with the decision arrived at by the Subordinate Judge with his knowledge of local conditions and after a careful examination of all the circumstances of the case. The plaintiff was Standing Vakil to the estate and would appear to have played a very active, if not a leading, part in the earlier preparation of the cases: most of the work falling upon him being such as would fall upon an Attorney where one was engaged at the time.

On the 12th October 1906 the plaintiff presented a bill (Exhibit A) for 650 days' work from the beginning of the suit until the 3rd of October 1906. He had been to Calcutta and various parts of India in connection with the case and he claimed to be paid Rs. 50 a day for work outside the District and Rs. 30 a day for work done in the District and Mr. Elwin, a member of the Civil Service who was then managing the affairs of the Estate under a power-of-attorney from the Rajah, decided that Rs. 40 a day on the average seemed fair (Exhibit A1). Mr. Elwin has been called and has confirmed his opinion in the box. He says: "I thought that amount was reasonable, considering the amount of work done by plaintiff and the places such as Madras, Benares, Hyderabad and Calcutta at which he had worked. . . . . I thought that that was a reasonable sum to be paid to him. . . . . I took into my consideration the fact that the plaintiff had to work at such distant places as Benares, Calcutta, Madras, etc. I would not have allowed such a high rate had he not worked at such distant places. On receipt of the plaintiff's petition I ordered the Superintendent of the Law Branch to verify the correctness of the figures" as to the number of days. There is also other evidence as to the very varied and responsible character of the work which the plaintiff had to do in the earlier stages of the case and we are not prepared to differ from the Subordinate Judge in accepting the amount which Mr. Elwin, who was the responsible authority in charge of the Estate, allowed.

The plaintiff also claims under Exhibit F for 270 more days' work. It says: "For 225 days as mentioned in my bill dated 3rd September 1907 Rs. 9,000." Unfortunately the defendant has not been able to produce the bill which gives the particulars of those days; but the evidence is that the plaintiff worked very hard indeed and we see no reason to differ from the Subordinate Judge, who has accepted this figure. It has also to be observed that in the written statement the defendant did not question the number of days in respect of what the plaintiff claimed, except in so far as the claim was for 270 days instead of 263 days; and the difference of seven days is accounted for by the fact that the bill, Exhibit A, was only made up to the 3rd of October while the bill was signed on the 10th October and Mr. Elwin, therefore, appears to have regarded it curiously as being a bill for services rendered up to the 10th October, whereas it is only a bill for services rendered upto the 3rd October. But there is nothing in the defendant's written statement to suggest that the defendant questioned the fact that he had really put in 263 days' work after the period covered by Exhibit A. Mr. Srinavasa Aiyangar's argument proceeded on the basis that this part of the claim was only for days during which the hearing was going on; and he showed that he has claimed in this bill for some 68 days when there was no hearing. He said that there were 68 days' hearing prior to Exhibit A, and that only left 169 days of the hearing for Exhibit F; but the fallacy appears to consist in the assumption that the plaintiff was only claiming remuneration for days when the hearing was going on, whereas according to his evidence he was equally busy, perhaps more busy, on days when it was not. So far as the period not covered by the bill which is missing is concerned, he gives the dates in September, November and December 1907 and May 1908 for which he claimed remuneration. On the pleadings and the evidence we are not prepared to differ from the conclusion of the Subordinate Judge that he was entitled to be remunerated for the number of days for which he claims.

There only remains the question whether the remuneration has been fixed on too high a scale; and as I have said, I think we ought to be slow to interfere in a matter of this kind with the conclusion which has been arrived at by the lower Court on a careful examination of all the

facts of the case. We have an order, Exhibit D, passed by Mr. Elwin in May 1907 when the trial had been interrupted by the vacation, saying that the plaintiff was to be in charge of the suit work at Waltair and supervise the work of the Vakils. This shows the important part that he was considered to play in the case from the point of view of the client. From the point of view of the Counsel we have the evidence of Mr. (now Sir William) Garth, one of the leaders of the Calcutta Bar, who speaks to the important services rendered by the plaintiff in connection with the case. It was the plaintiff who first went to Calcutta to instruct Mr. Garth in the case and during the time when Mr. Garth was at Waltair when he was examining and cross-examining the witnesses, the plaintiff, he says, was constantly attending and instructing him. No doubt there were other Practitioners from Madras, both senior and junior, who played a more important part; but still I think upon the evidence there can be no doubt that the plaintiff did take a very active part. That is even admitted by some of the witnesses for the defence. One of them says that he worked so hard night and day that he ultimately knocked himself up and for two months was unable to attend to a case. Mr. Garth observes that the amount claimed in the bill would certainly not be said to be excessive in Bengal and that in a case like this an exceptionally high fee might naturally be looked for. In these circumstances I am not prepared to differ from the conclusion at which the lower Court has arrived; and I would dismiss the appeal with costs.

TYABJI, J.—I agree and have very little to add. The first point taken by Mr. Srinivasa Aiyangar is that section 27 of the Legal Practitioners Act ought to be a guide in fixing the remuneration of the plaintiff in the suit. But that section refers to the fee which is to be paid to the adversary's Pleader, and that has no real bearing on the question we have to decide.

The next argument was that the suit is barred under the Limitation Act. The Subordinate Judge has held against this contention on the ground that Article 84 applies. As against this it is argued that the "costs of any particular business" to which the Article refers cannot include such costs as the plaintiff claims. This argument is quite untenable.

In assessing the costs the learned Judge has allowed a certain sum for each day on which the plaintiff worked. It was not suggested that this method is necessarily erroneous or was not open to the Judge; nor was any alteration (such as payment for each item of work done) suggested as possible in the circumstances of the present case.

The arguments of Mr. Srinivasa Aiyangar were confined to the contentions that the lower Court allowed remuneration for too many days and at too high a rate for each day.

The learned Judge, it was argued, was wrong in proceeding on the basis that the Pleader had worked for 650 *plus* 270 days, and that he had worked really only for 650 *plus* 169 days. As to this the only objection taken in the defendant's written statement was that the plaintiff worked for seven days less than he claimed; and the argument of Mr. Srinivasa Aiyangar, tending to show that the plaintiff worked for 101 days less than he claimed cannot be permitted at this stage. But in addition to that fact, the facts referred to by the learned Chief Justice are sufficient to show that the plaintiff did work for the total number of days alleged in the plaint.

Then as regards remuneration for each day's work that, of course, is in the discretion of the officer who has to decide upon the fees which Legal Practitioners are entitled to claim. The discretion has in the present case been exercised after a very careful consideration of all the evidence of the nature of the work done and of the qualifications of the plaintiff. The plaintiff did a great deal of work in preparing the suits in question for the hearing, and his remuneration ought to be fixed with reference to the magnitude of the subject-matter of the suits and the difficulties involved in the work that he did. The fees paid to the Counsel and other Pleaders engaged may well be taken into consideration. Bearing all this in mind it seems to me that for the reasons which have just been given and which I need not repeat, we may well accept the scale of Rs. 40 a day fixed by the Subordinate Judge.

I, therefore, agree that the appeal should be dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2389 OF 1913.

April 28, 1915.

Present:—Mr. Justice Rattigan.

HARJI MAL—PLAINTIFF—APPELLANT

versus

THE MUNICIPAL COMMITTEE, DELHI—DEFENDANT—RESPONDENT.

Punjab Municipal Act (XX of 1891), s. 195—Building erected in contravention of sanction—Notice to demolish building—Injunction against Municipality—Right of Court to interfere.

The plaintiff sued for an injunction against the Municipality to restrain them from interfering with the *chabutra* erected by the plaintiff. The *chabutra* was admittedly constructed by the plaintiff in contravention of the sanction of the Municipality. It was argued for the plaintiff that the building as erected was in point of fact more advantageous to the public than would be the building as sanctioned. The contention was disallowed and the suit was dismissed:

Held, that no second appeal lay in the case and the Courts were not competent to entertain the contention of the plaintiff.

Second appeal from an order of the Additional Divisional Judge, Delhi, dated the 11th November 1913, affirming that of the Subordinate Judge, second Class, Delhi, dated the 26th August 1913, dismissing the claim.

Mr. *Gokal Chand Narang*, for the Appellant.

Mr. *Santanam*, for the Respondent.

JUDGMENT.—After hearing Mr. Gokal Chand Narang for the appellant and Mr. Santanam for the respondent in reply, I must accept the latter's contention that no appeal can be entertained in the present case. The Additional Judge in his order, dated the 11th November 1913, points out that the action of the Municipal Committee is very unreasonable and that the building as erected by plaintiff is in point of fact more advantageous to the public than would be the building as sanctioned. He, however, has been compelled to dismiss plaintiff's suit on the ground that it has been built in contravention of the sanction obtained by him. I agree with the learned Judge that the Courts have no power to interfere in a case of this kind. The plaintiff knew quite well what he was authorized to build and in erecting the *chabutra*, as it now stands, he deliberatly took the risk of the Committee taking action against him under section 195 of the Municipal Act, and if he has been put to any loss he has himself only to blame. I must accordingly dismiss the appeal but I leave the parties to bear their own costs in this Court.

I may, perhaps, venture before concluding to express the hope that some reasonable arrangement will be come to between the parties and that the Committee may see their way to establishing their rights without putting plaintiff to the very heavy loss which he would apparently suffer if compelled to pull down the building.

Appeal dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1507 OF 1912.

April 17, 1915.

Present:—Sir Alfred Kensington, KT., Chief Judge, and Mr. Justice Shadi Lal.

KHILANDA RAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

NANDA RAM—PLAINTIFF—RESPONDENT.

*Custom—Succession—*Dakhna Aroras *of Multan—Sons—Eldest son entitled to extra share—Partition suit—Value of suit—Value of share of plaintiff.*

Among *Dakhna Aroras* of Multan there is a recognized custom as to giving of 1¼th share of ancestral immoveable property to the eldest son. [p. 767, col. 2.]

In a suit by a plaintiff for his share in joint family property the value of suit for purposes of jurisdiction is the value of the property claimed and not the value of the whole estate of which partition is prayed for. [p. 767, col. 1.]

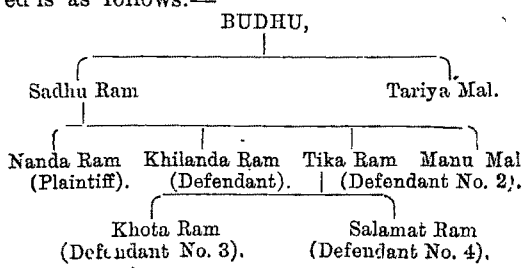
First appeal from the decree of the District Judge, Multan, dated the 5th August 1912 decreeing the claim

Mr. *Nand Lal*, for the Appellants.

Mr. *L. M. Datta*, for the Respondent.

JUDGMENT.—To make the very brief judgment of the lower Court intelligible various corrections of copyist's errors have to be made in the judgment as printed.

The pedigree of the *Arora* family concerned is as follows:—



KHILANDA RAM *v.* NANDA RAM.

The suit is between the members of Sadhu Ram's branch only. From plaintiff's statement at page 39 of the paper-book it appears that the common ancestor Budhu was a petty shop-keeper owning no land. After his death some land was acquired by his two sons jointly, and when Tariya Mal separated from his brother he was given a full half share of the estate as it then stood. Sadhu Ram died some 25 or 30 years ago leaving an unspecified area of land and undetailed personal property. His sons have till recently remained joint and have apparently prospered in the world, adding considerably to their paternal estate. They have now fallen out among themselves owing to some guardianship and partition proceedings and plaintiff has come into Court with a demand that he should be declared entitled to a 6/17ths share in the joint family estate of all kinds including land, houses, cash, moveables of all sorts and debts due to the firm, valuing the whole at Rs. 20,000.

The suit has been absurdly overvalued for jurisdiction purposes, as Rs. 20,000 is admittedly the assumed value of the whole estate. The valuation should have been at most Rs. 6,000 in round figures as representing plaintiff's alleged share. The plaint was at no time properly scrutinised in respect of details of the claim (see the District Judge's order of 1st July 1912 at page 33), while the absence of the prescribed extracts from Revenue Records makes it impossible to estimate what land or houses are included in the claim. The District Judge has avoided all difficulty by giving a decree to plaintiff in general terms for five shares instead of four "on partition of the ancestral property", but in framing the decree he has omitted to notice that even in respect of land the suit covers new acquisitions by plaintiff alone or by plaintiff and his brothers in equal shares as by the documents at pages 18, 17 and 22 to 33. The result is (see ground 10 of appeal) that defendants have been wrongly made liable for Pleader's fee calculated on Rs. 20,000 and if the claim had been properly sifted at the start it, would probably have been found that comparatively little property, much under Rs. 5,000 in value, was really in dispute, and the parties would have been saved the expense of coming to the Chief Court on first appeal.

We see no reason to doubt the correctness of the finding that among these *Dakhna Aroras* there is a recognised custom giving a $1\frac{1}{4}$th share of family property to the eldest son, as by remarks at pages 5 and 7 of the Multan Customary Law Code of 1901. The original *riwaj-i-am* entry in support of this custom (page 3 of the paper-book) makes it quite clear, however, that the custom covers ancestral property only. The *riwaj-i-am* does not profess to deal with moveable property at all, or with immoveable property other than ancestral. So far as we can judge from the incomplete record before us, plaintiff is already the recorded owner of $1\frac{1}{4}$th share in such ancestral land as there may be and he has given no detail at all of house property. There is some doubt whether he is entitled to anything more than he has already received and it may well be that the entire suit was either unnecessary or bad. The District Judge may possibly have intended his decree to mean this, but the terms of that decree are so vague that the defendants are entitled to some modification of the decree as framed.

We desire to make it quite clear that the plaintiff has failed to establish any sort of claim to a larger share than his brothers in either (1) house property, (2) land other than the area inherited from Sadhu Ram, or (3) moveables of any description including cash and debts due to the joint family.

The appeal is allowed to this extent only that in place of the decree given by the lower Court plaintiff is only declared entitled to a 5/17ths share in such land as may have been inherited from Sadhu Ram. The suit is dismissed in respect of houses, land acquired since Sadhu Ram's death and all moveable property covered by the suit. In all the property regarding which his suit is dismissed, he is entitled on partition to the same $\frac{1}{4}$th share as each of his brothers and to nothing more.

The whole dispute appears to have been both foolish and comparatively trivial and both sides are to blame for the litigation.

The parties will, therefore, pay their own cots throughout.

Appeal allowed.

ARUNACHALLAM PILLAY *v.* IYAMA.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL No. 52 OF 1915.

May 27, 1915.

Present:—Mr. Justice Young.

ARUNACHALLAM PILLAY—APPELLANT

versus

IYAMA—RESPONDENT.

Guardians and Wards Act (VIII of 1890)—Custody of child, suit for, maintainability of—Jurisdiction, objection as to, when taken.

The Guardians and Wards Act (VIII of 1890) forbids proceedings being taken in the ordinary way touching the guardianship of infants A suit for custody of a child must be brought under the Guardians and Wards Act which Act gives jurisdiction to the District Court over minors ordinarily resident in the District.

An objection as to jurisdiction can be raised at any stage of the proceedings.

Mrs. Annie Besant v. *G. Narayaniah*, 24 Ind. Cas. 290; 27 M. L. J. 30; 18 C.W.N. 1089; 1 L. W. 520; (1914) M. W. N. 585; 16 M. L. T. 165; 20 C. L. J. 253; 16 Bom. L. R. 625; 12 A. L. J. 1155, overruled.

Mr. *S. M. Bose*, for the Appellant.

Mr. *N. S. Aiyer*, for the Respondent.

JUDGMENT.—This was a suit brought by a father for the custody of his child. He succeeded in the Court of the first instance but failed in first appeal. The suit was not brought under the Guardians and Wards Act and the respondent, who is the mother of the child, now and for the first time takes the objection that this should have been done and that the present suit must be dismissed. The question whether this Act forbids the taking of proceedings in the ordinary way has been the subject of considerable discussion. Vide *Sharifa* v. *Munekhan* (1), *Sham Lal* v. *Bindo* (2), *Krishna* v. *Reade* (3) and *Ghasita* v. *Wazira* (4). A Full Bench of this Court has answered the question in the negative, *Ma Shwe Ge* v. *Maung Shwe Pan* (5), and the only question is whether this authority is overruled by the decision of the Privy Council in *Mrs. Annie Besant* v. *G. Narayaniah* (6) decided last year and reported in 24 Ind. Cas. at page 290. There a father sued in the District Court to recover the custody of his children from the person—defendant—to whom he had delegated his privileges of guardianship. The suit was not under the Guardians and Wards Act and was transferred for hearing to the High Court under the Letters Patent by consent. The question of jurisdiction was hardly contested in the lower Court, but was seriously questioned in appeal where the Chief Justice and Oldfield, J., in preliminary judgments specially devoted to the question held that the Guardians and Wards Act did not prohibit a suit being brought under the ordinary law, and concurred with the lower Court in declaring the plaintiff to be guardian and awarding to him the custody of his children

The defendant, however, appealed, to the Privy Council, which held that the District Court had no jurisdiction over infants save such as was conferred by the Guardians and Wards Act and that Act conferred its jurisdiction over minors ordinaril yresident in the district, that though the suit was transferred to the High Court yet under such circumstances the powers of the High Court would seem to be those of the District Court and also that by bringing a suit *inter partes*, the plaintiff had not followed the procedure prescribed by the Act for proceedings in a District Court touching the guardianship of the infants They accordingly dismissed the plaintiff's suit without prejudice to any application he might think fit to make to the High Court in England, where the children were then resident and which their Lordships held to be proper *forum* in which any application should be made.

In my opinion this case overrules the decision in *Ma Shwe Ge's* case (5) and I must that the proceedings should have been taken under the Guardians and Wards Act. I am also of opinion that as the point affects jurisdiction it can be raised at any time. I, therefore, dismiss the appeal but make no order as to costs, inasmuch as the objection has been taken so late.

Appeal dismissed.

(1) 25 B. 574; 3 Bom. L. R. 167.
(2) 26 A. 594; A. W. N. (1902) 135; 1 A. L. J. 266.
(3) 9 M. 31.
(4) 10 P. R. 1897.
(5) 2 L. B. R. 140.
(6) 24 Ind. Cas. 290; 27 M. L. J. 30; 18 C. W. N. 1089; 1 L. W. 520; (1914) M. W. N. 585; 16 M. L. T. 165; 20 C. L. J. 253; 16 Bom. L. R. 625; 12 A. L. T. 1155.

SANGAT SINGH *v.* UTTAM SINGH.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1483 OF 1913.

March 31, 1915.

Present:—Mr. Justice Shadi Lal and Mr. Justice LeRossignol.

SANGAT SINGH, MINOR, THROUGH *Bawa* BIR SINGH—PLAINTIFF—APPELLANT

versus

UTTAM SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of plaint—Minor plaintiff—Guardian and ward—Suit not to be dismissed on mere technicality.

The Divisional Court on appeal dismissed a minor plaintiff's suit on the ground that the plaint disclosed no cause of action but it appeared that the plaint was only technically not properly drawn up:

Held, that under the circumstances of the case the plaint should be allowed to be amended.

Second appeal from the decree of the Officiating Divisional Judge, Hoshiarpur, dated the 15th April 1913, reversing that of the Munsif, first Class, Hoshiarpur, dated the 31st October 1912, decreeing the claim.

Pandit *Ram Bhaj Datta*, for the Appellant.

Mr. *Nand Lal*, for the Respondents.

JUDGMENT.—Respondents' Counsel raises two preliminary objections: (1) that no second appeal lies, (2) that the appeal abates as one of the respondents has died. We overrule both these objections because this appeal turns on the interpretation of the plaint and the representatives of Uttam Singh deceased appear to be his brothers who are already parties to the suit.

The suit was brought on the allegations that plaintiff was owed Rs. 471 by defendants Nos. 4 to 6, who executed a mortgage for Rs. 1,000 in favour of Ishar Singh, brother of defendants Nos. 1 to 3 who, as Ishar Singh is now dead, are his heirs and representatives; that Rs. 471 out of the Rs. 1,000 was left in deposit with Ishar Singh for payment to plaintiff, but he was never paid. He consequently sued for Rs. 471 *plus* Rs. 315-8 interest.

The defendants Nos. 1 to 3 pleaded that there was no contract between themselves and the plaintiff, but in any case the money had been paid to plaintiff.

The first Court found these two pleas self-contradictory, that payment was not proved and decreed for plaintiff against defendants Nos. 1 to 3.

The Divisional Judge has dismissed the suit, not on the merits but on the preliminary technical point that the plaint disclosed no cause of action against the defendants Nos. 1 to 3.

The plaint certainly mentions that the mortgagee admitted his debt, but it does not state in clear unmistakeable terms that he admitted it, *i. e.*, assured responsibility for it to the plaintiff and stepped into the original debtors' shoes in regard to plaintiff.

His Counsel stated to the Divisional Judge that he had drafted the plaint and intended to aver that the mortgagee at the time of the mortgage had orally undertaken to pay the plaintiff.

This matter was not gone into in the first Court. Now the fact that the plaintiff's guardian—the plaintiff is a minor—was present at the time of execution of the mortgage and signed the mortgage as a witness, lends support to the allegation of a separate oral agreement between plaintiff and the mortgagee.

Consequently and also in view of the fact that plaintiff is a minor and that his just claim should not be defeated by a technicality, we think that he should be given an opportunity of amending his plaint, so as to make it clear that the mortgagee orally agreed to pay plaintiff's claim.

We accordingly accept the appeal and remand the case to the Divisional (now District) Judge for a decision on the merits, *viz.*, whether the mortgagee orally agreed to pay plaintiff, and, if so, whether the debt has been paid. It will be necessary for the District Judge to remand the case to the first Court under Order XLI, rule 25, as there was neither issue nor evidence on the point of oral agreement.

The parties shall bear their own costs in this appeal.

Appeal accepted; Case remanded.

JAGAN NATH *v.* GOPI CHAND.

PUNJAB CHIEF COURT.

CIVIL REVISION APPLICATION No. 18 OF 1914.

March 5, 1915.

Present:—Mr. Justice Shadi Lal.

JAGAN NATH—PETITIONER

versus

GOPI CHAND, MANAGING DIRECTOR OF THE POPULAR INSURANCE CO., LTD., RAWALPINDI—RESPONDENT.

Companies Act (VII of 1913), s. 38—Rectification of register—Application made late—Discretion.

A person who claims to have been misled by fraud or false representation into taking shares in a Company should raise the objection without delay.

The power to take summary action under section 38 of the Companies Act, 1913, is discretionary.

Application under section 38 of Act VII of 1913.

Lala *Nihal Chand*, for the Petitioner.

Mr. *Nand Lal*, for the Respondent.

JUDGMENT.—This is an application under section 38 of the Indian Companies Act, VII of 1913, for the rectification of the register of the Popular Insurance Company, Limited, Rawalpindi, on the ground that the applicant was induced to take shares by the fraud practised upon him by the Managing Director, Gopi Chand. It is clear that the alleged fraud was committed in November 1912 and the present application was made in December 1914. It seems to me that the issue, whether the fraud was committed or not, involves the determination of complex questions which affect not only the party to this application, but also another person who originally held the shares which were transferred to the applicant.

Now, it is clear that the remedy provided by section 38 is a discretionary one: "If this legal title is clear, and there is no difficult question of fact to be investigated, the Court will rectify the register without directing an action to be brought; but the Court has a discretion as to whether it will interfere summarily under the Act or direct an action, and will be guided by the nature of the facts in dispute and by the desirability of having them investigated by a Jury. And if there is an equity against the applicant the Court will probably not exercise its power under this section." *Vide* Lindley, Volume I, page 167. The same principle is laid down in Halsbury's Laws of England,

CHENGA REDDI *v.* VASUDEVA REDDI.

Volume V, page 154: "The jurisdiction is practically unlimited, but discretionary. If, from its complexity or otherwise, the Court thinks that any case could be more satisfactorily dealt with in an action, the Court, without prejudice to the applicant's right to institute an action for rectification, will decline to make an order."

A person who claims to have been misled by fraud or false representation into taking shares in a Company should raise the objection at an early period. Having regard to the delay of two years and the complexity of the questions involved, I am of opinion that this is not a fit case for the exercise of my jurisdiction under section 38. The applicant has got his remedy by a regular suit, in which all the matters which he wants to urge before me can be properly enquired into I accordingly refuse the application but leave the parties to bear their own costs in this Court.

Application refused.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 161 OF 1913.

March 9, 1915.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

M. CHENGA REDDI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

VASUDEVA REDDI, MINOR, BY GUARDIAN NARASIMHA REDDI—DEFENDANT No. 2—RESPONDENT.

Hindu Law—Adoption—Testamentary direction to adopt a certain boy given to widow—Death of adoptee—Second adoption, whether valid.

A Hindu embodied in his Will a direction to his widow to adopt a certain boy and to put him in possession of all property at the end of her life. The widow did adopt the boy who, however, having died, she adopted another. The reversioners of the first adoptee sued to set aside the second adoption:

Held, Per *Sankaran Nair*, J.—(1) that the question whether the Will authorised a second adoption on the death of the first adoptee was one of intention to be gathered from the terms of the Will and the surrounding circumstances; [p 777, col. 2; p. 773, col. 1.]

An authority to adopt expressed in a Will must be construed with reference to the presumption that a Hindu testator always intends the perpetuation of his family and that authority to adopt one specific child should, in case of that child's death, be held to warrant the adoption of another unless there is

something in the Will itself to show that the testator did not desire any other adoption to be made; [p. 774, col. 2.]

Veerapermall Pillay v. *Narain Pillay*, 1 Strange's Notes of Cases 78 at p. 104; 5 Ind. Dec. (o. s.) 41; *Lakshmibai* v. *Rajaji*, 22 B. 996; *Suryanarayana* v. *Venkataramana*, 26 M. 681; *Suryanarayana* v. *Venkataramana*, 29 M. 382; 10 C. W. N. 921; 4 C. L. J. 171; 16 M. L. J. 276; 1 M. L. T. 260; 8 Bom. L. R. 700; 3 A. L. J. 702; 33 I. A. 145; *Ramasami Aiyan* v. *Venkata Ramaiyan*, 6 I. A. 196; 5 C. L. R. 347; 2 M. 91 (P. C.); 3 Shome L. R. 39; 3 Ind. Jur. 472; 4 Sar. P. C. J. 42; 3 Suth. P. C. J. 663, followed.

Per *Oldfield*, J. (*dissenting*)—A Hindu testator who authorises an adoption generally must be presumed to do so with the primary intention that his widow shall secure his posthumous representation by an adopted son and make successive adoptions until that object is secured. [p. 776, col. 1.]

Where there is a conflict between the general presumption as to a testator's intention and the explicit or implied restriction contained in the Will itself the proper course is to attempt to ascertain with reference to the testator's own words and without reference to the general presumption whether he meant to restrict the authority he was conferring; and to have recourse to that presumption only after such attempt has failed. [p. 777, col. 1.]

Where the terms of the Will are clear and express it is not open to Court to add to those terms. [p. 777, col. 2.]

Veerapermall Pillay v. *Narain Pillay*, 1 Strange's Notes of Cases, 78 at p. 104; 5 Ind. Dec. (o. s.) 41; *Lakshmibai* v. *Rajaji*, 22 B. 996; *Suryanarayana* v. *Venkataramana*, 26 M. 681; *Suryananarayana* v. *Venkataramana*, 29 M. 382; 10 C. W. N. 921; 4 C. L. J. 171; 16 M. L. J. 276; 1 M. L. T. 260; 8 Bom. L. R. 700; 3 A. L. J. 702 (P. C.); 33 I. A. 145, distinguished.

Surendro Keshub Roy v. *Doorga Soondery Dossee*, 19 C. 513 at p. 534; 19 I. A. 108; *Amrito Lal Dutt* v. *Surnomoye Dasi*, 27 C. 996; 27 I. A. 128; 4 C. W. N. 549; *Venkata Narasimha* v. *Parthasarathy*, 23 Ind. Cas. 166; 37 M. 199; (1914) M. W. N. 299; 12 A. L. J. 315; 18 C. W. N. 554; 26 M. L. J. 411; 15 M. L. T. 285; 16 Bom. L. R. 328, followed.

Where the Will contains a provision that the estate should pass on the widow's death to the adopted son and does not at the same time make a provision as to its succession on the death of the adopted son, it is clear that the testator was either indifferent or content to leave his widow to adopt with the consent of the *sapindas*. An intention to confer on the widow, authority to make successive adoptions cannot be inferred from that act of his. [p. 778, col. 1.]

Appeal against the decree of the District Court of North Arcot, in Original Suit No. 3 of 1912 (Original Suit No. 3 of 1912, on the file of the Court of the Subordinate Judge of North Arcot).

FACTS.—The plaintiffs, reversioners to the estate of one Chenga Reddi, brought a suit in the District Court of North Arcot to set aside the adoption of the second defendant, Vasudeva Reddi, alleged to be made by the adoptive mother of the said Chenga Reddi, in accordance with the authority conferred on her by her husband by a Will. The Will, among other provisions, contained terms to the effect that he had two daughters, one of whom had two sons, and the other was the younger and likely to have more children. He wanted to adopt himself the second son of the eldest daughter, Chenga Reddi, but, as he was nearing death, he directed his wife to do so and pursuant to the terms of the said Will, the widow adopted Chenga Reddy, who subsequently died.

Twenty years after the widow, purporting to act under the said authority, adopted another boy who is the defendant in the suit. The suit is by the reversioners to the estate of the first adopted boy to set aside (the second) adoption.

The District Judge following the decision in *Suryanarayana* v. *Venkataramana* (1) dismissed the suit. This appeal is against that decree.

Dewan Bahadur *L. A. Govindraghava Aiyar* and Mr. *A. Ramachandra Aiyar*, for the Plaintiffs-Appellants, contended that (1) the direction was specific and did not indicate any primary intention followed by a second intention, but the Will indicated that the deceased intended to take that boy and that boy alone in adoption, and (2) what was contained was only a direction to the widow to take that boy alone in adoption and to act according to the directions given by the husband at the time of his death. He distinguished the present case from the Privy Council case in *Suryanarayana* v. *Venkataramana* (1) and cited in support of his contention a ruling of the Privy Council in *Surendra Nandan* v. *Sailaja Kant Das* (2), *Visalakshi Ammal* v. *Sivaramien* (3), *Mutsaddi Lal* v. *Kundan Lal* (4), *Venkata Narasimha* v. *Parthasarathy* (5).

Messrs. *T. R. Ramachandra Aiyar* and *N. Krishnamachariar*, for the Respondent, contended that (1) there was a distinction between the case where the authority to adopt

(1) 29 M. 382; 10 C. W. N. 921; 4 C. L. J. 171; 16 M. L. J. 276; 1 M. L. T. 260; 8 Bom. L. R. 700; 3 A. L. J. 702; 33 I. A. 145.

(2) 18 C. 385.

(3) 27 M. 577; 14 M. L. J. 310.

(4) 28 A. 377 (P. C.); 1 M. L. T. 39; 3 A. L. J. 246; 8 Bom. L. R. 371; 16 M. L. J. 174; 33 I. A. 55.

(5) 23 Ind. Cas. 166; (1914) M. W. N. 299; 12 A. L. J. 315; 18 C. W. N. 554; 26 M. L. J. 411; 15 M. L. T. 285; 16 Bom. L. R. 328; 37 M. 199.

takes the form of a power and a mere direction. In the former the widow is fettered by the condition imposed by the Will on her power, whereas in the case of direction, the primary intention must be borne in mind and effect should be given to the primary intentions of the testator, and the name of a particular boy to be adopted indicates his intentions but does not indicate a prohibition of further adoptions.

JUDGMENT.

SANKARAN NAIR, J.—The suit was brought by the plaintiffs as the reversioners of one Chenga Reddi, deceased, the admitted owner of the properties in suit, to set aside an adoption made by his adoptive mother Subbamma, the 1st defendant, to her deceased husband. The plaintiffs' case is that Subbamma was not authorized by her husband to make a second adoption. The District Judge of North Arcot dismissed the suit holding that she had been authorized. The plaintiffs appeal.

The authority is alleged to be given by a Will executed by the husband of the 1st defendant shortly before his death. The Will is in the following terms :—

"The Will dated the 8th *Avani* of *Vishu* (22nd August 1881) executed by one Mogili Reddigari Chenga Reddi of Thondanada village, Chandragiri Taluq, in favour of yourself Subbu, my wife, is as follows :—We have no male issue, but have only got (1) one elder daughter Subbamma and (2) one second daughter Chinna Subbamma, the said elder daughter having two sons and the second daughter one son and one female (issue). She may still give birth to more children. As I am certain that the disease of dropsy which I am now suffering from would grow worse and my last days are at hand and as, according to my intention, there is no time to adopt Chenga Reddy, the second son of my said elder daughter, you shall, after my demise, adopt the said boy and the particulars of direction you have to carry out in regard to the whole of my estate are as follows ; (here properties are described). You shall put the above-mentioned properties in the possession of the said adopted son at the end of your life-time (during your last moments). You know for the maintenance of my step-mother, Pedda Amma *alias* Chengamma, a *karar* (agreement) has been executed by her in October 1865 and she has been enjoying the lands, etc., which have been granted to her for maintenance for her whole life. She shall enjoy the said properties according to the terms of the said *karar*. As the oustandings due to me, amounts due to me under decrees, silver, gold and cash amount altogether to about Rs. 50,000 at present, you shall collect the said debts, keep the said properties in your possession, have the said adopted son in your care and protection and after, at the time of your death, considering the then circumstances and agreeably to the estate making such gifts as may be proper in favour of your two daughters and the (other grandsons) sons of your daughters. deliver the whole of the remaining estate to the said adopted son. This is the Will got written out of my free will by Chamala Munusamy."

After her husband's death the 1st defendant adopted Chenga Reddi, the second son of her elder daughter, Subbamma. He died and she has since adopted the 2nd defendant in the suit, who is the son's son of the younger daughter, Chinna Subbamma.

Now it is argued before us that there is a direction in the Will to adopt only Chenga Reddi; that nowhere is any authority expressly given to make a second adoption on his death; nor is there anything in the Will itself to imply such an authority.

It is also argued that it was the testator's intention, as expressed in the Will, to make the adoption himself and it was only his physical inability to do so that put off the adoption and that if he had adopted Chenga Reddi himself, there would have been no Will and there would have been no authority given.

It is further contended that the provision in the Will, that the widow, the 1st defendant, should surrender possession of the properties to the "said adopted son at the end of your life-time," shows that the testator did not contemplate the necessity of another adoption or, in other words, the contingency of the death of the adopted son and, therefore, no implied authority for a second adoption is to be found in the document. These arguments are of great weight.

On the other hand, it is contended that according to the rule of construction laid

down by the decisions of this Court and by the Judicial Committee of the Privy Council we are bound to uphold the adoption. It is argued that the testator having clearly expressed his desire that he should be represented by an adopted son and the widow having been authorized to adopt, effect must be given to his intention.

In the earliest case brought to our notice *Veerapermall Pillay* v. *Narain Pillay* (6), the authority was contained in the following words of the husband's Will: "If Ayya Pillai beget a son besides his present son you are to keep him to my lineage." Sir Thomas Strange affirmed the validity of the adoption made by the widow of another boy, holding that she was not bound to wait indefinitely.

It is argued by Mr. Govindaraghava Aiyar that there was another provision in that Will on which stress was laid by Sir Thomas Strange to show a primary intention on the part of the testator to be represented by an adopted son, and that Sir Thomas Strange said, with reference to that provision that it indicated an intention that the adoption should not be confined to any particular person or family and, therefore, he drew the inference that it was only a case of preference which the testator expressed that a son of Ayya Pillai should be adopted if available. This may be conceded but at the same time on reading the judgment there is no doubt that Sir Thomas Strange was of opinion that, if possible, effect should be given to the desire of the testator to be represented by a son. He said: "Of the advantages which, in the religious belief of the Natives, depend upon this mode of substitution where a man has no son of his own, their books are full; and yet, important as they are, we may readily imagine that the provision for it is frequently reserved for the chamber of disease, and the hour of dissolution, when pain and alarm often deprive us of the distinct use of every faculty, and leave us no power but that of expressing a general sentiment, or announcing a vague wish. * * * * * In such a state, will the law of the Hindu have best shown its wisdom in a matter upon which his happiness after death is supposed to depend, by requiring that, at the peril of his soul remaining in *put*, he shall specify a name which he cannot recollect, and declare a preference which it may be impossible for him at that moment to feel; or, by leaving it to the affectionate discretion of his surviving partner, consulting as it is her duty to do, with his nearest friends and relations, to substitute for him the person whom he would in all probability have himself preferred had he proceeded to adopt in his life-time, or had it occurred to him before his death to express a preference."

The next authority that is relied upon by the respondents' Pleader is the judgment of Farran, C. J., in *Lakshmibai* v. *Rajaji* (7). It was pointed out by the Chief Justice that it was common for a husband authorizing an adoption to specify the child he wishes to be taken and should that child die or be refused by his parents, the authority would still be held to warrant the adoption of another child, unless there is something in the Will itself to show that the husband did not desire any other adoption to be made. The ground of decision was stated to be that if a person desires an adoption and when he specifies the object he simply indicates a preference.

According to this view, the question for decision is not whether a husband only gives permission to his wife to adopt, leaving it entirely to her discretion to decide whether an adoption should be made or not, but whether he gives an imperative direction to her to adopt which she, as an obedient wife, was bound to obey. It was argued by the appellant's Pleader that this decision is not an authority to be followed in Madras because, in Bombay a widow is authorized to make an adoption without any authority from the husband and that the judgment must, therefore, be understood with reference to that rule of law. But it may be pointed out that this difference exists only when the husband is an undivided co-parcener and the reasoning of the Judge does not proceed on any such distinction. The case on which reliance is placed by the District Judge and by the Pleader for the respondents, is the judgment in *Suryanarayana* v. *Venkataramana* (8) confirmed by their Lordships of the Judicial Committee of the Privy Council in *Suryanarayana*

(6) 1 Strange's Notes of Cases 78 at p. 104; 5 Ind. Dec. (o. s.) 41.

(7) 22 B. 996.
(8) 26 M. 681.

v. *Venkataramana* (1). In that case the husband authorized his wife to adopt a son and died.. The widow adopted a son in pursuance of that authority but that son also died. The widow adopted a second time. It was held by the High Court that the husband's authority was not exhausted by the first adoption but held good for the second adoption also. In that case the authority was "in general terms requiring her to adopt so as to continue his line and to provide for his spiritual benefit." In that respect it differs from the case before us. There was no direction to adopt any particluar boy. But in delivering their judgment the learned Judges of this Court said: "We are of opinion that the husband's authority held good for the second adoption also. The object and purpose of the authority given by the husband was to perpetuate his family as well as to secure his spiritual benefit, and it would be unreasonable to hold that an accident such as the early death of the boy first adopted should be allowed to frustrate the fulfilment of his object and to preclude the widow from making another adoption in the absence of any legal impediment to her doing so. When the general intention of a Hindu to be represented by an adopted son is clear, as in this case, there seems no reason why effect should not be given to such intention, if it is possible to do so without contravening the law". And they refer to Ayya Pillia's case and the judgment in *Lakshmibai* v. *Rajaji* (7) already referred to. The learned Judges also relied upon Morley's Digest to show instances where a "widow makes a second adoption, on failure of the first by death, in fulfilment of a single injunction or authority of her husband, the object of such injunction being unattained unless the child live."

The learned Judges go even further and refer to a decision in *Ramasami Aiyan* v. *Venkata Ramaiyan* (9) as justifiying an adoption by a widow to carry out the husband's general intention, even where the husband did not directly give authority for the adoption. The judgment of their Lordships in *Ramasami Aiyan* v. *Venkata Ramaiyan* (9) does not, it appears to us, bear out the inference drawn by the learned Judges. There is no doubt, however, from this judgment that where the husband has clearly expressed his intention to be the perpetuation of the family and the securing of his spiritual benefit, the death of the boy first adopted should not stand in the way of the widow making another adoption if there is no legal impediment to her doing so. Of course any direction in the Will, express or implied, against a second adoption must be given effect to, and even if she is otherwise competent in law to make an adoption she cannot do it. This judgment was affirmed by their Lordships of the Privy Council. In their judgment they cite with approval the passage above extracted from the judgment of this Court. They refer with approval also to an expression of opinion by the Calcutta High Court that considering the religious efficacy that ensues from an adoption, a Court "should rather do its utmost to support it unless such adoption is clearly in excess or in breach of the power to make it," and in pointing out the limitations to the application of the rule, they refer to their own judgment in *Collector of Madura* v. *Moottoo Ramalinga Sethupathy* (10), that the authorities in favour of a widow's power to adopt with the assent of a kinsman proceed in a great measure upon the assumption *that his assent to this meritorious act is to be implied wherever he has not forbidden it*, and they proceed to indicate the circumstances in which such a prohibition by the husband may be inferred. They also express dissent from the view of the Calcutta High Court, that where the widow is directed to adopt a son she cannot adopt a second son if the first adopted son dies. The decision of the Calcutta High Court was based on the ground that as there was no permission to adopt one child after another the widow was not authorized to make a second adoption. There is little doubt that, in the opinion of their Lordships of the Privy Council, if the intention of the husband that he should be represented by an

(9) 6 I. A. 196; 5 C. L. R. 347; 2 M. 91; 3 Shome L. R. 39; 3 Ind. Jur. 472; 4 Sar. P. C. J. 42; 3 Suth. P. C. J. 663.

(10) 12 M. I. A. 397 at p. 443; 10 W. R. 17 (P. C.); 1 B. L. R. (P. C.) 1; 2 Suth. P. C. J. 135; 2 Sar. P. C. J. 361; 20 E. R. 389.

adopted son is clearly expressed in the Will, the adoption should be upheld unless there is anything in the Will to show that a second adoption should not be made.

In the case before us, there is very little doubt of the husband's general intention. He wanted to adopt a son himself and he could not carry out his intention on account of his inability to do so. He expresses his regret in the Will that they had no male issue. He told his wife that she must adopt her daughter's second son. The general intention, therefore, is perfectly clear. It is true that he did not contemplate the contingency of the adopted son's death. But it is not always that a testator likes to refer to such an inauspicious circumstance in a Will.

Is there anything, then, to imply an intention on the part of the husband against a second adoption? Having regard to the rules laid down by the Judicial Committee of the Privy Council in the passage in *Collector of Madura* v. *Mootoo Ramalinga Sethupathy* (10) extracted by their Lordships in their judgment in *Suryanarayana* v. *Venkataramana* (1), there is nothing in the disposition of his property or in the circumstances of the family to support that contention. The Will shows a clear intention that the bulk of his property should be taken by one of his descendants, and a desire to benefit also his other descendants. If the widow had no power to make a second adoption, this intention will be clearly frustrated. In the absence of any second adoption the property would not go to his own natural heirs, that is to say, his daughters and daughters' sons, but it would go to the heirs of his first adopted son *i. e.*, the plaintiffs. An intention, therefore, to divert the property from his natural heirs *i. e.*, his daughters and their issue has to be imputed to the testator if we deny the widow any authority to make a second adoption. The probabilities are that if he had fully expressed his intentions he would have authorized the widow to make another selection from his descendants.

Mr. Govindaraghava Aiyar relied upon the opinion of the Judicial Committee in *Surendro Keshub Roy* v. *Doorga Soondery Dossee* (11) and *Amrito Lal Dutt* v. *Surnomoye Dasi* (12) to show that even where there is a direction by the husband to make an adoption the widow was held not entitled to carry out that intention. It is true that in the earlier case there was a direction to his two widows by the testator for each of them to adopt a son. But the adoption was held invalid on the ground that the Will authorized only the simultaneous adoption of two sons and no other course. It was impossible to carry out, therefore, the testator's wishes unless two sons were adopted and such adoption was held to be illegal. The question, therefore, did not turn upon the nature of the power given to a widow to adopt, but upon the illegality of the power itself. In the other case, *Amrito Lal Dutt* v. *Surnomoye Dasi* (12), a husband purported to authorize his widows, jointly with two other persons, to adopt a son to him. This authority was held to be illegal.

In these cases the widow could not make any adoption at all, the question whether she could make a second adoption did not arise. Nor is the decision of their Lordships of the Privy Council in the Nidadavole case, *Venkata Narasimha* v. *Parthasarathy* (5), in point. In their judgment the Judicial Committee said: "He (that is, the testator) does not direct that there shall be an adoption, as he would naturally have done had he wished in all events to secure that there should be a son to perform the due religious rites. He makes it depend on the opinion of his widows *whether* and when an adoption should take place." The principle herein laid down is certainly not in support of the appellant's contention.

For these reasons I am of opinion that the adoption is valid. But as my learned brother disagrees with me, the decree of the lower Court is confirmed and appeal dismissed with costs under section 98, Civil Procedure Code.

OLDFIELD, J.—The question is whether the Will, Exhibit A, authorised the testator's widow to adopt a second time after the boy, whose adoption was specifically permitted by it, had been adopted by her and had died. I differ from my learned brother on a question of this kind with great diffidence.

(11) 19 C. 513 at p. 534; 19 I. A. 108.

(12) 27 C. 996; 27 I. A. 128; 4 C. W. N. 549.

But I do not think that the answer should be in the affirmative.

It is unnecessary for me to follow him in the majority of his references to decisions. For I accept his conclusion that a Hindu testator, who authorises an adoption generally, must be presumed to do so with the primary intention that his widow shall secure his posthumous representation by an adopted son and make successive adoptions, until that object is secured. Here, however, the question is of a conflict between that presumption and what are alleged to be restrictions on the use of the widow's authority implied in the terms conveying it, especially in the specification of the boy to be adopted. Only two of the decisions deal directly with such a case. The others merely lay down the presumption already stated in cases in which the authority was expressed in general terms; they did not and had not to deal with restrictions on it and, therefore, afford very little guidance. The first of those two decisions, *Veerapermall Pillay* v. *Narain Pillay* (6), is no doubt based on the presumption and applied it, although the authority specified the boy to be adopted. It, however, really carries the argument very little further. For, *firstly*, the application of the presumption could in fact be supported by the language of one of the collateral dispositions of property in the Will. And *secondly*, the specification was of a boy unborn, though his mother was pregnant at the date of the Will; and, after the boy thus born to her had died some months before the testator and before his Will had effect, the latter did not change it, though the mother had no other issue. In the circumstances the Court might well decide, as it did, that the testator had expressed his desire for posthumous representation subject only to a restriction, which had to his knowledge become inoperative, and give effect to the presumption it had formulated. There was not at the date when the Will spoke or later any boy, specified by it, in existence; and the authority had to be treated as general or given no effect at all. The case, therefore, differed entirely from that before us, in which such a boy was available and the restriction on the authority could be and was given effect, when the latter had to be exercised.

The other case, in which an authority to adopt a specified boy was in question, *Lakshmibai* v. *Rajaji* (7), is important because, although it was decided in Bombay, it is referred to by this High Court and the Privy Council in *Suryanarayana* v. *Venkataramana* (1) and *Suryanarayana* v. *Venkataramana* (8) as supporting the conclusion therein. But the authority in the latter case indicated no particular person for adoption by name or otherwise and placed no restriction whatever on the wife's discretion, the decision turning in both Courts on the general validity of the presumption already referred to which (in the absence of restriction on the authority) was sufficient to support the adoption. *Lakshmibai* v. *Rajaji* (7) was, no doubt, a case in which an adoption of a boy other than the one specified was upheld, when the latter was not available. But, *firstly*, as in *Veerapermall Pillay* v. *Narain Pillay* (6) the authority, as restricted by the testator, turned out to be ineffectual through causes beyond the widow's control. And, *next*, the case must, in my opinion, be distinguished on a more general ground, that the law under administration was different. For, though the judgment contains nothing explicit on the point, the first portion of it is statedly based on the law of the Bombay Presidency; and the facts that no co-parceners were parties and that the adoption was disputed by a widow indicated that the deceased testator was a divided co-parcener, since on the contrary assumption the widow would, whether or no the adoption was valid, have been entitled only to a maintenance and have had no interest in disputing it. If the decision is, as must be supposed, one regarding the widow of an undivided co-parcener, the question would be her general and subsisting right to adopt and of its revival, when the restriction placed on it by her husband turned out ineffective; and it would be decided on grounds inapplicable in Madras or in the present case, where the widow has no power to adopt inependently of her husband's authority and the question is whether, after a restricted authority has been acted on ineffectually, her possession of an unrestricted one can be presumed. In these circumstances the decision is not of assistance. And it is not necessary to treat it as imposed on Courts in this Presidency, as authoritative by either

of the judgments above referred to. For those responsible for them cannot be supposed to have overlooked the indications that it related to a divided family or to have disregarded the distinctive character of the law under application. The references to it were made to support the liberal rule of construction, which the learned Judges and their Lordships were applying to the authority before them and are, I would respectfully suggest, explicable as relating to the second ground of decision, on which also the Bombay judgment was based.

Two Calcutta cases, *Surendro Keshub Roy* v. *Doorga Soondery Dossee* (11) and *Amrito Lal Dutt* v. *Surnomoye Dasi* (12), were relied on by appellants. The authorities in them were, however, invalid *ab initio* since they conferred no power exercisable by the widow under Hindu Law, and the decisions regarding them, therefore, afford no guidance.

In the result, the two cases dealing with authorities specifying a particular boy are distinguishable from that before us; and the remaining cases dealing with unrestricted authorities contain nothing directly relevant. There, however, occur in them some incidental references to the construction of restrictions on authorities and I refer to them before dealing with the provisions of the Will before us. Earlier in this judgment I stated the question in issue as being of the conflict between the general presumption as to a testator's intention and the explicit or implied restriction, which the Will is alleged to contain. But it would have been more accurate to use no language which could suggest that the two were to be considered together and the latter weighed against the former. For the proper course is, as I think, first to attempt to ascertain, with reference to the testator's own words and without reference to the general presumption, whether he meant to restrict the authority he was conferring; and to have recourse to that presumption only after such attempt has failed. It is true that in *Veerapermall Pillay* v. *Narain Pillay* (6), "the collective effect of the Pandits' opinions" in favour of the general presumption is referred to as "repelling the construction attempted to be put upon the Will by defendants, ...had the intention of the testator ever so plainly required it" (page 98). But it was not necessary for the Court in that case to endorse those opinions to that extent. For immediately afterwards it pointed out only that where (as in the case before it) no such intention was expressed or was necessarily to be implied, none could be assumed and the general presumption as to the testator's object could be relied on. Again, whilst the High Court in *Suryanarayana* v. *Venkataramana* (8) said that "when the general intention of a Hindu to be represented by a son was clear, there seemed to be no reason why effect should not be given to such intention, if it were possible to do so without contravening the law. Each case must be decided on its own merits without applying too strict a rule of construction with regard to powers of this description," the Privy Council held consistently with the conclusion above stated that "the main factor for consideration is the intention of the husband. Any special instructions he may have given his widow must be strictly followed; where no such instructions have been given, but a general intention has been expressed to be represented by a son, effect should, if possible, be given to that intention." And their Lordships have given the clearest expression to these views in a very recent case, *Venkata Narasimha* v. *Parthasarathy* (5). In one passage in the judgment (page 223) they declined to treat the testator's motive as religious at all, because his language showed that it was secular. In another (page 222) they recognised that surrounding circumstances (including race and religious opinion) deserved consideration in arriving at a right construction of the Will and ascertaining the meaning of its language "as used by that testator in that document." But they held that " So soon as the construction is settled, the duty of the Court is to carry out the intentions as expressed, and none other. The Court is in no case justified in adding to testamentary dispositions. . . . . If they leave any eventuality unprovided for, the estate must, in case that eventuality arises, be dealt with according to the law, which provides for succession of property in the absence of testamentary directions applying thereto. But the Court never adds to a Will anything which needs to be done by testamentary disposition."

The terms of the Will in this case must

accordingly be construed strictly as they stand, and without any addition to them to provide for subsequent eventualities or expansion of them based on any presumed intention of the testator. I note, *first*, the statement that he had no time to adopt Chenga Reddi, as he intended to do; and here, as later, I can find no reason for assuming what he could easily have expressed, if he had wished, that his intention to adopt was not restricted to Chenga Reddi, but was general. There is, *next*, the direction to the widow to adopt Chenga Reddi, followed by no provision for the contingency of the latter's death or the refusal of his parents to give him. The result, as I read it, is that testator gave an authority to adopt, restricting its operation to Chenga Reddi, and I find myself unable to understand how a testator, who certainly did not trust his widow unreservedly in the action, which he authorised expressly, can be presumed to have authorised her to take further action by implication or to have meant to leave her to do so unfettered. And *lastly*, as regards the absence of any provision for future eventualities, the testator's attitude is made yet clearer by his reference to the devolution of his estate on the adopted son on his widow's death and the assumption it involved, that the former would survive the latter. That assumption was, as already observed, involved also in the restriction of the widow's authority. Its repetition makes it the more difficult to disregard it. The omission to provide for this eventuality in connection with the direction to adopt was merely tacit; but, as shown, authority would forbid the Court even in those circumstances to supply it by implication. The Courts' disability to do so is the clearer, when, as is the case here, the testator has elected not to provide for this eventuality, though he has provided for its converse, and the inference must be that he was either indifferent or content to leave his widow to adopt with the consent of the *sapindas*. It is not possible to supply the omission by any expedient, which would add to or modify the Will, as that proposed by respondent would do. My conclusion therefore, is that the Will authorises no second adoption after the failure of that of Chenga Reddi.

I would, therefore, reverse the lower Court's finding on issue 1. If this were the decision of the Court, it would be necessary to proceed to deal with issues 4 and 5. I do not do so, because in accordance with my learned brother's judgment the appeal must be dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 742 OF 1913.

April 7, 1915.

Present:—Justice Sir Donald Johnstone, KT., and Mr. Justice LeRossignol.

WADHAWA AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat HASSI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Punjab Tenancy Act (XVI of 1887), ss. 77, 100—Punjab Tenancy (Amendment) Act (III of 1912)—Jurisdiction of Civil and Revenue Courts—Panahi *tenant, right of, to establish occupancy right.*

Act III of 1912 does not set up any bar to action under section 100 of the Tenancy Act. [p. 779, col. 2.]

A *panahi* tenant (protected for a term of years) is not debarred from establishing occupancy rights under the Tenancy Act, 1886. [p. 779, col. 2.]

Second appeal from the decree of the Divisional Judge, Sialkot Division, dated 27th March 1913, affirming that of the Subordinate Judge, first Class, Sialkot, dated the 28th October 1912, decreeing the claim.

Mr. *Sham Lal*, for the Appellants.

WADHAWA *v.* *Musammat* HASSI.

Messrs. *Badr-ud-Din Kureshi* and *Daulat Ram*, for the Respondents.

JUDGMENT.—This was a suit by the landlord to oust from the land in suit the defendants, alleged by him to be trespassers.

These latter pleaded that they held the land from their ancestors, Nathu and Kundan, who had acquired occupancy rights in it.

The plaintiff retorted that Kundan and Nathu had a right to occupy the land for their joint lives.

The first Court found in this sense and on the ground that Nathu, the last joint tenant, was now dead, decreed for plaintiff.

From that decree all the defendants other than the descendants of Nathu, but including transferees of Nathu, appealed to the Divisional Court, but that Court dismissed the appeal, refusing to entertain the one real plea of the appellants, *viz.*, that they were entitled to hold the land as occupancy tenants.

Before us in second appeal, it is contended that the suit was instituted on 1st July 1912 and that Act III of 1912 came into operation on 24th May 1912, and so governs this case.

That Act provides that if in any civil suit it becomes necessary to decide any matter reserved under section 77 of the Punjab Tenancy Act for the exclusive determination of the Revenue Courts, the plaint shall be returned for presentation to the Collector.

The plaintiff-respondent contends that the Act is inapplicable to this case, as it is not necessary to determine the question of occupancy status, inasmuch as it is *res judicata* that the tenancy determined on the death of the last joint tenant.

He relies on the proceedings of 1863, 1875, 1892 for his view that the matter is *res judicata*.

After consulting the available documents we do not think that the objection can be upheld.

The proceeding of 1863 was apparently that of an Assistant Settlement Officer and though in his reasons for his order, he remarks that the landlord shall have a right of entry on the death of Kundan and Nathu, his order is simply to the effect that plaintiff must pay a sum of Rs. 54 to defendants, in which case he will be entitled to a rent of Rs. 18-12-0 per cent, or failing to pay Rs. 54, he will be entitled to 5 per cent. only during the life-time of the defendants.

Such tenants were called *panahi* or protected for a term of years, but this order was passed before the enactment of the first Tenancy Act of 1868, and a *panahi* was not debarred from establishing occupancy rights under the Tenancy Act (*cf.* Revised Settlement Report, Sialkot, paragraph 127).

This Court's order of 1876 proceeds upon the decision of 1863 and though it does not decide, it suggests that the tenancy will terminate on the death of the surviving joint tenant.

So much of its order, however, as comprises this suggestion was made *obiter*, for that question was not at that time before the Court.

The proceedings of 1892 were based solely on the 1863 and 1876 decisions.

In all this there is no clear bar to the defendants' plea that they are entitled to occupancy rights.

Defendants Nos. 1 to 3 are represented before us by Counsel, but they did not appeal to the lower Appellate Court and we need merely note that they support the appeal. From the foregoing, it seems to us clear that the defendants' claim to occupancy rights should have been tried.

It should have been tried by a Revenue Court under Act III of 1912. It was tried, though not in a very thorough manner, by the first Court while the lower Appellate Court refused to entertain it.

We have considered whether Act III of 1912 sets up any bar to action under section 100 of the Tenancy Act, but inasmuch as the Act of 1912 merely adds a proviso to section 77 of the Tenancy Act we hold in the negative.

The Munsif tried the case straightforwardly and we see no reason for throwing on the parties all the expenses of a fresh trial *ab initio*.

We, therefore, accept this appeal, set aside the decree of the lower Appellate Court and direct that the Subordinate Judge's decree be registered as a decree of an Assistant Collector, first grade, that the lower Appellate Court return the appeal for presentation to the Collector who will decide the case either on the materia

already on the record or if he deems it necessary, after a remand. Parties shall bear their own costs in this Court, and in the lower Courts, as may be ordered by the Revenue Court.

Appeal accepted.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1031 OF 1914.

March 4, 1915.

Present:—Mr. Justice Shadi Lal.

INDAR—DEFENDANT—APPELLANT

versus

MOTI RAM—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Custom—Alienation by widow—Necessity—Payment of debt due by husband—Hindu Law—Payment of barred debt—Payment out of income of property.

Under the Hindu Law a widow can validly alienate property to raise money for payment of debt due by her husband, even if she be able to pay it off out of the income of the property in her hands, but under the Customary Law she is not competent to do so.

Ramasami Chetti v. *Mangal Karasu Nachiar*, 18 M. 113; *Veerabadra Aiyar* v. *Marudaga Nachiar*, 8 Ind. Cas. 1072; 34 M. 188; 9 M. L. T. 235; 21 M. L. J. 320; (1910) M. W. N. 799 and *Debi Dayal Sahoo* v. *Bhan Pertap Singh*, 31 C. 433; 8 C. W. N. 408, referred to.

Under Customary Law, unlike Hindu Law, a widow is not bound to pay debts due by her husband which have become barred by limitation.

Musammat Mulo v. *Phulo Missar*, 108 P. R. 1888, referred to.

Second appeal from the decree of the Divisional Judge, Hoshiarpur Division, dated the 22nd January 1914, varying that of the Munsif, first Class, Hoshiarpur, dated 4th August 1913, decreeing the claim in part.

Bhagat *Gobind Das*, for the Appellant.

Lala *Balwant Rai*, for the Respondents.

JUDGMENT.—The point for determination in this appeal is, whether the mortgage by the widow is valid to the extent of Rs. 160 the which was borrowed to pay off the debt due by the husband. It is quite clear that the widow had ample income out of which she could, if she liked, pay the above amount. The learned Divisional Judge has consequently held that there was no necessity for the mortgage, and after considering the matter carefully I see no reason to take a different view.

It appears that under the Hindu Law widow is not bound to pay the debts of her husband out of the income of the property and that she can validly alienate part of the immoveable property to raise money for payment thereof. [Vide *Ramasami Chetti* v. *Mangal Karasu Nachiar* (1); *Veerabadra Aiyar* v. *Marudaga Nachiar* (2) and *Debi Dayal Sahoo* v. *Bhan Pertap Singh* (3).] The learned Pleaders on both sides are unable to cite any authority which deals with the similar point under the Customary Law. It is, however, noteworthy that as regards the barred debts, the rule of Hindu Law has not been applied to cases governed by the Customary Law, vide *Musammat Mulo* v. *Phulo Missar* (4). Taking a broad commonsense view of the matter, I think it can hardly be said that a widow who has ample funds to meet the debt is under the necessity to make an alienation of the property inherited from her husband. The law enunciated in paragraph 65, Explanation I, of Rattigan's Digest of Customary Law, goes to show that the income of the widow is an important factor to be considered in the determination of the question whether the alienation is, or is not for necessity.

Accordingly I am inclined to agree with the conclusion of the learned Divisional Judge and consider that necessity for the alienation has not been established. I affirm the decree of the lower Appellate Court and, dismissing the appeal, direct the parties to bear their own costs in this Court.

Appeal dismissed.

(1) 18 M. 113.
(2) 8 Ind. Cas. 1072; 34 M. 188; 9 M. L. T. 235; 21 M. L. J. 320; (1910) M. W. N. 799.
(3) 31 C. 433; 8 C. W. N. 408.
(4) 108 P. R. 1888.

THAKUR VASONJI MORARJI v. CHANDA BIBI.

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

May 7, 1915.

Present:—Lord Dunedin, Lord Atkinson, Sir George Farwell and Sir John Edge.

THAKUR VASONJI MORARJI —APPELLANT

versus

Musammat CHANDA BIBI—RESPONDENT.

Hindu Law—Alienation by widow—Legal necessity —Knowledge and consent of next heir—Construction of deeds—Guiding principle.

Deeds and contracts of the people of India ought to be liberally construed. The real meaning of the parties ought to be given effect to rather than the literal sense. [p. 783, col. I.]

Hunoomanpersaud Panday v. *Musammat Babooee Munraj Koonweree*, 6 M. I. A. 393 at p. 411; 18 W. R. 81 *n.*; Sevestre 253 *n.*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147, followed.

Where, therefore, in order to pay off some existing ancestral debts and some others contracted by her for necessity, a Hindu widow sold a house with the knowledge of her daughter, whose husband attested the deed of sale, and the debts were, as a matter of fact, paid out of the purchase-money and the recitals in the deed of sale contained a detailed account of the circumstances under which the house was being sold, and the vendor purported to convey all her own existing right, title and interest in or belonging or appertaining to the houses including easements, and declaring that the vendee shall be full owner and proprietor of the house sold:

Held, that the widow intended to convey absolute property in the house to the vendee and the daughter could not challenge the alienation. [p. 784, col. I.]

Appeal from a judgment and decree of the Allahabad High Court, dated February 6th, 1912, reversing those of the Subordinate Judge, Benares, dated July 20th, 1910.

FACTS.—The pedigree of the plaintiff appears from the following table :—

RAS BIHARI LAL

Radha Gobind (died childless).	=Phundo Bibi, (widow).	Krishen Chaitan Deo,
		Kunj Behari Lal—Rama Bibi (widow).
		Chanda Bibi (daughter) (plaintiff).

The property in question was acquired by Ras Bihari. After his death Radke Gobind and Krishen Chaitan remained in possession. The former having died, leaving a widow in Phundo Bibi, Krishen Chaitan came into exclusive possession of the property. He also having died his son, Kunj Bihari, came into possession, on whose death his widow, Rama Bibi, obtained possession as widow. The appellants wishing to build a *dharamsala* at Benares purchased the houses in question from Rama Bibi and as Phundo Bibi had a right to maintenance, she was also joined as vendor. Out of the purchase-money some existing ancestral debts were paid and so were some of the debts contracted for necessity. On the death of the widows Chanda Bibi, daughter of Kunj Bihari Lal, sought to set aside the deed of conveyance on the ground that her mother had alienated her life-estate only and that her consent was not obtained and could not be obtained as she was a minor at the date of sale. The Subordinate Judge decided against her, holding that the alienation by the widow was for necessity and that it was effected with full knowledge and consent of Chanda Bibi. The High Court on appeals decided that it was not clear from the recital of the deed that the widow intended to convey more than her life-estate and allowed the appeal. The appellant then appealed to His Majesty in Council in due course.

Mr. *DeGruyther*, *K. C.* (with him Mr. *Lowndes*), for the Appellant, contended that on reading the deed of conveyance as a whole and having regard to the circumstances, it was evident that all parties intended that the whole estate should pass under the conveyance. In all cases of contract and deed by the people of India the real intention of the parties only should be the governing factor. The appellant was buying the house for erecting a *dharamsala* and paid adequate consideration. The widow had some debts, both ancestral and of her own, which were satisfied out of the purchase-money. She being owner had power to sell absolutely under such circumstances. The respondent gave her consent by allowing her husband to sign the deed and, as a matter of fact, he lived in the house purchased with part of the sale-price. The appellant was further protected by section 38 of the Transfer of Property Act. Having paid a valuable consideration for the house in good faith he must be protected. In any case respondent was not entitled to the house now standing and should pay for the same before obtaining possession of the same.

Reference was made to *Hunoomanpersaud Panday* v. *Musammat Babooee Munraj Koonweree* (1); Transfer of Property Act, sections 8 and 38.

Respondent did not appear.

(1) 6 M. I. A. 393 at p. 411; 18 W. R. 81 *n.*; Sevestre 253 *n.*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

THAKUR VASONJI MORARJI *v.* CHANDA BIBI.

JUDGMENT.

LORD ATKINSON.—This is an appeal from a decree of the High Court of the North-Western Provinces, Allahabad, dated the 6th February 1912, whereby a decree of the Subordinate Judge of Benares, dated the 28th of July 1910, was set aside. The respondent did not appear on the hearing before this Board to support the judgment appealed from.

The suit out of which the appeal has arisen was brought by the respondent against Thakur Vasonji Morarji, a well-to-do merchant of Bombay, to recover possession of a certain house in the city of Benares, and also mesne rates.

The land upon which this house is built was part of the immoveable property inherited by the respondent's father, one Kunj Behari Lal, the last surviving male member of a joint Hindu family, who died on the 6th of November 1890. He left his widow, *Musammat* Rama Bibi, and the respondent, his daughter, by that lady him surviving. He had no other issue. One *Musammat* Phundo Bibi, the widow of Goshain Radke Gobind, the paternal uncle of Kunj Behari Lal, was, in and subsequent to the year 1892, entitled to maintenance out of the property so inherited by the latter. By deed, dated the 24th of November 1892, these two widowed ladies jointly conveyed to Thakur Vasonji Morarji some interest in the site of the aforesaid house with the two houses then standing upon it in consideration of the sum of Rs. 10,500.

The main question in dispute upon which the two Indian tribunals have differed is the nature of the interest so conveyed. The Subordinate Judge held in effect as a fact, *first*, that the sale of these houses was made by *Musammat* Rama Bibi as a matter of necessity, in order to discharge out of the purchase money certain debts due respectively by her husband's father, Krishen Chaitan Deo, deceased, and his aforesaid paternal uncle amounting to Rs. 9,500 with interest, for the payment of which the creditors were pressing, and also certain debts incurred by herself, in order to obtain the necessaries of life for the family; and, *secondly*, that *Musammat* Rama Bibi, having under these circumstances the power to sell the absolute interest in this immoveable property, she intended so to do; that this deed, on the true construction of its terms, effected her intention, and carried to and vested in the purchaser the absolute interest in the then existing two houses and their sites.

The High Court, while not differing from, or disturbing in any way the conclusions of fact at which the Subordinate Judge had arrived, or questioning the intention of *Musammat* Rama Bibi to sell and convey the absolute interest in this piece of immoveable property, held that the terms of the deed were inadequate to convey to the purchaser anything beyond her own interest in the same, which they described as a life-interest.

The purchaser, the defendant in the suit, died on the 22nd of March 1913. He purchased these houses for the purpose of founding a *dharamsala* on their site, and with that object caused the two dilapidated houses standing upon it at the date of the deed to be demolished, and one house to be erected upon the site at a cost to him of Rs. 13,000. Rama Bibi died on the 19th of August 1909, Phundo Bibi having pre-deceased her. On the 12th of January 1910 this suit was instituted by the respondent, as heir of her father, claiming the relief asked for on the ground that the sale by her deceased mother was made without necessity and without her, the respondent's, consent. The Subordinate Judge found as a question of fact that the respondent was not a minor at the date of the deed, and that she had full knowledge of the intended sale, and consented to it. Owing to the fact that the respondent did not appear on the hearing of this appeal, their Lordships thought it right not to content themselves with accepting and acting on the findings of fact of the Subordinate Judge, without examining for themselves the evidence upon which those findings purport to be based. Counsel for the appellant has accordingly fully opened this evidence. Their Lordships have fully considered it, and are clearly of opinion that the existence of the debts incurred by the predecessors of Kunj Behari Lal to the amount mentioned, the necessity for the sale of the absolute interest in these two houses in order to discharge them, and the payment of them out of the purchase-money, when obtained, are clearly established Their Lordships see no reason whatever t

dissent from any of the Subordinate Judge's findings of fact.

The question of the proper construction of the deed of conveyance remains. The principle laid down by Lord Justice Knight Bruce in delivering the judgment of this Board in the case of *Hunoomanpersaud Panday* v. *Musamnat Babooee Munraj Koonweree* (1) is particularly applicable to this case At page 411-412 of the report he says :—

"Deeds and contracts of the people of India ought to be liberally construed. The form of expression, literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses."

Well, it appears to their Lordships that an examination in detail of the provisions of the deed of conveyance in this case cannot leave any doubt upon one's mind that all the parties meant that the absolute interest in these two houses should be conveyed to the purchaser, and thought that it had by the deed been effectually conveyed to him. That instrument commences with a full and detailed recital of the title to the property. It contains a declaration that Rama Bibi is the owner of all the property left by her deceased husband, but that Phundo Bibi being an elderly woman in the family, this property was by courtesy enjoyed by the latter jointly with herself.

It is then recited that the deceased husbands of these two ladies (both of whom execute the deed) did not leave behind them property, the produce of which was sufficient to meet their necessary expenses ; that they had been obliged to borrow money to provide the ordinary necessaries of life ; that the father and paternal uncle of Kunj Behari Lal were at the time of their respective deaths each indebted to several creditors, still unpaid, who were pressing for their money; and that the only way by which money could be procured to discharge all these debts was by selling a portion of the property inherited by Kunj Behari Lal. Not, be it observed, a particular estate, or interest in the whole or a portion of that property, but a portion of the property itself, part of the *corpus* as it were, if one may use that expression.

Now, it is plain that all those recitals touching the existing indebtedness of the executants and their predecessors could only have been introduced for the purpose of showing that the circumstances were such as to give to the executants the power to dispose of the absolute interest. The recitals were entirely otiose, serving no purpose whatever, if the intention and object of the parties were merely to dispose of the interest to which Rama Bibi would normally be entitled as the widow of her deceased husband. She could dispose of that interest whether debts existed or not. So that special pains are taken to set out in detail the facts and circumstances which remove every fetter from her power of disposition over the absolute interest.

It is next recited that the two executants have jointly and severally agreed to sell and convey all their full and existing rights in the two houses to the purchaser for the sum of Rs. 10,500 to be paid in cash; and that Phundo Bibi has joined as an executant by virtue of her position in the family for the additional guarantee of the vendee. Her right to maintenance was a liability affecting the absolute interest in every portion of the property left by Kunj Behari Lal. It might last beyond the life of Rama Bibi if Phundo Bibi outlived her; but the vendee, it was agreed, was to enjoy the property absolutely discharged from this latter liability for all time. By the operative granting part of the deed Rama Bibi in the first place sells, conveys, and transfers all her rights and interest in these two houses to the purchaser without any reservation. Then Phundo Bibi transfers to him her only right in the property, namely, her right to maintenence. And then the two ladies jointly proceed to sell and convey to him all their own existing right, title, and interest in, or belonging or appertaining to these two houses, including easements, and declare that from the execution of the deed thenceforth the purchaser shall be—

"the full owner and proprietor of the said houses in our stead, and shall own, possess, and enjoy them in the same way as we have been hitherto doing."

Then there follow two very significant provisions, *first*, that—

"as proof of the existing debts and the necessity of conveying the property for purposes aforesaid Sham Lal, the husband of Chandra Bibi" (*the respondent*) "has signed as one of the witnesses of the deed,"

and *secondly*, that—

"should at any time the said vendee or his heirs and representatives be deprived of the whole or part of the property conveyed by this deed, he or they would be entitled to recover the money in full or in part, as the case may be, from us and rest of our property."

That guarantee might not be of much value, but it contemplated a loss which might occur after the death of Rama Bibi. Well, the purchase-money was paid, the debts were discharged, and Sham Lal and the creditors of the male debtors, whose claims were paid, signed the deed as witnesses.

Thus every precaution which apparently occurred to the minds of the parties to the instrument or to those of their advisers was taken to show on the face of the document that circumstances existed which would empower Rama Bibi to dispose of the absolute interest in this property.

There can be no doubt, therefore, as to the object and intention of the parties to the transaction, and as to their view as to the meaning and effect of the language of the instrument. They all obviously intended that all the interest which the recited circumstances, true in themselves, empowered Rama Bibi to alienate should pass to the vendee, and it is equally plain that they thought that the effect of the instrument was to pass it to him.

The High Court seem to have attached little importance to some, if indeed not all, of the pregnant recitals which have been referred to. They took the two following passages from the granting part of the deed, *first*:—

"I, the said Rama Bibi, do hereby convey sell, and transfer all my rights and interest in the said houses which I inherited from my said deceased huband, Goshain Kunj Behari Lal."

And *secondly*—

"We . . . sell all our existing rights, title, and interests . . ."

as together with the declaration that the vendee—

"will be the full owner and proprietor of the said houses in our stead, and shall own, possess, and enjoy them in the same way as we have been hitherto doing."

They then proceed to say—

"These recitals" (as they erroneously style them) "show that the widow wa selling such rights as she had as widow, that is to say, her life-estate."

With all respect to the learned Judges of the High Court, their Lordships are quite unable to take that view. They think that the High Court fell into the very error which Lord Justice Knight Bruce, in the passage already quoted, stated should be guarded against in the construction of deeds between the people of India. They took the strict literal sense of the words in the passages referred to, and ignored the meaning which the parties to the transaction obviously attached to them. It is not quite accurate to describe the interest which a widow normally takes in immoveable property, which her husband inherits and leaves at his death, as a "life-estate."

In Chapter XX of Mr. Mayne's Hindu Law, 8th Edition, page 846, he lays it down that it is wholly incorrect so to describe her estate, and that it would be just as untrue to speak of the estate of a father under the *Mitakshara* Law as one for life.

"Hindu law," he says, "knows nothing of estates for life or in tail, or in fee. It measures estates not by duration but by use. The restrictions upon the use of an estate inherited by a woman are similar in kind to those which limit the powers of a male holder but different in degree. The distinctive feature of the estate is that, at her death, it reverts to the heirs of the last male owner."

And again at page 870:—

"It is not a life-estate, because, under certain circumstances, she can give an absolute and complete title. Nor is it in any sense an estate held in trust for the reversioners. Within the limits imposed upon her, the female holder has the most absolute powers of enjoyment."

If the circumstances existed which enabled her to dispose of that absolute interest, and she intended to dispose of it, the language of the instrument does not seem inadequate for the purpose.

Taking the deed as a whole and endeavouring to reconcile its various provisions the one with the other, giving effect as far as possible to each, their

Lordships find nothing in its language constraining them to adopt a construction which would plainly defeat the object and intention of the contracting parties. They think the passages relied upon by the High Courts may well be construed as meaning to refer to the right to, and interest in, the property which Rama Bibi, as the widow of her deceased husband, had, in the particular circumstances of the case, power, for the purpose indicated, to sell and dispose of, that is, the absolute interest, and not as merely meaning to refer to the right and interest which a widow normally takes in the immoveable property which her husband owned at his death and leaves after him.

Their Lordships are, therefore, of opinion that the decree appealed from was erroneous and should be reversed, that the decree of the Subordinate Judge should be restored with costs throughout, and they will humbly advise His Majesty accordingly.

The respondent will pay the costs of this appeal.

Decree reversed.

Solicitors for the Appellants:—Messrs. *T. L. Wilson & Co.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 114 OF 1913.

February 22, 1915.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Coutts-Trotter.

VEMOORU AUDI NARAYANIAH—PLAINTIFF—APPELLANT

versus

PANCHAGNULA SREERAMULU AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Adoption, suit to set aside—Plaintiff and his mother living together—Knowledge of plaintiff's mother, whether knowledge also of plaintiff—Limitation Act (IX of 1908), Sch. I, Art. 118.

Where both the plaintiff and his mother live together in the same house, his mother's knowledge as to the date of a certain adoption is also his knowledge for purposes of Article 118 of the Limitation Act (IX of 1908).

Appeal against the decree of the District Court of Nellore in Original Suit No. 44 of 1910.

FACTS.—One Narasiah died in 1889, leaving behind him his widow, the second defendant, and two daughters by another wife. One of the daughters adopted a son, and the widow also adopted one in pursuance of an authority given by her husband. The plaintiff, as the adopted son of the daughter and as reversioner to the estate of the deceased Narasiah, sues to set aside the adoption of the 1st defendant as having been made without authority. The District Judge dismissed the suit on the ground of limitation.

Mr. *L. A. Govindaragava Iyer*, for the Appellant:—The plaintiff knew of the adoption only in 1905 and as the suit was brought within six years from that date is not barred by limitation.

Mr. *T. V. Venkatarama Iyer*, for the Respondents:—It is impossible that the plaintiff should not have known the adoption when he was living with his mother in the same house. The plaintiff further is more than 35 years of age and is also a Pleader's clerk. In these circumstances, knowledge of the fact of adoption ought to be imputed to him.

JUDGMENT.—We agree with the District Judge that the suit is clearly barred. The plaintiff's evidence that he came to know $3\frac{1}{2}$ years before suit is inconsistent with evidence of his mother, and the general evidence clearly shows that the plaintiff must have been aware that the 1st defendant was being put forward as the adopted son of his grandfather much more than six years before the institution of this suit.

The appeal is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 249 OF 1914

March 3, 1915.

Present:—Justice Sir Donald Johnstone, KT.

Kunwar RANZOR SINGH—PLAINTIFF—APPELLANT

versus

GAYAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Courts Act (IV of 1912), s. 41 (1) (c)—Second appeal—Finding of fact—Substantial error in procedure—Court overlooking material evidence—Consideration—Legal necessity.

RANZOR SINGH *v.* GAYAN.

A finding of fact arrived at by a lower Appellate Court can be assailed on second appeal only where it appears that in giving its decision the lower Appellate Court has not taken into consideration material evidence on the record and other material circumstances connected with the case. [p. 786, col. 1.]

In cases of old mortgages, where mortgagors have had subsequent opportunities of asserting want of consideration but expressly and impliedly admitted receipt of it in full, Courts will not expect mortgagees to give the same precise proof of payment and 'necessity' as in cases in which the transactions are of recent date.[p. 786, col. 2; p.787, col. 1.]

Second appeal from the decree of the Divisional Judge, Ambala Division, dated the 14th October 1913, reversing that of the Munsif, third Class, Ambala, dated the 8th August 1912, decreeing the claim.

Mr. *Sundar Das*, for the Appellant.

Mr. *Brij Lal*, for the Respondents.

JUDGMENT.—The land in suit is part of a larger area that was mortgaged by registered deed for Rs. 1,200 to the plaintiff on 28th May 1895. This portion (8 *bighas* 3 *biswas*) was in the personal possession of defendant No. 2, the rest being in possession of tenants who have all along attorned to plaintiff. The cause of action is said to be the fact that defendant No. 2 stopped paying rent and refused to vacate. The Munsif gave a decree for possession, whereupon defendants appealed to the Divisional Court, which remanded for further inquiry and report. The Munsif inquired and reported that the mortgage was for consideration and "necessity" and that defendant No. 1, regarding whose age there was some doubt, was certainly adult. The lower Appellate Court, however, took the view that passing of consideration was not proved, and so, holding that there was no legal mortgage, it dismissed the suit with costs throughout.

The second appeal here can succeed only under clause (*c*) of sub-section (1) of section 41 of the Courts Act, for the decision of the lower Appellate Court is essentially based on a finding of fact pure and simple, and I have, therefore, to see whether plaintiff's complaint that the learned Divisional Judge has gravely erred by overlooking material evidence present on the record is justified.

The consideration (Rs. 1,200) is thus stated in the deed;—

	Rs.
To be paid to Gopi, previous mortgagee, and "others"	905
Paid to Chamela (one of the mortgagors) a week earlier	125
To be paid before Sub Registrar ...	145
Costs of conveyance	25

The learned Divisional Judge finds that Rs. 600 were due to, and paid to Gopi, that Rs. 145 is not certified as having been paid before the Sub-Registrar, that the alleged payment of Rs. 400 to one Dina, said to be a creditor, unsupported by any receipt or proof of indebtedness, must be rejected, that the Rs. 125 item, not being evidenced by receipt and being *a priori* improbable, cannot be allowed.

To meet this Mr. Sundar Das points to the proof on the record that Rs. 400 was in fact paid to Dina, to the fact that at mutatation Chamela admitted receipt of full consideration and to the still more important fact that on 31st August 1900, Chamela and Nathu (defendant No. 2) executed an additional mortgage-deed on the same land for Rs. 531 making no protest that full consideration had not been paid on the previous mortgage. He also urged that possession should have been accorded against the money that actually did pass, but this is contrary to all authority [*e. g.*, *Khaira* v. *Maula* (1)] (Nathu was probably a minor in 1900, but we are not concerned with that here).

Now there is no question that the payment of Rs. 125 and Rs. 145 is not directly proved, and the evidence of payment of Rs. 400 to Dina is weak; and there remains only consideration of the weight to be given to the admission by Chamela at mutation and the indirect admission in 1900. As the learned Divisional Judge has not taken these matters into account at all, I am at liberty to do so, adding also the apparently uncontested facts that for all these years the tenants aforesaid have attorned to plaintiff and that for many years mortgagors paid rent for the land now in suit. It has been frequently ruled by this Court that, after the lapse of many years—17 in the pesent case specially where mortgagors have had subsequent

(1) 11 Ind. Cas. 191; 49 P. R. 1911; 212 P. L. R. 1911; 136 P. W. R. 1911.

opportunities of asserting want of consideration and have expressly and impliedly admitted receipt of it in full, Courts will not expect mortgagees to give the same precise proof of payment and "necessity" as in cases in which the transactions are of recent date. In my opinion, in the present case the conduct of parties since 1895 more than outweighs all deficiencies in the direct evidence and I cannot agree with the lower Appellate Court when he talks about defendants falling 'into the mouth of a shark." I can see no sufficient reason for doubting that the whole transaction was a perfectly ordinary and honest one.

For these reasons, interfering on the ground that the lower Appellate Court has committed a substantial error in procedure in ignoring patent facts and in ignoring the principles established by this Court for dealing with cases of old alienations, I allow this appeal and set aside the lower Appellate Court's judgment and decree, and grant to plaintiff a decree in full with costs throughout.

Appeal allowed.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL No. 248 OF 1911.

March 10, 1915.

Present:—Mr. Justice Sharfuddin and Mr. Justice Coxe.

HANUMAN PERSAD THAKUR—PLAINTIFF—APPELLANT

versus

JADUNANDAN THAKUR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Possession, recovery of, suit for—Purchaser's duty to inquire—Civil Procedure Code (Act V of 1908), s. 66, scope and meaning of—Benami *purchases*—Benamidar's *position and title—Real owner's powers.*

It is bad law to hold that though a purchaser is not bound to inquire whether his vendor is the *benamidar* for another man, he is bound to ascertain whether or not he is the *benamidar* of a woman. [p. 788, col. 1.]

Section 66 of the Civil Procedure Code is clearly aimed at *benami* purchases at execution-sales. [p. 788, col. 2.]

A real purchaser cannot base a suit against his *benamidar* on the fact of possession. [p. 788, col. 2.]

Sasti Churn Nundi v. *Anopurna*, 23 C. 699, not followed and approved.

The clear intention of section 66 of the Code is to stop *benami* purchases by making it impossible for the real owner to question the *benamidar's* title. [p. 788, col. 2.]

Bishan Dial v. *Ghazi-ud-Din*, 23 A. 175; A. W. N. (1901) 44, approved and followed.

Appeal against the decree of the Additional Subordinate Judge, Muzafferpur, dated the 31st of May 1910 and transferred to the file of this Court by an order of the Hon'ble Sir Asutosh Mookerjee, Kt., and the Hon'ble Sir Herbert Carnduff, Kt., two of the Judges of this Court, made on the 19th of June 1911.

Mr. *Casperz* and Babu *Gonesh Dutt Singh*, for the Appellant.

Babus *Umakali Mukherjee*, *Lakshmi Narain Singh* and *Baidyanath Narain Singh*, for the Respondents.

JUDGMENT.

COXE, J.—This appeal arises out of a suit for recovery of possession of certain land that was sold in execution of a decree against one Harnandan Thakur in May 1900. It was purchased ostensibly by the defendant, Jadu Nandan Thakur. The plaintiff is the heir of one Rajbati, the sister of Jadunandan, and his case is that Jadunandan purchased the property with Rajbati's money and on her behalf, and that she remained in possession till her death in January 1906, since when the defendants are in possession. The 2nd defendant is said to have purchased a portion of the property from Jadunandan in June 1904, in full knowledge that Jadunandan was merely a *farzidar*. The defence is that Jadunandan bought the property himself.

The Subordinate Judge has dismissed the suit, holding that it is barred by section 66 of the Code, and also that Jadunandan was the real purchaser. The plaintiff appeals.

Against Shia Thakur, the 2nd defendant, the plaintiff has, in my opinion, no case whatever. There is no evidence worth a moment's consideration that Shia had any reason to think that Jadunandan was not the real purchaser. Bhaya Singh, an important witness for the plaintiff, admits that Shia Thakur has been in possession since his purchase, which was $1\frac{1}{2}$ years before

Rajbati's death. Learned Counsel contended that Rajbati, being a *pardanashin*, could not be estopped from pleading that the ostensible owner was not the true owner, unless it was shown that everything had been explained to her. This seems to me an untenable contention. To accept it would be equivalent to holding that, though a purchaser is not bound to inquire whether his vendor is the *benamidar* for another man, he is bound to ascertain whether or not he is the *benamidar* of a woman. This is evidently unreasonable.

As regards Jadunandan I feel no hesitation in holding that the suit is barred by section 66 of the Code and, therefore, need not examine the question whether Jadunandan was or was not the real purchaser. But I may say that I incline to the belief that the Subordinate Judge's view of the facts is correct. Learned Counsel has subjected the defendant's case to powerful criticism, but clearly the whole burden of proof rests on the plaintiff. It is argued that there is a discrepancy between the defendant's pleading and his proof. In the first he asserts that he bought the property himself, whereas in his evidence he says that he obtained the money from his brother with whom he lives in commensality. This does not seem to me of very much importance, especially when it is remembered that the defendant's case is that the sale certificate is conclusive. It is contended also that as Jadunandan was Rajbati's *mukhtear*, the burden of proving the good faith of all transactions between them rests on him. But it is open to doubt whether the power-of-attorney authorised Jadunandan to purchase property for Rajbati or to manage her estates, and in any case we have not to decide what was the character of a transaction between them; but whether there was any transaction between them or not. No real explanation has been given why Rajbati should want to buy his property which is many miles away from her home. It can hardly have been with a view to enrich the estate, because that had to descend to the plaintiff with whom she had quarrelled. The reason assigned in the evidence, namely, that she wanted to restore it to the judgment-debtor who was her kinsman, would have appealed with equal strength to her brother, Jadunandan.

As I have said, however, the suit is, in my opinion, barred by section 66 of the Code, which lays down that no suit shall be maintained against any person claiming title under a purchase certified by the Court on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims. Now here the defendant certainly claims under a certified purchase and the suit is based on the ground that the purchase was made on behalf of the plaintiff's predecessor-in-interest. Learned Counsel contends that the plaintiff also sues on the ground that Rajbati remained in possession till her death and relies on the decision in *Sasti Churn Nundi* v. *Anopurna* (1), which certainly is in his favour.

If the decision quoted is correct, it makes a very serious inroad on the section, and indeed I do not think it would be going too far to say that, if it is accepted, the section is for all practical intents and purposes repealed. The section is clearly aimed at *benami* purchases at execution sales. We have no need of a specific provision of law that a suit against a real purchaser, based on a false allegation that he is a *benamidar*, must fail. The clear intention of the section is to stop *benami* purchases by making it impossible for the real owner to question the *benamidar's* title. It is sometimes said that the Legislature cannot have intended to enable fraud to be practised. But I cannot attach any other meaning to the section than this, that it aims at discouraging *benamis* by rendering the real purchaser helpless if he is cheated by his *benamidars*.

Now if the view taken in the case cited above is correct, namely, that the real purchaser can base a suit against his *benamidar* on the fact of possession, it is evident that the section at once loses all its effect. The purchase being *ex hypothesi* a *benami* purchase, the real purchaser would naturally get possession in every case, so that the only cases in which the section would be of any practical use would be those rare instances in which the parties quarrel immediately, even before possession is delivered. It can never have been the inten-

(1) 23 C. 699.

tion of the Legislature to enact the section for this limited purpose.

I agree with the decision in *Bishan Dial* v. *Ghazi-ud-Din* (2). It is not necessary, however, to refer the decision in *Sasti Churn Nundi* v. *Anopurna* (1) to a Full Bench, because the present case can be distinguished, as the trial Judge has pointed out, though it must be conceded that the distinction is somewhat unreal. Reading paragraph 7 of the plaint it cannot be disputed that this suit was brought "on the ground that the purchase was made on behalf of some one through whom the plaintiff claims."

The appeal fails and must be dismissed with costs. Defendant No. 2 is entitled to separate costs.

SHARF-UD DIN, J.—I agree.

In the memorandum of appeal, we are informed that the value of the appeal has been put down as Rs. 2,249-8-6, which is a mistake for Rs. 6,005.

Appeal dismissed.

(2) 23 A. 175; A. W. N. (1901) 44.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2026 OF 1913.

April 23, 1915.

Present:—Mr. Justice Rattigan.

HIRA AND OTHERS - DEFENDANTS—APPELLANTS

versus

Musammat GHATHU AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 120, 125—Custom—Alienation by widow—Occupancy rights, creation of—Suit for declaration that creation of occupancy rights by widow was invalid—Limitation, starting point of.

Article 125, and not Article 120, of the Limitation Act, applies to a suit for a declaration that a creation of occupancy rights by a widow is invalid as against reversionary rights of the plaintiff and the period of limitation for such a suit begins when occupancy rights are created. [p. 789, col. 2.]

A subsequent and belated objection in partition proceedings as to the partition of the occupancy holding does not give a fresh period of limitation. [p. 790, col. 1.]

Second appeal from the decree of the Divisional Judge, Hoshiarpur Division, dated the 17th May 1913, confirming that of the Munsif, first Class, Hoshiarpur, dated the 26th October 1912, decreeing the claim.

Mr. *Nand Lal*, for the Appellants.

Rai Bahadur Pandit *Sheo Narain*, for the Respondents.

JUDGMENT.—The facts are very simple. The husbands of *Mussammats* Murto and Gaurju died some time prior to 1879 and in that year the widows' names were recorded in the Revenue papers in the ownership column. In 1882 the widows appeared before the Revenue Authorities and stated that they had made their brother Hira an occupancy tenant and desired that the alienation in his favour should be recorded. It would appear that notice was issued and proclamation made, but that as no one came forward to object mutation was effected in Hira's name. In 1911 Hira appeared before the Revenue Authorities and had his two brothers' names added to his own as occupancy tenants and subsequently he, his brothers and *Musammat* Murto applied for partition of the land in their possession. Plaintiffs, who are the reversioners of *Musammat* Murto and *Musammat* Gaurju and also co-sharers in part of the land in dispute, objected to the partition proceedings on the ground apprently that Hira was not occupancy tenant of the land. The Revenue Officer decided, under section 117 of the Land Revenue Act, not to proceed with the partition proceedings until the question of Hira's right to the property had been determined by a competent Court, whereupon plaintiffs instituted the present suit for a declaratory decree in the Court of the Extra Assistant Settlement Officer who tried it as a Munsif, first Class. It is quite clear from the objection raised by plaintiff before the Revenue Officer in the partition proceedings, from the pleadings and issues in the present case, from the judgment of the Munsif and from the decree granted by him and accepted without demur by the plaintiffs, that all parties as well as the Court itself regarded the suit as one for a declaration that the creation of occupancy rights by the widows in 1882 in favour of Hira was invalid. Regarded in this light there can be no possible doubt that the suit is barred under Article 125 of the Limitation Act, and I am quite unable to follow the officiating Divisional Judge when he holds without any discussion that the Article applicable is Article 120 and that the time when right to sue accrued was the date when Hira applied for partition. In my opinion the suit as laid, as understood by everybody in the

Courts below, was clearly barred by time. Mr. Sheo Narain for the respondents seeing this difficulty has argued that the claim was really one for a declaration that Hira, as the person in whose favour occupancy rights had been created by a widow merely holding for life, was not entitled to claim partition. This is an ingenious attempt to get over the difficulty, but I cannot allow the whole aspect of the case to be thus changed in second appeal.

I accordingly hold that the suit was barred under Article 125 and accepting the appeal, I set aside the orders of the Court below and dismiss the plaintiffs' suit with costs throughout.

Appeal accepted.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1160 OF 1913.

June 1, 1915.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice N. Chatterjea.

KEDAR NATH BANERJEE AND OTHERS—DEFENDANTS—APPELLANTS

versus

HARIDAS GHOSE—PLAINTIFF AND OTHERS—*Pro forma* DEFENDANTS—RESPONDENTS.

Hindu Law—Dayabhaga—*Succession, principle of—Great-grandfather's son's daughter's son and maternal uncle, contest between.*

In a contest between the great-grandfather's son's daughter's son and the maternal uncle regarding succession under the *Dayabhaga* School of Hindu Law, the great-grandfather's son's daughter's son is the preferential heir. [p. 791, col. 1.]

Gooroo Gobind Shaha v. *Anund Lal Ghosh*, 13 W. R. 49 (F. B.); 5 B. L. R. 15 and *Kailash Chandra Adhikary* v. *Karuna Natha Chowdhury*, 19 Ind. Cas. 677; 18 C. W. N. 477, followed.

Appeal against the decree of the Subordinate Judge, second Court, Burdwan, dated the 23rd of December 1912, affirming that of the Munsif, Kalna, dated the 12th of September 1911.

Babu *Rishendra Nath Sarkar*, for the Appellants.

Babu *Nagendra Nath Ghose*, for the Respondents.

JUDGMENT.

JENKINS, C. J.—The point in contest in this litigation is whether in a *Dayabhaga* family, the great-grandfather's son's daughter's son or the maternal uncle is to be preferred. The proposition only has to be stated to make one realize what an amount of learning and industry the problem might demand. We have had the advantage of having the position of the maternal uncle advocated before us by one who is worthily following in the steps of his distinguished father and we can say; much as we regret the absence of Babu Golap, we do not feel we have suffered anything in view of the argument that has been addressed to us.

Undoubtedly there are, as Babu Rishendra Nath Sarkar has brought clearly to our notice, a number of considerations that might be brought into play were the matter untouched by authority. But a Full Bench of this Court, as far back as *Gooroo Gobind Shaha* v. *Anund Lal Ghose* (1), came to a conclusion as to the principle of succession in a *Dayabhaga* family which really governs this case. It has been treated as governing cases of a similar description by other distinguished Judges, whom I name in this particular connection merely because they are Judges who would be particularly familiar with and interested in the question. The learned Judges are Mr. Justice Guru Das Banerji, Mr. Justice Mookerjee and Mr. Justice N. R. Chatterjea. And they one and all have felt that it is not for this Court, at any rate, to question the propriety of that Full Bench decision. In the case of *Kailash Chandra Adhikary* v. *Karuna Natha Chowdhury* (2) the contesting parties were in the precise position, curiously enough, of those who are now litigating before us, that is to say, the contest there was as here: between the great-grandfather's son's daughter's son and the maternal uncle. There it was decided in favour of the great-grandfather's son's daughter's son. And I see no ground on which we can refuse to follow that ruling. The learned Vakil in the course of his argument before us has done his best to depreciate the value of the maxim *stare decises*. But that is an argument that must be addressed to a higher authority and not to this Court.

(1) 13 W. R. 49 (F. B.); 5 B. L. R. 15.
(2) 19 Ind. Cas. 677; 18 C. W. N. 477.

There was another argument advanced before us, namely, that the possession of Tulsi was such that her existence offers a complete bar against the suit. But that was a point not taken in the lower Courts, nor in the original grounds of appeal here. It was a very late development. But obviously the basis of that argument involves an investigation into facts on which it is beyond our competence to embark. We cannot, therefore, give effect to it.

As to the first point our decision, in obedience to the authorities, is that the plaintiff who claims under the great-grandfather's son's daughter's son is entitled to succeed. This is in accordance with the view of the learned Subordinate Judge and the Munsif.

The result is that the appeal must be dismissed with costs.

N. CHATTERJEA, J.—I agree that the principle of succession governing this case must be taken to have been settled by the Full Bench decision in *Goo.oo Gobind Shaha* v. *Anund Lal Ghose* (1). The particular point raised in this case was decided in the case reported as *Kailash Chandra Adhikary* v. *Karuna Natha Chowdhury* (2) and I see no reason to alter the opinion which I expressed in that case.

Appeal dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 514 OF 1913.

May 18, 1915.

Present:—Mr. Justice Chevis and Mr. Justice Shadi Lal.

Miss HAMILTON—DEFENDANT—APPELLANT

versus

SHANKAR DAS—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Execution—Money-decree—Attachment before judgment—Deposit in Court—Decree in favour of 3rd parties against judgment-debtor—Subsequent decree-holders, whether can attach money deposited in Court—First decree-holder's lien.

The plaintiff in an action for money against one *K* got his property attached before judgment. Later, he obtained a decree, but its execution was stayed on the application of the judgment-debtor pending the decision of the appeal. Subsequently, with the consent of the parties the Court modified its order allowing *K* to sell the property on condition that after paying off the debts etc., he paid the remainder into Court as security for the decree against him. It was subsequently discovered that another creditor had a mortgage in his favour on the estate and in consequence of this both the parties arrived at a fresh agreement, the terms of which were embodied in an application to the Court signed by both the parties which stated specifically that the plaintiff should have a first lien on the balance for the sum for which he may ultimately get a decree. This application was granted and the property sold. The plaintiff then filed cross-objections asking for a further sum and increased interest from the date of the institution of the suit. Ultimately the judgment-debtor's appeal was dismissed and the cross-objections partially accepted by the Chief Court.

During the pendency of the appeal the defendant obtained a money decree against *K* and attached the money paid by him into Court as security. The plaintiff objected, but the executing Court ordered rateable distribution. The plaintiff then sued for a declaration that he was entitled to payment in preference to the other decree-holders:

Held, (1) that the plaintiff was fully justified in bringing the declaratory suit; [p. 792, col. 2.]

(2) that the money was deposited by *K* and accepted by the Chief Court as security for the due performance of such decree as might ultimately be binding upon him and the defendant by attaching the money before the date of the final decree in favour of the plaintiff did not prejudicially affect the latter's rights. [p. 793, col. 2.]

First appeal from the decree of the Subordinate Judge, first Class, Lahore, dated the 24th of February 1913, decreeing plaintiff's claim.

Mr. *B. Bevan Petman*, for the Appellant.

Lala *Durga Das*, for the Respondents.

JUDGMENT.—The facts of this case, so far as they are relevant to the matter in controversy in this appeal and the connected Appeal No. 1160 of 1913, are as follows. The respondent, Shankar Das, brought an action in 1903 for Rs. 21,589-7-6 against Mrs. Kennelly and got the Charing Cross Hotel, the property of the defendant, attached before judgment. On the 10th of April 1909 he obtained a decree for Rs. 6,132-13-6 with future interest and costs against Mr. Kennelly, the son and heir of Mrs. Kennelly, who had died during the pendency of the suit, and on the 9th of June 1909 the judgment-debtor preferred an appeal against that decree to the Chief Court and applied for stay of execution thereof pending the decision of the appeal. The prayer for the stay of execution was granted by the Chief Court on the 9th of June 1910 and the building of the hotel was accepted as security for the decretal amount and the judgment-debtor was prohibited from making an alienation of it.

It appears that in September of that year Mr. Kennelly received an offer from Mr. Faletti for the sale of the property and applied to the Chief Court for permission to sell it and stated that "he is ready to deposit in the Court of the District Judge, Lahore, the amount of the decree in dispute as security if the sale takes place."

With the consent of the parties the Court, in modification of its order dated the 9th June 1910, passed on the 10th of September 1910 an order allowing Mr. Kennelly to sell the estate to Mr. Faletti for Rs. 1,90,000, on condition that Mr. Kennelly after paying the debt due to the mortgagee and retaining Rs. 5,000 for his private purposes, paid "the remainder of the sale-money into this Court as security for the decree against him." It was subsequently discovered that another creditor had a mortgage in his favour on the estate and it was in consequence of this and other reasons that Shankar Das and Mr. Kennelly arrived at a fresh arrangement by which after paying off the debt due to the mortgagees and certain other creditors and retaining Rs. 8,800 for his own expenses, Mr. Kennelly agreed to deposit the balance, Rs. 26,141-12-3, in the Chief Court. The terms of the agreement were embodied in an application presented to this Court on the 16th of September 1910 and it is noteworthy that this application, which is signed by both the parties, states specifically that Shankar Das shall have a first lien on that amount for the sum for which he may get a decree in the Chief Court. The Court granted the application, varied its order of the 10th of September 1910, and allowed Mr. Kennelly to sell the property in accordance with the terms of the agreement. Four days later, Mr. Kennelly deposited in the Chief Court the above-mentioned sum and on the 8th of October 1910 Shankar Das preferred cross-objections against the decree of the District Judge asking for a further sum of Rs. 15 770-2-11 and increased interest from the date of the institution of the suit. The Division Bench, who heard the appeal and the cross-objections, decided on the 1st of July 1912 that the appeal be dismissed and accepting the cross-objections partially, they passed a decree for Rs. 17,555 in favour of Shankar Das.

During the pendency of the appeal in the Chief Court and after the order dated the 16th of September 1910, Miss Hamilton and Mrs. Daly instituted suits against Mr. Kennelly and each obtained a simple money-decree for the sum due to her. In execution of her decree Miss Hamilton attached on the 28th of June 1912, four days before the decree of the Chief Court in favour of Shankar Das, the money paid by Mr. Kennelly into the Court. Shankar Das objected to this attachment and the executing Court decided on the 28th of October 1912 that the money be distributed rateably among the three decree-holders. Dissatisfied with this order, Shankar Das brought on that very day the present action, alleging that the money constituted security for the satisfaction of the decree passed in his favour by the Chief Court, and asked the Subordinate Judge to give him a declaration that he was entitled to payment in full in preference to the other decree-holders. The Court of first instance has decreed this claim and against its decision Miss Hamilton and Mrs. Daly have preferred separate appeals Nos. 514 and 1160 of 1913, respectively, which will both be disposed of by this judgment.

As regards the form of the suit, we may state at once that the plaintiff-respondent was fully justified in bringing a declaratory suit. On the 28th of October, when the action was commenced, the whole of the money was in deposit in Court and consequently the plaintiff's obvious remedy was to seek a declaration in the manner he has done. The mere fact that the defendants have during the pendency of the suit taken away a part of the deposit does not affect the plaintiff's remedy, more especially when we find that the money still in deposit is sufficient to satisfy the claim of the plaintiff.

Upon the merits, the determination of the appeals rests upon the contract entered into between Shankar Das and Kennelly on the 16th of September 1909. There is no doubt whatever that the hotel was released from attachment and the decree obtained by Shankar Das was stayed upon Kennelly depositing the balance of the money as security, and the question for decision is whether the money so deposited was to constitute security for such sum, not exceeding

the amount decreed by the District Judge, as may be found due to Shankar Das by the Appellate Court, or for any amount irrespective of that limit which the Court of Appeal may decree in his favour. In support of the former alternative, which is the contention urged by the learned Counsel for the appellants, we have the fact that on the day of the deposit there was before the Court only the appeal instituted by Kennelly and Shankar Das had not yet filed his cross-objections, and the further fact that if Kennelly had deposited in Court the amount decreed against him by the original Court, he would have got his property released from attachment and Shankar Das could not have insisted upon the deposit of a larger amount. But we are concerned, not with what might have been done by Kennelly, but with what was actually done by him. Now it is absolutely clear that on the 16th of September neither of the appellants, who obtained their decrees subsequently, had any right to the balance of the price of the hotel and it is beyond dispute that Kennelly, subject to the rights of Shankar Das, had an absolute power of disposal over it and could give it to anybody he liked. To understand the intention of the parties in making the deposit we have got the evidence of Mr. B. Petman, Barrister-at-Law, to the effect that before the date of the deposit Shankar Das had decided to file cross-objections against the decree granted to him by the District Judge and that it was for this reason that Kennelly's claim to take all the money over and above the sum required to satisfy the decree then under appeal was resisted by Shankar Das. The result was that the two came to terms and Kennelly paid into the Court the sum specified above which, it is to be noted, greatly exceeds the amount payable by him in pursuance of the decree of the District Judge and is nearly equal to what would have been the total amount of Shankar Das's claim as laid in the plaint with future interest and costs. A perusal of the application presented by both the contracting parties to the Chief Court on 16th of September 1910 shows that Mr. Kennelly agreed "that the balance Rs. 26,141-12-3 be paid into the Chief Court, Punjab, and that Lala Shankar Das have a first lien on the same for the sum or which he may get a decree in the Chief Court and this will be looked upon and shall constitute a first charge." *Ex facie* this document is a valid contract between the parties and it fully supports the contention of the respondents that the deposit was to be security, not only for the amount decreed by the District Judge, but also for any sum by which that decree may be enhanced by the Chief Court at the instance of the respondent. This view receives support from the facts which we have set out in the preceding paragraph and which afford the only possible explanation of the payment into Court by Kennelly of a sum far in excess of the amount awarded to the plaintiff by the Court of first instance. It will be observed that the language of the application is in accordance with the terms of Order XLI, rule 5 (3) (*c*), which deals with the stay of execution by the Appellate Court during the pendency of the appeal.

We have, therefore, no hesitation in holding that the money was deposited by Mr. Kennelly and accepted by the Chief Court as security for due performance of such decree as may ultimately be binding upon him, and it seems to us clear that Miss Hamilton by attaching the money before the date of the final decree in favour of the respondent did not prejudicially affect his rights. The attachment did not and could not render nugatory the contract of security entered into between Kennelly and Shankar Das and in law it operated upon such sum as was in excess of the amount decreed by the Chief Court. This principle is perfectly clear and if any authority is needed, we would refer to the observations in a judgment of this Court reported as *Kanwar Hira Singh* v. *David Parkes Masson* (1).

It follows from the above discussion that the Court of first instance was quite right in deciding the suit in favour of the plaintiff. We accordingly affirm its judgment and decree and dismiss the appeal with costs.

Appeal dismissed.

(1) 60 P. R. 1892.

RAM PIARI *v.* RAGHUNATH SINGH.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL NO. 723 OF 1914.
June 1, 1915.
Present:—Mr. Justice Piggott.
Musammat RAM PIARI—DEFENDANT—APPELLANT
versus
RAGHUNATH SINGH AND OTHERS—PLAINTIFFS AND DEFENDANT—RESPONDENTS.

Mortgage—Redemption, right of—Plaintiff, whether compelled to set up prior mortgage against his Will.

One *K S* was the owner of a certain *zemindari*. One of the four sons of *K S* mortgaged a one-fourth share to the father of *R*, the defendant, on the 7th of December 1877. On July 27th, 1877, the whole property was usufructuarily mortgaged by the four sons to *Z*. The entire consideration of *Z*'s mortgage went towards satisfying a decree for sale obtained on a previous mortgage of 1872. The plaintiffs, having acquired certain shares in the equity of redemption from some of the descendants of *K S*, redeemed the entire mortgage from *Z*. *R* brought a suit on her father's mortgage and she impleaded only the son of her mortgagor and also *Z*, but not the present plaintiffs. She obtained a decree for sale of the one-fourth share and purchased it herself. The plaintiffs then brought the present suit for redemption of the mortgage of December 7th, 1877:

Held, that the plaintiffs were entitled to redeem the mortgage of the 7th of December 1877 and that whatever rights *Z* or the plaintiffs, as her successors-in-interest, might hold in respect of the mortgage of 1872, these were not rights which the plaintiffs could be compelled to set up or to exercise against their will and that the possible existence of such rights did not affect the position of the plaintiffs as mortgagees subsequent to the defendant. [p. 795, col. 1.]

Held, further, that *R* as auction-purchaser of the equity of redemption, had a right of redemption. [p. 795, col. 1.]

Hassanbhai v. *Umaji*, 28 B. 153; 5 Bom. L. R. 892, referred to.

Second appeal from the decision of the District Judge of Farrukhabad, dated the 14th February 1914.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Appellant.

Mr. *Sowhny*, for the Respondents.

JUDGMENT.—The somewhat complicated facts out of which this second appeal arises are fully given in the judgment of the lower Appellate Court. The essential point in issue admits of being briefly stated. There was a certain *zamindari* property belonging to a family descended from one Khuwat Singh. A one-fourth share in this *zamindari* property was mortgaged by one of the four sons of the said Khuwat Singh to the father of *Musammat* Rampiyari, the present defendant-appellant. The date of this mortgage was December 7th, 1877. On July 27th, 1887, the whole o the property in question was mortgaged by the four sons of Khuwat Singh, with possession, to one *Musammat* Zaibunnisa. The plaintiffs in the present suit acquired certain shares in the equity of redemption from some of the descendants of Khuwat Singh and on the strength of this acquisition, have redeemed the entire mortgage in favour of *Musammat* Zaibunnisa, and have apparently obtained possession. Subsequently *Musammat* Rampiyari brought a suit on her father's mortgage of December 7th, 1877, in which she impleaded only the son of her mortgagor, and also *Musammat* Zaibunnisa, who had at the time no interest in the property in question, as her mortgage had been paid off. She did not implead the present plaintiffs. She got a decree for sale in respect of the one-fourth share covered by her mortgage, brought that share to sale and purchased it herself. Whether she has or has not succeeded in obtaining effective possession of this one-fourth share as against the plaintiffs is not clear from the pleadings on the evidence in the case. The present suit is by the plaintiffs for redemption of the mortgage of December 7th, 1877, in favour of *Musammat* Rampiyari's father. The suit was dismissed by the Court of first instance, but has been decreed on appeal. In both the Courts below the only point actually decided was a very narrow one. It appears that the entire consideration of *Musammat* Zaibunnisa's mortgage of July 27th, 1887, went towards satisfying a decree for sale which had been obtained on a previous mortgage, affecting the entire property of Khuwat Singh, executed on April 16th, 1872. *Musammat* Rampiyari contends that the plaintiffs have succeeded to the rights of *Musammat* Zaibunnisa in respect of her mortgage of July 16th, 1872. The argument is that *Musammat* Zaibunnisa could have held up this prior mortgage as a shield in any suit brought against her in respect of her mortgage of July 27th, 1887, that she was, therefore, in effect a prior mortgagee as compared with the father of *Musammat* Rampiyari and not a subsequent mortgagee. I agree with the learned District Judge that, whatever rights *Musammat* Zaibunnisa, or the plaintiffs as her successors-in-interest, might held in respect of the mortgage of July 16th, 1872, these were not rights which the plaintiffs could be compelled to set up

or to exercise against their Will. The possible existence of such rights does not, therefore, affect the position of these plaintiffs as mortgagees subsequent to the defendant-appellant. Had they been impleaded in the suit brought by the latter on her father's mortgage, they would not have been bound to set up any claim in respect of the mortgage of July 16th, 1872, and they might have been content to exercise the right of redemption which they possess as subsequent mortgagees under the deed of July 27th, 1887. They were deprived of this option by not being impleaded as defendants in the suit for sale brought by *Musammat* Rampiyari. I hold, therefore, that these plaintiffs possess an existing right of redemption in respect of the mortgage of December 7th, 1877, which they are entitled to exercise, as they claim to do, in the present suit.

The memorandum of appeal to this Court raises a further point, about which I feel considerable difficulty. *Musammat* Rampyari's present position is not merely that of a mortgagee under the deed of December 7th, 1877, but she is also the purchaser of the equity of redemption in respect of the share affected by that mortgage. The transfer of the equity of redemption by the auction sale under which Rampiyari purchased was effected behind the backs of the present plaintiffs, and could not deprive them of the right of redemption which they possess as subsequent mortgagees. It was, however, an effective transfer *qua* the rights of the mortgagor, just as much as if the mortgagor had sold his equity of redemption to the prior mortgagee by a private sale behind the back of the subsequent mortgagees. I have no doubt, therefore, that the defendant-appellant, *Musammat* Rampiyari, has a right of redemption as against the plaintiffs-respondents. In *Hassanbhai* v. *Umaji* (1), in a case strongly analogous to the present one, the High Court in second appeal passed a decree which had the effect of giving the prior mortgagee, who had acquired the equity of redemption, a first option of redeeming the subsequent mortgages, even while asserting the right of the subsequent mortgagees to redeem the prior mortgage, if the holder of the equity of redemption failed to redeem them. The difficulty I feel about passing a similar decree in the present case is in the main a practical one, arising out of the state of the pleadings and the evidence. It is true that, in the fourth and fifth paragraphs of her written statement, *Musammat* Rampiyari did plead her rights as a purchaser of the equity of redemption. She went on to assert that the present suit had only been brought in order to anticipate a suit for redemption which she herself was about to institute against the present plaintiffs. She did not, however, proceed to claim any sort of alternative relief on the strength of these pleadings, apart from the dismissal of the plaintiffs' suit altogether. Something must have been said about the point in argument in the Court of first instance, for the learned Munsif fixed an issue in the following terms: "Can the plaintiffs or the defendant No. 1 get any relief in this case?" No evidence was led by either party to show the amount that would be due to the plaintiffs for the redemption of *Musammat* Zaibunnissa's mortgage, beyond the fact that the sum actually paid to *Musammat* Zaibunnissa by the plaintiffs-respondents was Rs. 1,000. Whether there were any costs of redemption which the plaintiffs would be entitled to add to this amount is not apparent from the record. Moreover, no question was raised in the Courts below, or has been gone into, as to whether the integrity of the mortgage in favour of *Musammat* Zaibunnissa has been so broken up as to entitle *Musammat* Rampiyari to redeem a one-fourth share of the property affected by that mortgage on payment of one-fourth of the mortgage-debt. Some argument has been addressed to me on the questions of law involved; but I doubt whether the materials on the record are sufficient to enable me to decide them. A question of limitation might perhaps arise, in view of the fact that the plaintiffs paid off the whole of *Musammat* Zaibunnissa's mortgage at a time when they only held a fractional share in the equity of redemption, and they would consequently become the holders of a charge in respect of the shares in the equity of redemption which do not belong to them, including, of course, the share of the mortgagor whose rights have been acquired by *Musammat* Rampiyari. Under all the circumstances I do not think that the right of *Musammat* Rampiyari, as owner of the equity of redemption, to redeem

(1) 28 B. 153; 5 Bom. L. R. 892.

from the plaintiffs-respondents, either the whole of the property covered by the mortgage of July 27th, 1887, or a one-fourth share in the same on payment of a proportionate fraction of the consideration, can properly or conveniently be determined in the present suit. I, therefore, content myself with dismssing the appeal and I do so accordingly with costs, including fees on the higher scale.

Appeal dismissed.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 1156 OF 1914.

April 15, 1914.

Present:—Mr. Justice Shadi Lal.

GHULAM AKBAR KHAN—DEFENDANT—PETITIONER

versus

Musammat BAKHAT BIBI AND ANOTHER, REPRESENTATIVES OF *Musammat* AISHAN, DECEASED, PLAINTIFFS AND OTHERS—DEFENDANTS—RESPONDENTS.

Suits Valuation Act (VII of 1887), s. 11, rules under —Jurisdiction of Court — Waiver—Consent—Valuation of suit.

The valuation of a suit, for a declaration that the plaintiff is the owner of a certain land assessed with land revenue for purposes of jurisdiction is governed by rules framed under the Suits Valuation Act, and the plaintiff cannot fix an arbitrary valuation and make the suit cognizable by a Court of a particular grade.

Neither waiver nor consent of parties can confer upon a Court jurisdiction to entertain a suit which is beyond its pecuniary limits. The fact that the defendant did not object to the jurisdiction of the Court does not validate the proceedings.

Petition, under section 70 (*a*) of Act XVIII of 1884 as amended by Act XXV of 1899, for revision of the order of the District Judge, Mianwali, dated the 1st August 1914, confirming that of the Munsif, first Class, Mianwali, dated the 30th April 1914, decreeing the claim.

Mr. *Nand Lal*, for the Petitioner.

Pandit *Ram Bhaj Datta*, for the Respondents.

JUDGMENT.—After hearing Counsel on both sides I have arrived at the conclusion that the Munsif had not the jurisdiction to entertain and try the suit and that all the proceedings in his Court are *ultra vires* and must be set aside. It appears from the *patwari's jard* filed by the plain iff with her plaint that land revenue assessed on the land is Rs. 46-11-0, and it is clear that the value of the suit for purposes of jurisdiction is more than Rs. 1,000. It is true that in the plaint the value for purposes of jurisdiction was fixed at Rs. 1,000 and that this valuation was not objected to by the defendant-petitioner in his written statement; Mr. Ram Bhaj Datta for the respondent argues that as the defendant impliedly admitted the valuation put upon the suit by the plaintiff he should not be allowed to allege in the Court of Revision that that valuation was wrong. This contention I am unable to accept. It is a well-established principle of law that neither waiver nor consent of parties can confer upon a Court jurisdiction to entertain a suit which is beyond its pecuniary limits. In this case I have no doubt that the suit was beyond the pecuniary jurisdiction of the Munsif.

The provisions of section 11 of the Suits Valuation Act have obviously no application to the circumstances of the case.

It has been laid down in several judgments, vide, *inter alia*, *Gunga Sahai* v. *Sheo Lal* (1) and *Khuda Yar* v. *Wahab Din* (2), that that section applies to cases in which the valuation for purposes of jurisdiction depends upon the parties or the Court, and not to cases where the valuation is determined by rules having the force of law. In the case before me the rules framed under the Suits Valuation Act determine the value for jurisdiction and neither the parties, nor the Court, has any discretion in the matter.

In fact the learned Pleader for the respondents does not rely upon section 11 and I have no doubt that it is wholly inapplicable to the case.

I am accordingly constrained to hold that the proceedings of the Munsif, the order of reference made by him and the award of arbitrator are *coram non judice* and must be set aside. The application for revision is, therefore, accepted and the Court of first instance is directed to return the plaint to the plaintiff for presentation to the proper Court. As the objection to jurisdiction was not taken in the Court of first instance, I direct the parties to bear their own costs throughout.

Appeal accepted.

(1) 132 P. R. 1894.

(2) 35 P. R. 1901; 47 P. L. R. 1901.

RASH BEHARI LAL MANDAL *v.* TILUCKDHARI LAL.

CALCUTTA HIGH COURT.
FIRST CIVIL APPEAL No. 350 OF 1913.
June 9, 1915.
Present:—Mr. Justice Fletcher and
Mr. Justice Richardson.
RASH BEHARI LAL MANDAL—
DEFENDANT—APPELLANT
versus
TILUCKDHARI LAL AND ANOTHER—
PLAINTIFFS—RESPONDENTS

Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 2 —Limitation Act (IX of 1908), s. 29, Sch. I, Art. 116—Arrears of rent, suit to recover—Agricultural land, lease of, for agricultural purposes—Transfer of Property Act (IV of 1882), s. 107.

In a suit for arrears of rent the rent that was in arrears and was sued for, was for the year 1313 B. S. under a first *kabuliat*, and for the years 1313-1318 B. S. under a second *kabuliat*. The defendant's estate was taken charge of by the Court of Wards on the 11th November 1903, and whilst his estate was under their charge the Collector gave an acknowledgment in writing on the 20th September 1910 with respect to the rent now sued for:

Held, per *Fletcher, J.*, that the rent sued for the year 1313 was barred by limitation, as the case came under the Bengal Tenancy Act, and the leases were found to have been granted for agricultural purposes. [p. 798, col. 1.]

The Bengal Tenancy Act does not apply to leases of agricultural land which are not for agricultural purposes. [p. 798, col. 1.]

Umrao Bibi v. *Mahomed Rojabi*, 27 C. 205; 4 C. W. N. 76; *Burna Moyi Dassee* v. *Burna Moyi Chowdhurani*, 23 C. 191, *Promotho Nath Mitter* v. *Kali Prasanna Chowdhry*, 28 C. 744, referred to.

Per *Richardson, J.*—Where a lease relates to agricultural land but is not a lease for agricultural purposes, it is clearly governed by the Transfer of Property Act. Such a lease can only be made under section 107 by a registered instrument [p. 798, col. 2.]

Where a lease appears to be in substance a temporary lease granted to a rent-farmer or middleman and relates to agricultural lands, there is no question of any conflict between the Bengal Tenancy Act and the Transfer of Property Act or of applying any provision of the latter Act. [p. 799, col. 1.]

Section 29 of the Limitation Act contains a saving clause in regard to special and local laws. [p. 799, col. 1.]

Whether a lease of agricultural land is or is not a lease for agricultural purposes the Bengal Tenancy Act applies, and the period of limitation applicable is that provided by that Act. [p. 799, col. 1.]

Appeal against the decree of the Officiating Subordinate Judge, First Court, Bhagalpur, dated the 28th of April 1913.

Dr. *Dwarka Nath Mitter* and Babu *Naresh Chandra Sinha*, for the Appellant.

Babu *Chandra Sekhar Prosad Singh*, for the Respondents.

JUDGMENT.

FLETCHER, J.—The only question raised in this appeal is whether the period of limitation for a portion of the claim is governed by Article 2 of Schedule III of the Bengal Tenancy Act or Article 116 of the Indian Limitation Act. The suit was brought to recover arrears of rent due under two *kabuliats*. The first *kabuliat* was dated the 23rd of May 1902 and was given in respect of certain properties leased to the defendant for a term of four years (1310-1313) at a rent of Rs. 1,200, per annum. The second *kabuliat* was dated the 15th of January 1906 and was given in respect of certain other properties leased to the defendant for a term of eight years (1313-1320) at a rent of Rs. 438 a year.

The rent that was in arrears and was sued for was for the year 1313 under the first *kabuliat* and under the second *kabuliat* for the years 1313 to 1318. The defendant's estate was taken charge of by the Court of Wards on the 11th November 1908, and whilst his estate was under their charge the Collector gave an acknowledgment in writing on the 20th September 1910 with respect to the rent now sued for.

The only question, therefore, that arises is with reference to the rent due for the year 1313, for if the period of limitation applicable to the present suit is that provided under Article 2 of Schedule III to the Bengal Tenancy Act then when the Collector gave the acknowledgment in writing on the 20th September 1910, the rent for the year 1313 was already barred by limitation. The leases in the present cases are expressed to be *mustajiri* leases. Although a *mus'a-giri* lease is sometimes and perhaps usually a lease to middleman, yet in Behar the term is applied frequently to temporary leases instead of the word *thika* (*see* Land Law of Bengal by S. C. Mitra). The two clauses in the lease that are chiefly relied upon are first the words: "I the *mustajir* shall enjoy the *parti* land which may be converted into culturable land in the *jamabandi* of the *mouza*, which may be increased till the terms of this Settlement." The translation is not a very happy one, but the meaning seems to be that the tenant may either cultivate the waste land or let

it out to tenants and enjoy the increased rental.

The words relied on by the respondent to this appeal are: "Be it known that in the said *mouzas* you the proprietors have no *kamat* land," that is, lands in the possession of the *zemindars*.

Now the Bengal Tenancy Act does not define the classes of leases to which the Act applies. The local extent of the Act is given in section 1 (3) of the Act. It has, however, always been held that the Act only applies to agricultural land. A class of cases, however, has grown up in the Courts to the effect that the Act does not apply to leases of agricultural land which are not for agricultural purposes [see *Umrao Bibi* v. *Mahomed Rojabi* (1)].

The case of *Promotho Nath Mitter* v. *Kali Prasanna Chowdhry* (2) was much relied on in argument. The remarks of Maclean, C. J., in that case are only to the effect that a *putni* was not a lease for agricultural purposes, and, therefore, the provisions of the Transfer of Property Act applied as to the merger of the *putni* on its being purchased. That some of the provisions of the Bengal Tenancy Act, *viz.*, those as to the period of limitation provided by the Act for recovering arrears of rent from the *patnidar*, apply had already been decided in this Court in the case of *Burna Moyi Dassee* v. *Burna Moyi Chowdhurani* (3). That case remains unaffected by any subsequent decision of this Court. If the period of limitation provided by the Bengal Tenancy Act applies to arrears of *putni* rent, it must also apply to the leases in the present suit even if we accept the construction placed on those leases by the Vakil for the plaintiffs. I think, however, that the leases in the present case, even apart from the decision in *Burna Moyi Dassee's* case (3), come under the Bengal Tenancy Act. One of the purposes for which the leases were granted was to authorise the defendant to bring under cultivation the waste land which, I think, is obviously an "agricultural purpose."

That being so, I think that the rent sued for the year 1313 is barred by limitation. The decree of the lower Court must be varied by deducting from the decretal amount the amount of rent and interest thereon for the year. Subject to that modification the decree appealed against will be affirmed.

As the appellant has only succeeded as regards the rent for 1313 there will be no order as to the costs of this appeal.

The order of the lower Court as to the costs in that Court will remain unaffected.

RICHARDSON, J.—I agree. It is not always easy to ascertain precisely what the purposes of a lease are and in the present case I doubt whether it is necessary to determine, whether the lease in question is or is not a lease for agricultural purposes within the meaning of section 117 of the Transfer of Property Act. Under clause (3) of section 1 of the Bengal Tenancy Act, that Act extends to the whole of Bengal with the exception of certain specified areas, with which we are not now concerned. The lease covers land to which the Act *prima facie* extends. It has been held, however, that there are non-agricultural lands outside the excepted areas to which the provisions of the Act according to their true construction have no application [*Raniganj Coal Association Ltd.* v. *Judoonath Ghose* (4); *Umrao Bibi* v. *Mahomed Rojabi* (1); *Hedayet Ali* v. *Kalanand Singh* (5)]. But the land here is admittedly agricultural land and these authorities, therefore, are not pertinent. On the other hand where a lease relates to agricultural land but is not a lease for agricultural purposes, it is clearly governed by the Transfer of Property Act, which is an Imperial Act, in respect of matters within the scope of that Act (so far as its operation is not excluded by anything in its section 2). By way of illustration reference may be made to *Promotho Nath Mitter* v. *Kali Prasanna Chowdhry* (2). Such a lease again can only be made under section 107 by a registered instrument. In these and other cases the Transfer of Property Act has been held to apply. In other respects, however, the relationship between the parties to such a lease may still be subject to the provisions of

(1) 27 C. 205; 4 C. W. N. 76.
(2) 28 C. 744.
(3) 23 C 191.
(4) 19 C. 489.
(5) 20 Ind. Cas. 332; 17 C. L. J. 411.

KISHEN SINGH v. SOHNA.

the Bengal Tenancy Act. [*Durga Prosad Bundopadhya* v. *Brindabun Roy* (6); *Peary Mohan Mukhopadhya* v. *Sreeram Chandra Bose* (7); *Burna Moyi Dassee* v. *Burna Moyi Chowdhurani* (3)]. The Government have not found it necessary to issue any notification in exercise of the power conferred by section 117 of the Transfer of Property Act and so far as I am aware, the position gives rise to no practical difficulty, except the initial difficulty in some cases of determining whether a particular lease is or is not a lease for agricultural purposes, that is to say, where the question is whether some provision in the Transfer of Property Act is or is not applicable. That question does not really arise in the present case. The lease here appears to me to be in substance a temporary lease granted to a rent-farmer or middleman. It relates, as I have said, to agricultural lands. There is no question of any conflict between the Tenancy Act and the Transfer of Property Act or of applying any provision of the latter Act. The point is whether the period of Limitation applicable to a suit for arrears of rent due under the lease is that prescribed by the Limitation Act or that prescribed by the Tenancy Act. The argument for the respondents is that the lease is not a lease for agricultural purposes, and is, therefore, subject only to the Transfer of Property Act, and is not governed in any respect by the Tenancy Act. But in the view of the cases cited and of the terms of section 117 itself, that conclusion by no means follows from the premise. There is no dispute that if the Tenancy Act applies for any purpose the period of limitation is three years as provided in Article 2 of the Schedule, III of the Tenancy Act. Section 29 of the Limitation Act contains a saving clause in regard to special and local laws. In my opinion whether this lease is or is not a lease for agricultural purposes, the Tenancy Act applies and the period of limitation applicable is that provided by that Act.

Decree modified.

(6) 19 C 504.
(7) 6 C. W. N. 794.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1599 OF 1913.

April 15, 1915.

Present:—Mr. Justice Rattigan.

KISHEN SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

SOHNA AND OTHERS—PLAINTIFFS AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Necessity—Strict proof, when not required—Consideration, small portion of, not for necessity—Sale, if set aside.

When a suit to set aside an alienation is filed a considerable time after the alienation was effected, strict proof of necessity cannot be expected from the vendee. [p. 799, col. 2.]

A sale is not to be set aside when only a small portion of the consideration for the sale is not found to be for necessity. [p. 800, col. 1.]

Second appeal from the decree of the Divisional Judge of the Ferozepore Division, dated the 30th April 1913, reversing that of the Munsif, first Class, Moga, dated the 18th June 1912, dismissing the claim.

Mr. *Nand Lal*, for the Appellants.

Bakhshi *Gokal Chand*, for the Respondents.

JUDGMENT.—Both the Courts are agreed in finding that the sum of Rs. 200 was actually paid to Pala Singh, an antecedent creditor, and the sum of Rs. 45 to Arjan, also an antecedent creditor. The first Court, upon the strength of the Full Bench ruling in *Devi Ditta* v. *Saudagar Singh* (1), held that it was unnecessary for the vendee to show that the debts to Pala Singh and Arjan were themselves incurred for necessary purposes. The Divisional Judge did not accept this view and as a result granted plaintiffs a decree to the effect that the sale would not affect their reversionary rights after the death of the vendor. This decision is clearly opposed to the ruling of the Full Bench and as there is no reason to doubt the genuineness of the debts due to Pala Singh and Arjan, the items in question must be held, so far as the present vendee is concerned, to have been incurred for necessary purposes. It may be conceded that the evidence adduced by the vendees in this case is not as strong as it might have been, but at the same time it is to be remembered that the sale took place in 1902, that the original vendee, Budh Singh, died in 1904 and that the present contesting defendants were minors at the time of the transaction and cannot be expected to know

(1) 65 P. R. 1900; P. L. R. 1900 p. 322.

much about this incident. I accordingly accept the appeal and restore the decree of the first Court, as I agree with the Munsif that the small sum of Rs. 45 alleged to have been due on a book account forms but a trifling part of the total consideration. I am also by no means prepared to say that this latter item could not have been proved to have been incurred for necessary purposes had the plaintiff sued while Budh Singh himself was alive. The appeal is accepted and respondents must pay costs throughout.

Appeal accepted.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL NO. 310 OF 1913.

May 13, 1915.

Present:—Mr. Justice Young.

MG. PO MYA—APPELLANT

versus

MA DOUNG AND OTHERS—RESPONDENTS.

Arbitration—Reference by natural guardian of minors—Mutual agreement—Repudiation by other party, power of.

A natural guardian can refer a question that concerns the wards to arbitration and when the question does not concern the minors solely but also the guardian, there is consideration and mutuality sufficient to preclude the other party to the reference from repudiating it. [p. 801, col. 1.],

Temmakal v. *Subbammal*, 2 M. H. C. R. 47; *Romon Kissen* v. *Hurrololl*, 19 C. 334; *Sakrappa Lingappa Hebsur* v. *Shivappa Basappa*, 8 Ind. Cas. 647; 12 Bom. L. R. 984; 35 B. 153, referred to.

Mr. *Rahman*, for the Appellant.

Mr. *R. N. Banerji*, for the Respondents.

JUDGMENT.— This is a suit upon an award, which has been upheld by both the lower Courts. The objections urged before me were, *first*, that the procedure of the Court of first instance had been highly improper and prejudicial to the appellant's case in that the learned Sub-Divisional Judge had allowed the plaintiff's Counsel, after one arbitrator had been examined at length, to put his desposition to the other arbitrators and ask if it was correct. The lower Appellate Court severely criticised this procedure with the result that the Sub-Divisional Judge was called on for a report, when he explained that the procedure in question was adopted at the request of both the parties. Under such circumstances the objection falls to the ground under Evidence Act, section 142. The *second* objection was that the reference was bad in that a mother referred to arbitration the questions whether her deceased husband had not deposited during his life-time certain property with the defendant and whether he should not restore the same to her as one of the heirs and as representing her minor children. The defendant was found by both Courts to have assented to the reference but it having gone against him, he now disputes the authority of the mother to make the reference and says it is not binding on him. It cannot be disputed that she was the natural guardian of her own minor children and as pointed out at page 137 of Trevelyan's "Law relating to Minors" she had as such power to do all acts which were necessary and proper for realization, protection and benefit of the property of the minors. The defendant having denied the factum of the deposit, it was clearly to their interest that the matter should be settled. In *Temmakal* v. *Subbammal* (1) it was held that a guardian could bind minors by a reference. In *Romon Kissen* v. *Hurrololl* (2), Trevelyan, J., held the same, though he seems to have been, of the opinion that a minor might be able to upset the award on coming of age, if the award was shown to be contrary to his interest—a proposition which seems too general having regard to the decision of *Sakrappa Lingappa Hebsur* v. *Shivappa Basappa* (3), if the award was *bona fide*. Here, however, not only were the minors interested but the mother was also interested and the question does not really arise for, as pointed out in Russell on Awards, 9th Edition, at page 30, the defendant must, if the minors were not bound, be presumed to have known the law and facts and to have got all the consideration for which he stipulated in the consent of the mother, who was of full age and who also bound herself. I am not satisfied, therefore, that a natural guardian cannot refer a question

(1) 2 M. H. C. R. 47.
(2) 19 C. 334.
(3) 8 Ind. Cas. 647; 35 B. 153; 12 Bom. L. R. 984.

that concerns her wards to arbitration and I am satisfied that when the question does not concern the minors solely but also the guardian, there is consideration and mutuality sufficient to preclude the other party to the reference from repudiating it. I would, therefore, dismiss the appeal with three gold *mohurs*, costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 75 OF 1914.

April 15, 1915.

Present:—Sir Alfred Kensington, KT., Chief Judge.

HAZARA SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

ARUR SINGH—PLAINTIFF—RESPONDENT.

Custom—Sale—Consideration—Necessity for trifling amount not proved, effect of—Punjab Courts Act (IV of 1912), s. 41 (1) (a)—Second appeal, ground for interference in.

In a suit to set aside a private sale the Courts should not interfere where the sale is an act of ordinary prudence or where the consideration is held to be necessary except to a comparatively trifling amount.

Therefore, where a lower Court overlooks these provisions, the Chief Court is entitled to interfere in second appeal.

Second appeal from the decree of the Additional Divisional Judge of the Ferozepur Division at Ludhiana, dated the 22nd October 1913, reversing that of the Civil Judge, exercising the powers of a Munsif, first Class, Ferozepur, dated the 15th April 1913, dismissing the claim.

Mr. *Santanam*, for the Appellants.

Bakhshi *Gokal Chand*, for the Respondent.

JUDGMENT.—The two sales here in dispute were effected by Wazir Singh in June and July 1904, and for practical purposes they may be considered as forming one transaction. The vendor died in January 1907, and the present suit by his nephew as reversioner was not brought against the sons of vendee till nearly five years later. The only explanation that can be given of the delay is that the plaintiff was engaged in business in China.

The first Court dismissed the plaintiff's suit finding that the whole consideration was valid and necessary. The lower Appellate Court has upheld the consideration up to Rs. 1,513 out of the total nominal sum of Rs. 1,750, rejecting a variety of small items covering some minor debts of the vendor and expenses of the deeds. It has on this finding converted the sale into a mortgage for Rs. 1,513, and the case is before me on second appeal by the sons of the vendee.

I cannot allow a contention on behalf of the plaintiff-respondent that no question of law is involved. The law in these cases is somewhat indefinite, but there are several well-known rulings to the effect that the Courts should not interfere where the sale is an act of ordinary prudence, or where the consideration is held to be necessary except to a comparatively trifling amount. Both these propositions of law seem to me to have been overlooked by the learned Divisional Judge.

The vendor was a pensioned soldier, aged 62, whose son had long before disappeared. Judging by the revenue assessment the land must have been of poor quality, and in selling to another retired soldier in the village the vendor was not acting capriciously in order to spite his reversioners. 134-14/20 *kanals* had been already mortgaged to different mortgagees. By selling 116 *kanals* the vendor was able to clear off all these mortgages together with some small but apparently genuine debts. He left 24 *kanals* free of incumbrance on his death, so that he can hardly be said to have alienated his land unnecessarily.

The small items of consideration to which the lower Appellate Court has objected appear to be all genuine enough, and I fail to understand why these outstanding debts should not be treated as debts of which the payment was necessary. An old man left alone in the world may easily find it difficult to avoid contracting debt to some extent and too severely critical an attitude towards him is quite out of place.

My conclusion is that these sales should not be interfered with in any way, many years after the bargains were made. The appeal is, accordingly, accepted and the decree of the lower Appellate Court is set aside and that of the first Court dismissing the plaintiff's suit is restored with costs to the defendants-appellants throughout.

Appeal accepted.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 508 OF 1913.

June 14, 1915.

Present:—Sir Donald Johnstone, KT., Chief Judge, and Mr. Justice Rattigan.

RAJA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ALLAH DITTA AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Necessity—Alienation of ancestral property—Good faith—Second appeal—Question of law or fact.

The question of valid necessity may be one of law, or of customary law or one of fact according to the peculiar circumstances of each case.

Where, therefore, in a suit by the minor sons for a declaration that the sale of ancestral property by their father shall not affect their reversionary right after his death, it appeared that the alienor was really in need of money for household necessities and that he took the money in good faith for ordinary purposes:

Held, that the question of valid necessity was one of fact in the case and its necessity being proved, the plaintiffs' suit must fail.

Second appeal from the decree of the Divisional Judge, Jhelum Division, dated the 12th March 1912, reversing that of the Subordinate Judge, second Class, Gujrat, dated the 24th April 1911, decreeing the claim on payment of Rs. 300.

Mr. *Kanwar Narain*, for the Appellants.

Dr. *Muhammad Iqbal*, for the Respondents.

JUDGMENT.—The case is the familiar one of minor sons contesting the alienation of ancestral property by their living father, who, of course, is a *pro forma* defendant. The first Court held that the suit was within time, that Rs. 300 of the Rs. 600 purchase-money was not for "necessity," and that on the death of the alienor plaintiffs would be entitled to recover the land sold from the alienees on payment of Rs. 300. The lower Appellate Court, however, took the view that there were indications that in consequence of famine and so forth, alienor probably really did require the cash item (Rs. 350), that the alienation was old, made nearly twelves years before suit, and that it was unreasonable to expect from vendees any precise proof of "necessity."

Plaintiffs filed a revision here, but by a special order of the learned Judge in Chambers, who held that perhaps appeal lay but certainly revision did not, the revision was turned into an appeal, and was referred to a Division Bench specially for a ruling on the question, whether "valid necessity" is a point of law only or a point of Customary Law. We may note that no certificate for second appeal has been put in. We find ourselves unable to give a plain answer to this question. It seems to us that according to the peculiar circumstances of each case the question may be one of Customary Law or one of law or one of fact. In *Santa Singh* v. *Waryam Singh* (1), for instance, there is a case in which the question was one of law merely, while in the present case it strikes us as being one of fact, *viz.*, was alienor really in need of Rs. 350 for household necessities? The parties are in no wise at variance as to any principle of law or of Customary Law.

On the merits we entirely agree with the learned Divisional Judge. In our opinion there is on the record, if the rulings of this Court as to *quantum* of proof required in cases where suit has been long delayed be followed, ample proof that the alienor took the money in good faith for ordinary purposes and not at all for any of the purposes denounced in such rulings as *Devi Ditta Singh* v. *Saudagar Singh* (2).

In short, we think there is no force in the appeal and we dismiss it with costs.

Appeal dismissed,

(1) 24 Ind. Cas. 361; 207 P. L. R. 1914; 147 P. W. R. 1914; 19 P. R. 1915.

(2) 65 P. R. 1900; P. L. R. 1900, p. 322.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 200 OF 1912.

June 7, 1915.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice N. Chatterjea.

ANATH NATH MITRA—DEFENDANT—APPELLANT

versus

THE MIDNAPUR ZEMINDARY CO., LTD., —PLAINTIFF—RESPONDENT.

Enhanced rent, recovery of, suit for—Tenure-holder, rent paid by, whether liable to enhancement—Construction of document, essentials for.

Variableness of rent is the normal condition and even the naming of a sum is not conclusive against this; and, therefore, each case of enhancibility of rent is to be judged by its own peculiar circumstances. [p. 803, col. 1.]

Where there is no document, the conduct of the parties, especially where it extends over a long period of time, may justify an inference as to the terms on which land is held; but where there is a document defining the right of the parties, its terms

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must in the first instance be investigated. [p. 803, col. 1.]

In construing a document to ascertain its meaning, the Court must have regard to every fact a knowledge of which may conduce to the right application of the words used. [p. 803, col. 2.]

Soorasoonderee Debia v. *Golam Ali*, 19 W. R. 141; 15 B. L. R. (P. C.) 125 *n.* and *Huro Prasad Roy Chowdhury* v. *Chundee Churn Boyragee*, 9 C. 505; 12 C. L. R. 251, referred to.

Where no sufficient ground is found for excluding the normal condition of variableness, the rent is enhancible. [p. 804, col. 1.]

Appeal against the decree of the District Judge of Midnapur, dated the 6th of November 1911, modifying that of the Subordinate Judge, first Court, at that place, dated the 23rd of February 1911.

Babu *Karunamoy Bose*, for the Appellant.

Dr. *Rash Behari Ghose* and Babus *Joges Chandra Roy* and *Sitaram Banerjee*, for the Respondent.

JUDGMENT.—The appellant is a defendant in a suit for the recovery of enhanced rent. It has been conclusively determined that he is a tenure-holder and not a *raiyat* and the only question that remains for decision is, whether the rent he pays is liable to enhancement. The Subordinate Judge of the first Court at Midnapur held that the rent was enhancible and dismissed the suit. This decree has been reversed by the District Judge.

From the decree of the District Judge the present appeal has been preferred. Among the points urged in opposition to the appeal is the contention that the conclusion of the District Judge is on a question of fact and so it cannot be questioned in an appeal from appellate decree.

To appreciate this argument it is necessary to observe what the conditions are which bear on the question of enhancibility of rent. Variableness is the normal condition and even the naming of a sum is not conclusive against this.

Each case, however, has to be judged by its own peculiar circumstances. If there is no document, the conduct of the parties, especially where it extends over a long period of time, may justify an inference as to the terms on which land is held.

But where there is a document defining the right of the parties, its terms must, in the first instance, be investigated.

Here the rights of the parties must be determined by the terms of the documents, and this is a matter of construction which is open to this Court on second appeal.

There are several documents and the first is dated as far back as 1824. It is expressed to be granted to Gopi Nath Mittra, "a tenant, for clearing jungle." The *jama* is at the rate of 5 annas 7 *gundas* per *bigha* and the land leased and the total rent was said to be Rs. 66-14. The lease, however, provided for remissions, which had the effect of making the rent progressive until in 1237 (1830) it was payable at full rate, Rs. 66-14. This, it was agreed, should be paid year by year as the rent of the 200 *bighas*. And then the document proceeds as follows: "You shall continue to enjoy the jungle land with great felicity on bringing the same under cultivation, and causing the same to be held in *jote* by other persons, according to the former boundaries thereof. If you bring or cause to be brought under cultivation any land in excess of this quantity of land, then you shall separately pay rent of the land that may be found to be excess by measurement, at the rate of 5 annas 7 *gundas* per *bigha* as stated in this *patta*. This *patta* is granted to you in respect of the land, with the exception of the *hasil* and *paikan* lands included in former *jama* but lying within the aforesaid boundaries. You shall not get any remission (in rent) on account of drought, inundation, destruction of crops by worms, jungle or waste lands."

This then is the first document we have to construe and in asscertaining its meaning the Court must have regard to every fact a knowledge of which may conduce to the right application of the words used.

Though it may be that the construction placed on no document is an authority for the construction of another, yet we have the sanction of the Privy Council that it is relevant to the construction of the lease now under consideration that it was granted with a view to the reclamation of jungle land that for the first few years the amount of rent payable was progressive, and that then a fixed-rate was named. [*Soorasoonderee Debia* v. *Golam Ali* (1).] This decision has been accepted as furnishing a test in later cases, and among them it will suffice to mention *Huro Prasad Roy Chowdhury* v. *Chundee Churn Boyragee* (2).

(1) 19 W. R. 141; 15 B. L. R. (P. C.) 125*n*.
(2) 9 C. 505; 12 C. L. R. 251.

In view of the salient facts of this case I hold that on the true construction of the lease of 1824 the rent payable by the tenant is not enhancible in the manner claimed. Of the five remaining leases four appear to be in the nature of grafts on that with which I have dealt, and each to be a recognition the additional land has come within its scope as was contemplated from the first. To each of these the same considerations apply and I hold that the rent in each case is not enhancible.

But to the 6th and last lease none of the considerations which have influenced the construction I have placed on the five earlier ones apply, and I can find no sufficient ground for excluding the normal condition of variableness. In the case of the last lease, therefore, the rent is enhancible.

We accordingly set aside the decree of the lower Appellate Court with costs throughout to be paid by the respondent. The case will go back to the lower Appellate Court for the rent of the 6th lease only to be fixed in accordance with these remarks and for a decree.

Decree set aside; Case remanded.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1085 OF 1913.

June 14, 1915.

Present:—Sir Donald Johnstone, KT., Chief Judge, and Mr. Justice Rattigan.

SULTAN SINGH—PLAINTIFF—APPELLANT

versus

HASHMAT ULLAH AND OTHERS—DEFENDANTS—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), ss. 29, 31—Permission to guardian to sell ward's property—Power of Court to stop sale if detrimental to ward—Specific Relief Act (I of 1877), ss. 38, 41—Plaintiff repudiating transaction must restore benefits received only if other party acted in good faith—Defendant not to restore benefits.

The Legislature did not intend that a Court should give permission to a guardian to sell the ward's property without fixing at least an approximate price and without clearly ascertaining what is to be sold and the value of it. [p. 805, cols. 1 & 2.]

Even if a Court has given sanction under section 29 and section 31 (1) it is not beyond the power of that Court to intervene and stop the sale, if it finds something detrimental to the ward's interest is contemplated. [p. 805, col. 2.]

If a plaintiff sues to undo a transaction entered into by his guardian in his name during his minority, then *if the other party has acted in good faith and the plaintiff or his estate has actually received benefit*, the plaintiff must, as a condition precedent to the undoing of the said transaction, restore the said benefit. If, however, the minor or *quondam* minor is the *beatus possidens* and is being sued by the other party; a claim against the minor for refund of the benefit would fail. [p. 805, col. 2.]

Second appeal from the decree of the Divisional Judge, Delhi, dated the 20th February 1913, reversing that of the Subordinate Judge, first Class, Delhi, dated the 19th August 1911, decreeing Rs. 2,800 with proportionate costs.

Rai Sahib Lala *Moti Sagar* and Lala *Balwant Rai*, for the Appellant.

Mr. *Nanak Chand* and Dr. *Muhammad Iqbal*, for the Respondents.

JUDGMENT.—Mr. Moti Sagar on behalf of plaintiff-appellant began his address by giving us a history of the affair. As the facts are stated by him with substantial correctness, though with one notable omission, we reproduce his version here, remarking at once that in our opinion, upon a correct interpretation of the facts and a sound application of the law thereto, the plaintiff has no case.

The relationship of the defendants, who are minors, to their present and *quondam* guardians and others appears from the podigree-table given in the judgment of the lower Court, thus:

Musammat Hussaini, (now gardian *ad litem*)
|
Musammat Imtiyazi Begam, (guardian under the Act)
|
defendants.

Musammat Imtiyazi Begum has had two husbands, *viz.*, Salim Ullah, deceased father of defendants, and Ali Hussain, their stepfather, who is still alive. The minors have property in the United Provinces as well as in Delhi, and *Musammat* Imtiyazi Begum many years ago was appointed statutory guardian by the District Judge of Muradabad. Debts were outstanding against the minors, and on 3rd August 1906 the guardian procured from the District Judge aforesaid leave to sell property in Delhi, but the sanction was very general and did not state terms or details of any kind. Time passed, and at last on September 30th, 1908, the guardian entered into a contract to sell 3/16ths share of specified house property in Delhi to plaintiff for Rs. 35,000. The deed was registered and Rs. 600 was paid over to the guardian before the Sub-Registrar. For this sum a receipt was taken and in that document the terms of the contract were stated in

full. It seems that plaintiff wished that the minors' share in the property should be partitioned before actual purchase, and it was, therefore, agreed between him and the guardian that she should sue for partition, he undertaking to supply funds for litigation expenses up to Rs. 12,000 to be credited to plaintiff as part of the Rs. 35,000 aforesaid. Then on 13th November 1908 he advanced Rs. 2,000 on this agreement, and the guardian proceeded to institute two partition suits, which, we may remark, have not yet been finally disposed of. Then on 25th January 1909 the guardian applied to the District Judge of Muradabad for approval of the sale to plaintiff, but that officer refused sanction, called upon plaintiff to show cause why the contract should not be rescinded and the Rs. 2,600 returned, and then asked the Delhi District Judge for an estimate of the actual value of the property under consideration. The latter made an estimate of Rs. 45,000 as the fair market value, whereupon the other District Judge offered plaintiff his option of taking the property at that figure, or buying only some 11 shops for Rs. 18,000, which was an alternative proposal made by the guardian. On 25th February 1910 plaintiff refused both offers, and the District Judge of Muradabad sanctioned the sale of 11 shops at Rs. 18,000 in the open market. Next day one Parmeshri Das having accepted the bargain, a draft deed in his favour was approved, and, when a few days later plaintiff offered Rs. 19,000, the offer was refused as too late. On 18th July 1910 the sale to Parmeshri Das was finally sanctioned, and next day plaintiff filed against the minors alone his present claim, which is for Rs. 2,600 advanced *plus* Rs. 574-4-3 interest and expenses.

It is convenient here at once to dispose of a contention of Mr. Moti Sagar's. He argues that the sanction of 3rd August 1906 was sufficient authority for the completion of the sale, that the guardian's application of 25th January 1909 was uncalled for, and that the District Judge of Muradabad should not have interfered any further with the guardian's discretion. In support he quotes section 29 and section 31 [especially sub-section (3) (*a*)] of the Act; but, in our opinion, it was probably never intended that a Court should give permission to a guardian to sell the ward's property without fixing at least an approximate price and without clearly ascertaining what was to be sold and the value of it—as to this see section 31 (1). Again, the guardian evidently never understood she was to have *carte blanche*, for she did ask for sanction before completing the sale, and in any case it seems to us that, even if a Court has given sanction under section 29 and section 31 (1), it is not beyond the power of that Court to intervene and stop the sale, if it finds something detrimental to the ward's interests is contemplated. Lastly, the Court had never, even in the most general way, sanctioned the actual contract entered into with plaintiff, *viz.*, the arrangement that the guardian was to get advances from him, to count as part of the purchase-money, in order to bring partition suits for the benefit of plaintiff. We find, therefore, that the Court was justified, both in law and in equity, in its order refusing sanction to the sale to plaintiff and to the contract of 1908.

But plaintiff's Counsel argues that in any case he is entitled to refund of his actual advances, and he quotes rulings dealing with the well known doctrine that a minor, even if he is entitled in law to repudiate a transaction done on his behalf by his guardian, should restore to the other party benefits received. The law on that subject is clear and can be stated in a few words, and we need not discuss the rulings in which it is to be found. If a plaintiff sues to undo a transaction entered into by his guardian in his name during his minority, then, *if the other party has acted in good faith and the plaintiff or his estate has actually received benefit*, the plaintiff must, as a condition precedent to the undoing of the said transaction, restore the said benefit. If, however, the minor or *quondam* minor is the *beatus possidens* and is being sued by the other party, ordinarily, according to the authorities, a claim against the minor for refund of the benefit would fail. Passing over the latter proposition, however, and looking at the history of the case, one cannot help seeing how hopelessly plaintiff fails in connection with the first proposition. The litigation to be undertaken was not for the benefit of the minors in intention and there is no evidence that it has turned

out so in fact, and one has only to look at the discreditable transaction with Ali Hussain, step-father of defendants, discussed by the lower Appellate Court at page 10 of the paper-book but not mentioned by Mr. Moti Sagar as part of the history of the case, to see that plaintiff can never be allowed to say that his hands are clean and that he has acted in good faith. Apparently plaintiff was ready to pay not only Rs. 35,000 but some thousands more for the bargain, and the diversion of those additional thousands from the pockets of the minors into the pocket of Ali Hussain puts plaintiff out of Court at once.

We entirely agree, therefore, with the learned Divisional Judge in holding that the suit fails, and we wholly dissent from the first Court's way of looking at the case.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 1132 OF 1915.

May 3, 1915.

Present:—Mr. Justice Fletcher and Mr. Justice Roe.

BEHARI LAL NANDY AND OTHERS—PLAINTIFFS—PETITIONERS

versus

KEDAR NATH NEBU AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

Damages—One co-sharer's right to sue another co-sharer—Mutual arrangement about actual possession, effect of—Increased rent, demand for, for fishing.

Where the plaintiff sues one of the co-sharers for damages for the wrongful removal of fish from a tank and it is found that there was an arrangement by which the defendant was put in possession of the tank with the right to take fish from it:

Held, that the arrangement or lease could not be void even under the Transfer of Property Act, because the act that was done in removing the fish was a past act and at that time, if under an arrangement, lease or license, whatever it may be called, the right was in existence, the defendant was justly exercising his right in fishing in the tank, and damages could not be claimed against him.

Rule against the judgment of the Munsif of Amta, District Hooghly, exercising the powers of a Court of Small Causes.

Babus *Baidya Nath Dutt*, *Gour Mohan Dutt* and *Presh Chandra Dutt*, for the Petitioners.

Babu *Monmotho Nath Ganguli*, for the Opposite Party.

JUDGMENT.

FLETCHER, J.—This is a Rule calling upon the opposite party to show cause why the decree of the Small Cause Court complained of should not be set aside. The plaintiffs are the petitioners in this Rule. The plaintiffs brought the suit against the defendant No. 10 and others claiming damages for the wrongful removal of fish from a tank. The defendant No. 10 is a co-sharer of the plaintiffs and the other defendants. He set up the plea that, by means of an arrangement arrived at between him and the other sharers, he had been put in possession of the tank with the right of fishery therein for a period of nine years and that he removed the fish under such authorization. It is said that that lease is void having regard to the provisions of the Transfer of Property Act. That makes no difference in a suit like this, because the act that was done in removing the fish is a past act and at that time, if under an arrangement, lease or license, whatever it may be called, the right was in existence, the defendant No. 10 was justly exercising his right in fishing in the tank and damages cannot be claimed against him. I see no reason to differ from the conclusion arrived at by the learned Judge of the Small Cause Court that there was an arrangement by which the defendant No. 10 had been put in possession of the tank with the right to take fish from it. The view that the learned Judge has taken is that, owing to the large accession of fish in the tank that arose from the flood last year, the plaintiff required further rent from the defendant No. 10 and it was only when the defendant No. 10 refused to pay the increased rent that the present suit was lodged against him. That seems to be amply sufficient to dispose of the present Rule without considering whether, if the lease is not proved, the defendant No. 10 as a co-sharer had the right to remove the fish without being liable to account to his co-sharers. The present Rule, therefore, fails and must be discharged with costs, two gold *mohurs*.

ROE, J.—I agree.

Rule discharged.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 819 OF 1897.

September 6, 1898.

Present:—Mr. Justice O'Kinealy and Mr. Justice Pratt.

ROMESH CHANDRA BISWAS AND OTHERS —PLAINTIFFS—APPELLANTS

versus

GHULAM NABI FAKIR—DEFENDANT—RESPONDENT.

Rent, suit for—Kabuliat, *construction of—Enhancement, no question of.*

Where on the face of a document which was to have effect for three years, it appeared that the rent fixed was a certain amount but that the landlord allowed a certain amount to be held in abeyance for three years, and for those three years, year by year a certain amount was to be paid by the defendant according to the instalments mentioned, and where the landlord sued for the arrears:

Held, that what the plaintiff sued for was not enhancement, no more than if a landlord gave a receipt for half the rent for the first year, half the rent for the second year, and half the rent for the third year, and subsequently sued for the whole rent.

Appeal against the decree of the Subordinate Judge, Rangpur, dated the 4th of February 1897, modifying that of the Munsif, first Court, Gaibanda, dated the 18th August 1896.

Babus *Srinath Das* and *Kolada Kinkar Roy*, for the Appellants.

Babu *Ishar Chandra Chakravarti*, for the Respondent.

JUDGMENT.—This is an appeal from a decision of the Subordinate Judge of Rangpur, dated the 4th February 1897.

The suit was for rent and was based on a *kabuliat* dated the 1st *Baisak* 1295. The parties have left the case in such a position that all we have to do is to construe that document. Nothing in regard to conduct amongst themselves has been left to us to determine. The document is in regard to a *meadi sarasari jote*, and was to have effect for three years. In the first column of the schedule of land and *jama* set out in that document is a description of the land, in the second column is the total area, in the third column the rate per *bigha*, in the fourth column is the rent in *sicca* rupees, in the fifth column is the *batta* on the Company's coin, in the sixth column is the total rent in the Company's coin, which is stated at Rs. 19-0-18¼ *gandas*, in the seventh column is the *hajat* allowed till the end of the term, which is stated at Rs. 10-8-4½ *gandas*, and in the last column is the balance, being the net rent payable which is stated at Rs. 8-8-13¾ *gandas*. Further on the document runs thus:—"And on the expiry of the term of this *daul*, I shall pay in the manner aforesaid the full *jama* of Rs. (19-0-18¼) nineteen and *gandas* eighteen and a quarter including the said amount left in abeyance." The plaintiffs now sue after expiry of the three years for the full *jama* of Rs. 19-0-18¼. The defendant denied the *kabuliat* altogether. He also stated that he knew nothing about *hajat* in the *kabuliat*. But subsequently he admitted that he executed this document.

On the face of the document it appears that the rent fixed was Rs. 19-0-18¼ but that the landlords allowed a certain amount to be held in abeyance for three years, and for those three years, year by year Rs. 8-8-13¾ were to be paid by the defendant according to the instalments mentioned. In that view of the case what the plaintiffs sued for was not enhancement, no more than if a landlord gave a receipt for half the rent for the first year, half the rent for the second year and half the rent for the third year, and subsequently sued for the whole rent. It may be for, ought we know, that it was never intended to act upon that document, but no such case was placed before us.

We, therefore, set aside the decree of the lower Appellate Court, and restore that of the Court of first instance, with costs in all the Courts.

Decree set aside.

PRIVY COUNCIL.

APPEAL FROM THE PUNJAB CHIEF COURT.

May 19, 1915.

Present:—Lord Atkinson, Sir George Farwell, Sir John Edge and Mr. Ameer Ali.

PADMAN AND OTHERS—APPELLANTS

versus

HANWANTA AND OTHERS—RESPONDENTS.

Will not produced—Presumption—Secondary evidence, admissibility of—Estoppel.

The rule of law that "when a Will is traced to the possession of the deceased and is not forthcoming at his death the presumption is that he has destroyed it", must be applied with considerable caution in India in view of the habits and condition of the people. [p. 810, col. 2.]

A Hindu *Jat* in 1884 executed a Will under which his surviving sons and a grandson whose father had died were to take equal shares. In 1898 he revoked that Will and executed another by which he excluded two of his sons. After his death mutation was made

in accordance with the Will of 1884. The devisees under the second Will, except two of the grandsons, sued for the shares in respect of which the two excluded sons had been recorded as owners. Before the trial of the suit the parties agreed to refer the dispute to arbitration. The arbitrators made an award and in accordance therewith the suit was dismissed. The plaintiffs applied for revision of the order and one of the plaintiff's thereafter applied to withdraw his application for revision. The Chief Court reversed the order of dismissal and remanded the case for trial. At the trial the original Will of 1898 was not forthcoming but a copy of that Will was obtained from the Registrar's Office and admitted in evidence without any objection:

Held, that the Will was admissible in evidence as the reasonable presumption was that the Will was mislaid and lost or else stolen by one of the defendants after the death of the testator. [p. 810, col. 2.]

Held, further, that the plaintiff who had withdrawn his revision petition was not estopped from claiming his share nor were those who had not joined in the suit. [p. 811, col. 1.]

Welch v. *Phillips*, 1 Moore P. C. 299; 12 E. R. 828; 43 R. R. 83, dissented from.

Appeal from a judgment and decree of the Punjab Chief Court, dated July 17th, 1909, reversing those of the Divisional Judge of Ferozepore, dated December 6th, 1907, affirming those of the Court of the District Judge of Ferozepore, dated July 22nd, 1907.

FACTS.—The facts of the case are sufficiently set forth in their Lordships' judgment.

Messrs. *DeGruyther*, *K. C.*, (with him *Mr. Parikh*), for the Appellants, contended that it was not proved that Daula at the time he made the Will in question was of sound disposing mind. The parties were governed by the Punjab Customary Law. The property being jointly acquired, Daula could not dispose of it to the exclusion of two of his sons who had helped in acquisition thereof. There was no pooof that the Will was lost and, therefore, secondary evidence was inadmissible. It was proved that Daula had concealed the Will by his subsequent acts. The Will was in the custody of Daula himself and as on his death it was not found, the presumption was that hed estroyed it. This presumption was not rebutted; on the contrary there was evidence in support of it. In any case the respondents could recover only their own share of the property in suit. Withdrawal from the proceedings to set aside the award of the arbitration could not deprive those who were rightly entitled to a certain share of their shares. It was settled law that guardians on behalf of a minor could not compromise without the leave of the Court. The object of the Civil Procedure Code was to secure the finality of an award. Under section 522 the decree passed on an award was not appealable. Error in law did not vitiate the award. Application in revision under section 622 was subject to the Limitation Act, Schedule II, Article 158, and section 12.

Reference was made to *Welch* v. *Phillips* (1), *Manohar Lal* v. *Jadu Nath Singh* (2), *Ganesha Row* v. *Tulju Ram Row* (3), *Ghulam Jilani* v. *Muhammad Hussain* (4).

Mr. *Arthur Grey*, for the Respondents, contended that sufficient evidence had been given of the execution of the Will of 1898 at the time of the death of the testator and the contents thereof were rightly proved by secondary evidence. The Will was not destroyed with the intention of revoking it. The findings of facts in which the Divisional Judge and the Chief Court had concurred could not be disturbed. The property was self-acquired and, therefore, Daula had power to dispose of it as he chose. The Chief Court was right in refusing to review the decree with regard to the share of Ram Sukh and still more with regard to the share of Bhinja and Shera.

[LORD ATKINSON:—You sued for undivided whole.]

He was entitled to sue for a declaration and be trustee for others. Such suits were frequently brought and proper decree made without prejudice to the rights of others.

[MR. AMEER ALI: Declaration is one thing and suit for possession another.]

[SIR GEORGE FARWELL:—In England it would be impossible suing on behalf of one and making him defendant. It was settled Hindu Law that no trusteeship was created by joint beneficial interest.]

[MR. AMEER ALI:—Is not Shera's case distinct from others?]

In appeal it was open to the parties to raise any point, but not on revision. Nobody had a right to be heard. Proceedings were by petition (see section 150 of the Civil Procedure Code of 1908 and the Punjab Courts Act XVIII of 1884, section 70, which applied section 622 of the Civil Procedure Code of 1882 with-

(1) 1 Moore P. C. 299; 12 E. R. 828; 43 R. R. 83.

(2) 33 I. A. 128; 28 A. 585; 10 C. W. N. 898; 9 C. C. 219; 4 C. L. J. 8; 8 Bom. L. R. 489; 1 M. L. T. 210; 16 M. L. J. 291; 3 A. L. J. 710.

(3) 19 Ind. Cas. 515; 17 C. W. N. 765; 11 A. L. J. 589; 18 C. L. J. 1; 15 Bom. L. R. 626; 14 M. L. T. 1; (1913) M. W. N. 575; 25 M. L. J. 150; 36 M. 292; 40 I. A. 132 at p. 139 (P. C.).

(4) 29 I. A. 51; 12 M. L. J. 77; 29 C. 167; 6 C. W. N. 226, 25 [illegible] 1902.

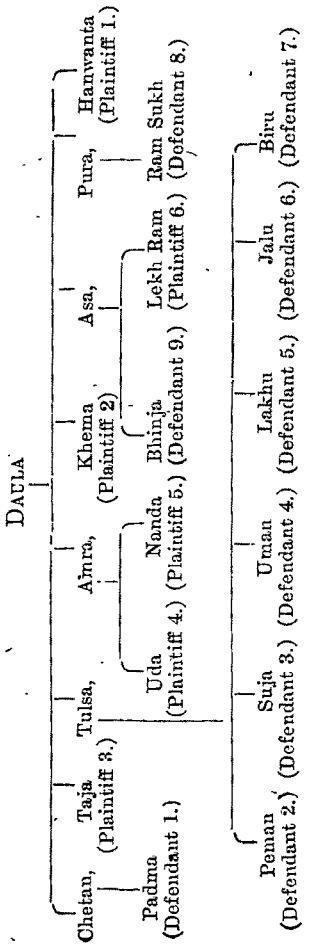
out the word illegal). If there was material irregularity, the High Court called for the record. The High Court had power of its own motion to send for the record, but in practice it was on petition by any one. This was only in cases when there was no appeal.

Mr. *De Gruyther*, in reply.

JUDGMENT

MR. AMEER ALI.—This is an appeal from a judgment and decree of the Chief Court of the Punjab, dated the 17th of July 1909, and the dispute relates to the property of one Daula, a Jat by origin who migrated from Bikanir many years ago and settled in the Ferozepore District. He died in April 1902, leaving a large family of sons and grandsons and considerable landed property.

The following pedigree will explain the relative position of the contesting parties in the present litigation.



In 1884 Daula had executed a Will, which was duly registered at the time, under which his surviving sons and a grandson, Ram Sukh, whose father, Pura, had died, were to take his properties substantially in equal shares.

In January 1898 he revoked his former Will and made another, which also was registered, by which, excluding Chetan and Tulsa, he left his property in six equal shares to his four other surviving sons and to Ram Sukh, the son of Pura, and to Bhinja and Lekh Ram, the two sons of Asa, who had died in the meantime.

On Daula's death there were the usual mutation proceedings for the registration of the names of his successors in the Collector's Register, in the course of which the devisees under the second Will claimed to have their names recorded to the exclusion of Chetan's and Tulsa's representatives. In view, however, of the provisions of the Will of 1884 the Collector ordered the names to be entered in eight shares and referred the contending parties to settle their respective claims in the Civil Court. This happened in September 1902, and in December following the present suit was brought by the persons taking under the second Will against the representatives of Chetan and Tulsa, defendants Nos. 1 to 7, to establish the plaintiffs' claim under the Will of 1898 and to recover possession of the one-fourth share of Daula's lands in respect of which Chetan and Tulsa had been recorded as owners. This one-fourth includes the shares of Ram Sukh and Bhinja, who, on their refusal to join in the action, had been made defendants Nos. 8 and 9.

The defendants Nos. 1 to 7 raised various objections to the plaintiffs' suit, the nature of which is indicated by the issues framed by the Court of first instance. They are as follows:—

(1) Whether the property in dispute was acquired by Daula alone or jointly by him and his sons.

(2) Whether the Will of 1898 was executed by Daula voluntarily and whether he was competent to make such a Will.

(3) If so, whether the Will has been cancelled by any subsequent act on his or on the part of the plaintiffs.

Before trial, however, the parties agreed to refer the dispute to arbitration. The arbitrators made an award, and on the 25th November 1903 the District Judge, in accordance therewith, dismissed the plaintiffs' claim. On revision under section 623 of the Civil Procedure Code of 1882, the Chief Court reversed the order of dismissal and remanded the case to be disposed of according to law. On remand the first Court went into evidence and in the result dismissed the plaintiffs' claim, principally on the ground that the lands in dispute were not the self-acquired properties of Daula over which he had a right of disposition *dehors* the ordinary law, under which ancestral property is inheritable by sons and grandsons *per stirpes* in equal shares. The District Judge does not say this in so many words, but this is clearly the effect of his judgment. On the other issues he does not appear to have come to definite findings.

On appeal by the plaintiffs the Divisional Judge was of opinion that the properties to which the suit related were the self-acquired properties of Daula within the Hindu Law, and that the Will of 1898 was not open to the objection of having been executed under undue influence or without due comprehension; but he considered that the subsequent acts of Daula showed that he had revoked or cancelled it. He was further of opinion that no sufficient foundation was laid for the admission in the first Court of secondary evidence of the Will of 1898. He accordingly dismissed the plaintiffs' appeal.

From his judgment the plaintiffs appealed to the Chief Court, which agreed with the Divisional Judge in his finding that the properties in dispute were the acquisitions of Daula who had a right of disposition over them. The learned Judges were also of opinion in agreement with the second Court on the question of the competency of Daula to make the Will of 1898, but they differed from the Divisional Judge on the point on which he had dismissed the plaintiffs' suit. They held in substance that there was no sufficient evidence of revocation. They accordingly set aside the Divisional Judge's judgment and gave the plaintiffs a decree for the entire one-fourth share claimed by them.

An application for review of judgment was made to the Chief Court under the provisions of section 622 of the Civil Procedure Code, for the exclusion of the shares of Ram Sukh and Bhinja from the decree in favour of the plaintiffs. It was also attempted to be argued on this application, on certain grounds to which their Lordships will refer presently, that the share of Shera, one of the sons of Khema who had died after the institution of the suit, should be excluded. These applications were rejected by the Chief Court.

The defendants have now appealed to His Majesty in Council, and the case has been argued on their behalf in great detail. It was urged in the course of the argument that a registered copy of a Will of 1898 was admitted in evidence without sufficient foundation being laid for its admission. No objection, however, appears to have been taken in the first Court against the copy obtained from the Registrar's office being put in evidence. Had such objection been made at the time, the District Judge, who tried the case in the first instance, would probably have seen that the deficiency was supplied. Their Lordships think that there is no substance in the present contention.

As regards the question of revocation, the Chief Court, after reviewing all the circumstances, said as follows: "We think that the more reasonable presumption in this case is that the Will was mislaid and lost, or else was stolen by one of the defendants after the death of Daula"; and they held that in their opinion it was not revoked. Their Lordships think that it was perfectly within the competency of the learned Judges to come to that finding. Much stress has been laid on the view expressed by Baron Parke, in *Welch* v. *Phillips* (1), that when a Will is traced to the possession of the deceased and is not forthcoming at his death, the presumption is that he has destroyed it. In view of the habits and conditions of the people of India this rule of law, if it can be so called, must be applied with considerable caution. In the present case the deceased was a very old man and, towards the end of life, almost imbecile. There is nothing definite to show that he had any motive to destroy the Will or was mentally competent to do so. On the other hand the circumstances favoured the

view the Chief Court has taken that the Will was either mislaid or stolen.

As regards the contention that the shares of Shera, Ram Sukh, and Bhinja should be excluded from the decree in favour of the plaintiffs, their Lordships will first deal with Shera's share. It is urged that inasmuch as Shera had put in a petition in the Chief Court to withdraw his application for revision in the arbitration matter which was formally granted on the 3rd April 1906, he must be taken as estopped from questioning the defendants' right so far as his particular share is concerned. In other words, that he must lose his share, if he is otherwise entitled to it, by the simple fact of having withdrawn or tried to withdraw his application for revision. Their Lordships think this contention is clearly not well founded. On the same day on which the order was made on Shera's petition, *viz.*, the 3rd of April, the Chief Court set aside *in toto* "the reference to arbitration and subsequent proceedings as altogether bad." The parties were thus relegated to their original rights; Shera is now a plaintiff, and entitled, like the others, to his share.

The effect of the order in the mutation proceedings was to place the representatives of Chetan and Tulsa in possession of two-eighths or one-fourth share of the property, and the suit is to recover from them this share; but Ram Sukh and Bhinja, who are entitled, under the Will of 1898, to one-sixth and one-twelfth respectively under the second Will, disclaim all benefit thereunder. They are apparently in possession under the Revenue Court's order of one-eighth and one-sixteenth respectively. The one-fourth share claimed by the plaintiffs, for which the Chief Court has made a decree in their favour, includes the excess share of Ram Sukh and Bhinja, which amounts to one-twenty-fourth and one-forty-eighth respectively, in the aggregate one-sixteenth. The plaintiffs are clearly not entitled to a decree for their shares. The decree of the Chief Court must, therefore, be modified to that extent. In other words the decree will be for three-sixteenths instead of one-fourth. And their Lordships will humbly advise His Majesty accordingly.

Having regard to the general result of the appeal, their Lordships think the ends of justice will be met by ordering each party to bear their own costs.

Decree modified.

Solicitor for the Appellants:—Mr. *Edward Dalgado.*

Solicitors for the Respondents:—Messrs. *T. L. Wilson & Co.*

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2978 OF 1911.

February 5, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

LABAN SARDAR—PLAINTIFF—APPELLANT

versus

CHOYEN MALLICK AND OTHERS—DEFENDANTS—RESPONDENTS.

Partnership—Contribution, suit for—Co-partners, liability of, for debts—Contract Act (IX of 1872), s. 43—Second appeal—New defence, if can be set up.

Though partners are jointly liable to third persons, a partner who pays more than his share of the partnership debt, whether voluntarily or not, is entitled to contribution from his co-partners. [p. 812, col. 2.]

Boulter v. *Peplow*, 9 C. B. 493; 137 E. R. 584; 19 L. J. C. P. 190; 14 Jur. 248; 82 R. R. 401 and *Fitzgerald* v. *McCowan*, (1898) 2 I. R. 9; 4 Irish Law. Rep. 1, referred to.

Where the plaintiff and the defendants, members of a partnership firm, borrowed money in their individual capacity and were sued as such by their creditor and the decree obtained by the latter was executed not against the partnership property, but against the private property of the plaintiff alone:

Held, that the payment by the plaintiff to the decree-holder really signified that he had in substance been called upon to supply the entire capital, although the initial arrangement between the parties was that the capital should be furnished by all the share-holders in equal proportion, and that, therefore, a suit for contribution was maintainable. [p. 813, col. 2; p. 814, col. 1.]

Guda Kulita v. *Joyram Das*, 26 C. 262 *note* and *Sadhu Narayana Aiyangar* v. *Ramaswami Aiyangar*, 3 Ind. Cas. 487; 4 M. L. T. 475; 32 M. 203, referred to.

In second appeal a defendant cannot be permitted to make a new case which involves the investigation of facts. [p. 814, col. 1.]

Appeal against the decree of the District Judge, Nadia, dated the 8th of June 1911, affirming that of the Munsif, second Court, Kushtia, dated the 31st of August 1910.

Moulvi *Nur-ud-Din Ahmed* and Babu *Rajendra Prasad*, for the Appellant.

Babu *Shama Chandra Roy*, for the Respondents.

LABAN SARDAR *v.* CHOYEN MALLICK.

JUDGMENT.—This is an appeal by the plaintiff in a suit for contribution. His case is that he and the defendants borrowed money from one Fazil Mandal with a view to carry on a business for the sale and purchase of goods. The money borrowed was applied for the purposes of the partnership and in fact constituted the nucleus of the capital. Fazil Mandal subsequently sued the plaintiff and defendants and obtained a decree on the 2nd February 1907. He took out execution, however, against the plaintiff alone who was thus constrained to satisfy the decree, under compulsion of legal process, by payments made from time to time during the years 1908 and 1909. The plaintiff now seeks to recover from each of the defendants the sum payable by him in respect of the debt due to Fazil Mandal. The first defendant resisted the suit substantially on the ground that the partnership had been closed, that the accounts had been adjusted and that the plaintiff had been paid the sum which was due to him. The allegation in substance was that the plaintiff alone was bound to furnish the entire capital and had been repaid. The second defendant also resisted the claim on similar grounds. The Courts below have dismissed the suit, on the ground that it is not maintainable in the form in which it has been brought and that the remedy of the plaintiff is by way of a suit for dissolution of partnership and for adjustment of accounts. The Courts below have found in effect that the money was borrowed by the plaintiff and the defendants jointly and that it was applied for the purposes of the partnership business. The Courts below have further found that the plaintiff alone was liable to furnish the entire capital, that there has been no adjustment of accounts as alleged by the defendants and that the plaintiff has not been paid the sum due to him.

The question in controversy between the parties is, whether in this state of facts the suit as framed is maintainable. On behalf of the respondents, it has been argued that no contribution suit lies, because the parties stood in the position of partners and that the only remedy of the plaintiff is to institute a suit for adjustment of accounts after realization of the assets. In our opinion the contention of the defendants cannot be sustained.

The rule applicable to cases of this description is thus formulated in the Laws of England edited by Lord Halsbury, Volume XXII, paragraph 66: "Though partners are jointly liable to third persons, a partner who pays more than his share of a partnership debt, whether voluntarily or not, is entitled to contribution from his partners." In support of this statement reference may be made to the cases of *Boulter* v. *Peplow* (1), *Sedgwick* v. *Daniell* (2), *Betard* v. *Hawes* (3) and *Fitzgerald* v. *McCowan* (4). In the case of *Sedgwick* v. *Daniell* (2), the plaintiff and the defendants were share-holders in a Joint Stock Mining Company. Money was required to work the mine. *T*, who was also a share-holder, applied to a Bank for an advance of £500, which had consented to make an advance on the security of the joint promissory note of the plaintiff, the defendants and *T*. The note was given and the money advanced was applied to the purposes of the mine. The plaintiff was subsequently compelled by the creditors to pay more than his share of the note. He, therefore, sued the defendants for contribution. It was ruled that this was not a part of the partnership transaction and that the action was maintainable. In the case of *Betard* v. *Hawes* (3), the plaintiff along with eleven others including the defendant became liable for a debt contracted in respect of a scheme. The creditor sued the plaintiff who ultimately paid the whole debt. Two of the original contractors died before payment. The plaintiff sued the defendant for contribution. It was ruled that although there might be many cross-liabilities amongst the provisional committee men in respect of the scheme, an action lay at law for contribution against such of them as were liable to pay this debt. Similarly in the case of *Boulter* v. *Peplow* (1) *A*, *B* and *C*, by an agreement in writing, hired the premises of *D*. The premises so hired were intended to be and were used for the purposes of the Joint Stock Company of which *A*, *B* and *C* were

(1) 9 C. B. 493; 137 E. R. 984; 19 L. J. C. P. 190; 14 Jur. 248; 82 R. R. 401.

(2) (1857) 2 H. & N. 319; 115 R. R. 561; 27 L. J. Ex. 116.

(3) (1853) 2 El. & Bl. 287; 3 Car. & K. 278; 22 L. J. Q. B. 443; 17 Jur. 1154; 1 W. R. 387; 118 E. R. 775; 95 R. R. 550.

(4) (1898) 2 I. R. 1 at p. 9; 4 Irish Law. Rep. 1.

at the time of the contract committee men. The rent was for some time paid by the Company, but ultimately fell into arrears. Thereupon *D* sued *A*, *B* and *C* upon the agreement, *B* and *C* suffered judgment by default. *D* recovered the amount of rent and costs from *A*. It was ruled that *A* was entitled to sue *B* and *C* for contribution and that the remedy against *B* was not affected by the circumstance that *B* had ceased to be a member of the Committee before accrual of the rent in respect of which the action had been brought. Mr. Justice Maule observed as follows: "*Prima facie*, where one of three joint contractors who are jointly sued, pays the whole debt, he is entitled to receive contribution from the other two. That state of circumstances exists here: and the only question is, whether there existed any other facts which afford an answer to the plaintiff's right to such contribution. It does not appear to me that any such answer has been given." Mr. Justice Williams stated that whatever remedy the persons who had made themselves liable for the rent might have against the other members of the Company, when these persons placed themselves under this liability to the landlord of the premises, they likewise came under an implied liability, *inter se*, that if one should be called upon to pay and should actually pay the whole rent, the other two would reimburse him in respect of their respective shares. This implied contract was not in any degree affected by the rule of law that one partner cannot sue his co-partner in respect of a partnership debt. Mr. Justice Talfourd added that the contract out of which the cause of action arose was entirely for that partnership and that the defendants were liable to contribution irrespectively of the accounts amongst the partners. This view of the law has been adopted by the Courts of this country, as is clear from an examination of the decisions in *Guda Kulita* v. *Joyram Das* (5), *Durga Prosonno Ghose* v. *Raghu Nath Das* (6), *Subbarayudu* v. *Adinarayudu* (7), *Sadhu Narayana Aiyangar* v. *Ramaswami Aiyangar* (8) and *Gudlavellaru* v. *Vellathambi* (9). In the first of these cases, Mr. Justice Banerjee pointed out that a suit for contribution by a partner against some of his co-partners, on account of money paid by him for the satisfaction of a debt contracted by him jointly with the said co-partners, is maintainable in cases where the liability satisfied by the plaintiffs is not a joint liability of the entire partnership or where the said partners were some only of several persons comprising the partnership and the bond was executed not in the usual course of business of the partnership. A suit for contribution is also maintainable in cases where the partners expressly promised to contribute their share of the debt after a decree had been passed upon the bond. The rule is similarly stated by Mr. Justice Muttusami Ayyar in the case of *Sabbarayudu* v. *Adinarayudu* (7). The learned Judge pointed out that it is no doubt a settled rule of law that advances made by one partner to the partnership concern can only result in matters of accounts and cannot be made the subject of a separate suit. But to this general rule there are exceptions where the ad ances are made by one partner not to the partnership concern, but to the other partners in respect of what he has to contribute to the joint capital, as in *French* v *Styring* (10); or where two partners borrow from a Bank on their joint promissory note and apply the money borrowed to the partnership concern and one of the partners is compelled to pay more than his share of the debt, the transactions have been considered to be separate and altogether *dehors* the partnership and as such capable of sustaining an action for contribution: *Sedgwick* v. *Daniell* (2). In the case before us, as already explained, the plaintiffs and the defendants borrowed money in their individual capacity. They were sued as such by their creditor and the decree obtained by the latter was executed, not against the partnership property, but against the private property of the plaintiff alone. The payment by the plaintiff to the decree-holder really signifies that he has in

(5) 26 C. 262 *note*.
(6) 26 C. 254; 3 C. W. N. 299.
(7) 18 M. 134.
(8) 3 Ind. Cas. 486; 4 M. L. T. 475; 32 M. 203.
(9) 15 Ind. Cas. 2 8; 11 M. L. T. 188; (1912) M. W. N. 384.
(10) 2 C. B. (N S.) 357 at p. 365; 26 L. J. C. P. 181; 3 Jur (N. S.) 670; 5 W. R. 561; 140 E. R. 455; 29 L. T. (o, s.) 127; 109 R. R. 716.

substance been called upon to supply the entire capital, although the initial arrangement between the parties was that the capital should be furnished by all the share-holders in equal proportion. In circumstances like these, a suit for contribution is obviously maintainable.

On behalf of the respondents, reference has been made to section 43 of the Indian Contract Act. That section lays down that when two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one of such joint promisors to perform the whole of the promise. Each of the two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract. In the case before us, consequently, the plaintiff is *prima facie* entitled to call upon each of the defendants to contribute equally with himself to the performance of the promise jointly made by them in favour of their creditor. The only question is, whether a contrary intention appears from the contract. The circumstances as already explained do not indicate that there was any contrary intention on the part of the partners. On the other hand, the intention to be gathered is that each of them agreed to contribute a rateable share of the partnership capital. If the plaintiff is refused relief in this suit, that agreement between the parties would practically be ignored.

It has finally been contended on behalf of the respondents that they may be permitted to establish in the present litigation that if the partnership accounts are adjusted, it would be found that the plaintiff was not entitled to recover the whole of the sum claimed from each of the defendants. In our opinion, although a defence of this character might well have been available to the defendants in the Court of first instance, it is too late for them to urge the point in this Court. The defence was to the effect that the accounts had been adjusted and that upon settlement of accounts the plaintiff had been paid the sum legally due to him. This defence has failed and the defendants cannot be permitted at this stage to make a new case which involves the investigation of facts and must, if entertained, necessitate a remand to the Court of first instance.

The result is that this appeal is allowed, the decrees of the Courts below set aside and a decree made in favour o the plaintiff for Rs. 148-3 against the first defendant, Rs. 152-3 against the second defendant and Rs. 152-3 against the third defendant. Each of these sums will carry interest at the rate of 12 per cent. per annum from the 14th April 1909 to the date of the institution of the suit. The decretal amount will carry interest at the rate of 6 per cent. per annum from the commencement of the suit to the date of realization. The plaintiff is entitled to his costs in all the Courts.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 6 OF 1914.

April 29, 1914.

Present:—Mr. Justice N. Chatterjea and Mr. Justice Beachcroft.

NILMONI CHOWDHURI—APPELLANT

versus

BASANTA KUMAR BANERJEE AND ANOTHER—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 36—Burden of proof—Transferee to prove good faith and valuable consideration.

Section 36 of the Provincial Insolvency Act lays the onus upon the transferee to prove that the transfer made by an insolvent was made in good faith and for valuable consideration. [p. 815, col. 1.]

Appeal against the order of the District Judge, Murshidabad, dated 12th December 1913.

Babus *Bepin Behari Ghosh* and *Haradhone Chatterjee*, for the Appellant.

Babus *Gobind Chandra Dey Roy* and *Aboni Nath Bhattacharjee*, for the Respondents.

JUDGMENT.—This is an appeal against an order of the District Judge of Murshidabad declaring a mortgage said to have been executed by an insolvent in favour of the appellant on the 13th November 1912, void against the Receiver in the insolvency proceedings and annulling the same. The learned Judge upon a consideration of the circumstances and the evidence adduced on behalf of the Receiver has come to the conclusion that the mortgage was a bogus transaction effected in bad faith and that it was not for valuable consideration.

JAIRAM *v.* DOMA.

It is contended on behalf of the defendant that the onus is upon the Receiver to show that the transfer was not made in good faith and for valuable consideration. We are of opinion that the onus is upon the appellant to prove that the transfer was made in good faith and for valuable consideration. The wording of the section, in our opinion, leaves no doubt as to the person on whom the onus should rest. This contention, therefore, must be overruled. It is *next* contended that the appellant had not sufficient opportunity of adducing evidence. It appears that the appellant had no witnesses in Court present, except one, on the day on which the matter was taken up by the Judge. An application was presented on behalf of the appellant to the Court for postponing the case on the ground that the witnesses were not present and that he himself was not able to attend Court to give his deposition. The learned Judge disallowed that application and the result was that the case had to be decided on the evidence adduced by the Receiver only. In all the circumstances of the case we think that another opportunity ought to be given to the appellant to produce evidence in the case. But this must be upon terms. We accordingly direct the case to be sent back to the lower Court at once; and on the appellant depositing into the Court below the costs incurred by the respondent in the lower Court and the costs of this Court, the hearing-fee in this appeal being assessed at five gold *mohurs*, within one week from the date of arrival of the record and this judgment, and on the appellant applying to the Court below to issue summons upon his witnesses and depositing all necessary costs for the purpose within one week from the arrival of the record and this order, the Judge will issue summons upon the witnesses for the appellant and fix an early date for the re-hearing of the case. The appellant will be entitled to have the five Calcutta witnesses who were cited summoned by the Court and also the two witnesses mentioned in the list of witnesses dated the 14th November, who are residents of the District of Murshidabad, examined provided the appellant can procure their attendance without summons. The respondent will be entitled to adduce any rebutting evidence he wishes to do.

On the appellant failing to deposit the costs within the time specified, this appeal will stand dismissed with costs.

Case remanded.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 136 OF 1914.

November 25, 1914.

Present:—Sir Henry Drake-Brockman, KT., J. C.

JAIRAM—APPELLANT

versus

DOMA—RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 13—Suit by malguzar *to recover value of manure under* Wajib-ul-arz—*Small Cause—Second appeal, if competent.*

The plaintiffs, *malguzars* of a certain *mauza*, sued to recover from the defendant a sum of Rs. 34, on account of the wrongful removal of manure to which they set up title under a clause of the *Wajib-ul-arz*, which ran as follows:—

'In this village the *malguzar* takes according to long custom the manure of those who have no fields of their own: in return he shall allow them free grazing and *nistar*:

Held, that a second appeal in this case was barred under section 102 of the Code of Civil Procedure, as the suit was of a nature cognizable by a Court of Small Causes, because

(*a*) it was one for damages consequent on the wrongful removal of manure to which the plaintiffs were entitled, and not for delivery of that manure, or

(*b*) even if the claim were regarded as one for the manure itself as a 'due' within the meaning of that term as used in Article 13 of the second Schedule to the Provincial Small Cause Courts Act, 1887, that 'due' was not payable to the plaintiffs by reason of their interest in immoveable property. [p. 816, col. 1.]

The dues contemplated by Article 13 are payments to which a person is entitled as representing his interest in certain immoveable property, and not because he possesses some interest in immoveable property. [p. 816, col. 1.]

Appeal against the decree of the District Judge, Bhandara, dated the 29th October 1913, confirming that of the Munsif, Bhandara, dated the 15th November 1912.

Mr. *A. M. Mudaliar*, for the Appellant.

Mr. *P. S. Kotwal*, for the Respondent.

JUDGMENT.—The plaintiffs in the suit of which this second appeal arises are the *malguzars* of *Mauza* Malipar. They sued to recover from the defendant a sum of Rs. 34, being the value of manure to which they set up title under clause XIV of the *wajib-ul-arz*. The relevent part of that clause runs as follows:—

"In this village the *malguzar* takes according to long custom the manure of those

who have no fields of their own: in return he shall allow them free grazing and *nistar*."

The plaint alleges that the defendant is a non-agriculturist who habitually grazes his cattle in and takes fuel from the village jungle without paying fees and till the end of the *Falsi* year 1319 (1909-1910 A. D.) regularly gave his manure to the plaintiffs. In 1320 and 1321, however, the defendant wrongfully sold his manure to others for Rs. 20 and Rs. 14 respectively. The total sum claimed including interest is Rs. 37-2-9.

The first Court allowed Rs. 28 for principal and Rs. 1-2-4½ for interest. The defendant's appeal to the District Judge was dismissed.

To this second appeal preferred by the defendant a preliminary objection is taken, *viz.*, that the suit being of a nature cognizable by a Court of Small Causes, section 102, Civil Procedure Code, bars the appeal. To this it is replied that the suit is for a due payable to the plaintiffs by reason of their interest in immoveable property and, therefore, falls within the purview of Article 13 of the second Schedule to the Provincial Small Cause Courts Act, 1887. No authority is cited at the Bar on either side.

I am of opinion that the preliminary objection must succeed. In the *first* place, the suit is really one for damages consequent on the wrongful removal of manure to which the plaintiffs are entitled, not for delivery of that manure. And *secondly*, even if the claim be regarded as one for the manure itself as a "due" within the meaning of that term as used in Article (13) aforesaid, still that due is not "payable to the plaintiffs by reason of their interest in immoveable property." As stated in the *wajib-ul-arz* the *malguzars'* claim rests on custom. I think too with Abdur Rahim and Sundara Ayyar, JJ., in *Sri Maharajah of Vizianagaram* v. *Kota Veeranna* (1) that the dues contemplated by Article (13) are payments to which a person is entitled as representing his interest in certain immoveable property, not because he possesses some interest in immoveable property. A similar view seems to have been taken by Shephard and Subramania Ayyar, JJ., in *Mullapudi Balakrishnayya* v. *Venkatanarasimha. Appa Rau* (2).

I am asked to treat the memorandum of second appeal as an application for revision, in which connection the second and fourth grounds only are pressed. The former ground impeaches the finding of the District Judge in appeal that inasmuch as the defendant merely takes land on *batai* he comes within the category of persons who have no fields of their own. The other ground urges that the plaintiffs failed to discharge the burden which lay on them of showing that they allowed the defendant full *nistar* in respect of fuel as required by the *wajib-ul-arz*. Now the evidence of the defendant being a *bataidar* is of the vaguest description, his witnesses merely deposing that "he does *batai* work for others." A *bataidar* may or may not be a tenant: see *Khoshal* v. *Nanhu* (3), *Deopuri* v. *Arjun* (4) and *Ganoo* v. *Mukund* (5). If the defendant merely enters into cultivating partnership, he certainly cannot be regarded as having any fields, and for all his evidence establishes he does no more than that. In this connection I have to observe that the backbone of his case was a claim to be joint tenant of a holding recorded in the name of a nephew, a plea which failed in both the lower Courts. With regard to the burden of proof the defence regarding fuel was thus put in paragraph 3 of the defendant's written statement:—

"It is denied that the plaintiffs allow full *nistar* of fuel to the defendant and his nephew. The defendant had, therefore, to use the droppings of cattle as fuel."

This plea relates solely to the joint tenancy set up by the defendant but not established. It was not even suggested that regarded as a person without a field, the defendant was not allowed *nistar* as required by the *wajib-ul-arz*, and consequently no issue to cover such an allegation was framed. In these circumstances I cannot attach any weight to the general statement made by Aba (D. W. No. 3) that the *malguzar* charges 1 pice per head-load for fuel brought from the forest.

I hold that no appeal lies and that no sufficient ground for interfering in revision is made out. The decree of the District Judge is affirmed and costs in this Court will be paid by the defendant. Rs. 10 are allowed as Counsel's fee here.

Decree affirmed.

(1) 11 Ind. Cas. 760; 36 M. 18; 10 M. L. T. 167; (1911) 2 M. W. N. 139; 21 M. L. J. 829.
(2) 19 M. 329.
(3) 6 C. P. L. R. 117.
(4) 10 C. P. L. R. 29.
(5) 14 C. P. L. R. 12.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 54 OF 1915.

February 16, 1915.

Present:—Sir Alfred Kensington, KT., Chief Judge, and Mr. Justice Rattigan.

TARA SINGH—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Evidence Act (I of 1872), ss. 24, 25, 26, 27—Confession—Information received from accused, how far relevant.

Where the statement made by an accused to the Sub-Inspector of Police was to the effect that he would point out the spot where he had committed the murder, and thereafter he conducted the Police to a spot where earth was found saturated with blood:

Held, that so much of the Sub-Inspector's evidence as related to the alleged confession by the accused that he committed the murder was not admissible in evidence. [p. 820, col. 1.]

It was not the intention of the Legislature to allow the Police by an ingenious perversion of the provisions of section 27, Indian Evidence Act, to get rid of the safeguards thrown round prisoners by sections 24, 25 and 26 of the Act and the exception to the general rule must be very strictly confined within its legitimate limits. [p. 820, col. 1.]

Appeal from an order of the Additional Sessions Judge of Lahore, dated the 14th December 1914, convicting the appellant.

The Hon'ble Mr. *Muhammad Shafi*, K. B., and Mr. *Brij Lal*, for the Appellant.

Mr. *A. B. Broadway*, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—One Natha Singh *Jat* aged about 40 years (according to Exhibit 6), owned land in the village of Subhrai, in the Kasur Tahsil and also in a small adjacent village called Bhura Hitar, and he had been residing for some time with his wife, *Musammat* Nihali (aged 30), and his children in the latter village. According to the evidence on the record, he was a professional thief and used to associate with Thakar Singh (P. W. No. 3), an approver in this case, and Tara Singh, appellant, and the three committed thefts together. His wife, *Musammat* Nihali, (also an accused in this case) is a woman of bad character, and has had immoral relations with Thakar Singh and Tara Singh as well as with another man in *Mouza* Waighil. The woman's conduct and her relations with Thakar Singh and Tara Singh created a scandal in *Mouza* Subhrai and *Mouza* Bhura Hitar, and Natha Singh was frequently requested to put a stop to her proceedings. He seems however, to have been an easy-going and complaisant husband and despite his neighbours' remonstrances continued his friendship with his two companions in crime.

On the 11th April 1914 Natha Singh was at work in his field in *Mouza* Subhrai, and in the evening while he was so engaged, Thakar Singh and Tara Singh appeared and asked him to accompany them [See the evidence of Kundan Singh (P. W. No. 5) and Wasawa Singh (P. W. No. 6)]. Later on the same evening the three were seen together by Chet Singh (P. W. No. 7), Arur Singh (P. W. No. 8) and Massa Singh (P. W. No. 9) and finally by Buta Singh (P. W. No. 10). Since then nothing has been heard of Natha Singh, nor has any one seen him. His continued absence, at a time when his presence in his fields was urgently required, gave rise to suspicions and rumours, and eventually on the 29th April Kundan Singh (P. W. No. 5) made a report at the Police station (see Exhibit P-7) setting forth the facts as above stated and suggesting that Natha Singh had been murdered by Tara Singh, Thakar Singh and *Musammat* Nihali.

The Sub-Inspector proceeded without delay to *Mouza* Bhura Hitar and searched the house of *Musammat* Nihali, but without result. The following day the houses of Thakar Singh and Tara Singh were also searched but nothing was found. Later on Thakar Singh and Tara Singh were produced before the Sub-Inspector, Sheikh Barkat Ullah (P. W. No. 18), and arrested. The Sub-Inspector, after stating the facts as above set forth, deposes as follows :—

"I took Tara Singh's statement. Tara Singh said that he would show me the spot where he had murdered Natha Singh. I went with him and he showed me a place where I found that the earth was stained with blood. It was literally soaked with blood as if it was fermented. There was also hair there, but I cannot say if the hair was mixed with the earth or separate from it. He also showed me a place at the river where he said that he had thrown the corpse of Natha Singh into the river."

From a reference to the Police diaries, it appears that Thakar Singh refused to make any detailed statement or to give

any information unless he were first tendered a free pardon and that the statement of Tara Singh referred to by the Sub-Inspector in his evidence was recorded as follows: " *Yeh bhi kaha ke wuh mauqa qatl ka nishan de sakta hai.*" If this record is accepted as correct, there was in fact no such definite admission of guilt as is deposed to by the Sub-Inspector.

On the 2nd day while the Police were making their investigation, a human arm was found on the river bank about $\frac{3}{4}$ of a mile lower down from the spot where the body is said to have been thrown in. On the 11th May the accused persons were taken before Lala Labhu Ram, Magistrate, first class, who recorded a note (see page 24) to the effect that Tara Singh denied all knowledge about Natha Singh's murder or that he had any acquaintance with Natha Singh, *Musammat* Nihali or Thakar Singh; that Thakar Singh on the other hand admitted that he had taken part in the murder in conjunction with Tara Singh and *Musammat* Nihali, and that he had in his possession a *pagri* of the deceased and the weapon with which the murder was committed but that he would not give this up unless first given a promise of pardon; and that *Musammat* Nihali admitted illicit friendship with Tara Singh and Thakar Singh during the last six months and added that while Tara Singh had no wife of his own, Thakar Singh had a wife, but on her account had sent his wife away to her own parents. Her statement will be found at page 24 of the record.

On the 12th May Thakar Singh was granted a padron and on the 13th May he took the Police and the investigating party first to the place where the murder is alleged to have been committed and then to a place near the river where he stated that he had buried certain blood-stained clothes and the *chhavi* with which the crime had been committed (Exhibits P-A, B, C, D and E). On digging up the ground at the place indicated the articles in question were found and in the *pagri* (Exhibit P-A) there was found a letter addressed to Natha Singh. This letter has been proved to have been delivered to the latter a few days before his disappearance. [See Jagat Singh (P. W. No. 21), Tilok Singh (P. W. No. 22) and Ranga (P. W. No. 23)]. Among the clothes was a *chaddar* said to belong to Tara Singh (Exhibit P-B), but Tara Singh was not questioned with regard to this and there is no proof that it ever belonged to him. There is also evidence on the record to the effect that *Musammat* Nihali tried on one occasion to get some arsenic from Ishar Singh (P. W. No. 25) and this witness goes so far as to assert that when he asked her why she wanted it, she told him that she intended to give it to her husband. Hukam Singh (P. W. No. 26) deposed that he heard this story shortly afterwards from Ishar Singh, but the Sessions Judge has very rightly discredited all this evidence as improbable in itself and irrelevant in the present case. He has also and equally rightly rejected the evidence of Narain Singh, P. W. No. 17, who stated that one morning at about dawn he saw Thakar Singh and Tara Singh go to Natha Singh's house and there heard them tell *Musammat* Nihali that "they had finished off the business." The learned Sessions Judge, while accepting the evidence of the witnesses who depose that they saw Natha Singh in the company of Thakar Singh and Tara Singh on the evening of the 11th April, points out, and we agree with him, that this evidence proves nothing more than that the three men were in company together a good many hours before the alleged murder was committed. He also attaches no importance to the discovery of the arm-bone as reliable proof of the death of Natha Singh. The result is that, so far as the above evidence goes, there is no reliable corroboration of the statement of the approver that Tara Singh was one of Natha Singh's murderers. The learned Sessions Judge, however, lays great stress on the statemant alleged to have been made by Tara Singh to the Sub-Inspector on the 30th April before Tara Singh pointed out the spot where the murder is said to have been committed. As already remarked, the Sub-Inspector deposes that Tara Singh told him that he would point out a place where he (Tara Singh) had committed the murder. The learned Judge holds that a statement of this kind, whether it amounts to a confession or not, is admissible in evidence, provided that it led to the discovery of some fact, and that the question then

merely is whether the statement is true and the discovery is genuine. He finds that the statement is true and that the spot pointed out by Tara Singh is actually the spot where the murder was committed, and he concludes with the words: "I consider that the guilt of Tara Singh is fully established by the evidence of the Sub-Inspector and of Chet Singh as to his statement, coupled with his discovery of the blood-stained soil." The Assessors were also of opinion that Natha Singh had been murdered, and two of them were of opinion that Tara Singh's guilt has been fully established; agreeing with them, the Sessions Judge convicted him of murder and sentenced him to death. One Assessor thought the case doubtful and did not credit the evidence that Tara Singh had pointed out the scene of the murder, *Musammat* Nihali, who was alleged to have abetted the murder, was acquitted on the ground that there was no sufficient corroboration of the evidence of the approver.

The appellant has appealed through his Counsel, Messrs. Muhammad Shafi and Brij Lal, and Mr. Broadway, Assistant Legal Remembrancer, appeared at the hearing on behalf of the Crown.

After careful consideration of the evidence on the record and of the arguments addressed to us, we are satisfied that Natha Singh was murdered on the night of the 11th April 1914 and that Thakar Singh, the approver, and Tara Singh, appellant, were both concerned in the murder. There can be no doubt that the letter (Exhibit P-4) found in the *pagri* (Exhibit P-A) was the one addressed to Natha Singh a few days before his disappearance. Jagat Singh (P. W. No. 21) testifies that he wrote it at the instance of Tilok Singh (P. W. No. 22), and his evidence is corroborated by that of Tilok Singh and of Ranga (P. W. No. 23), the messenger who delivered the letter to Natha Singh. The Sub-Inspector, Sheikh Barkat Ullah (P. W. No. 18), states that he found the letter in the *pagri*; that when found it was "stained with blood" and that it was not sent to the Chemical Examiner because it was feared that the process of chemical examination might seriously damage it. The discovery of this letter corroborates the statement of the approver as to the fact of the murder of Natha Singh, and the genuineness of the discovery is testified to by unimpeachable evidence [see the evidence of Honorary Captain Sardar Bahadur Lehna Singh (P. W. No. 10); Ram Chand (P. W. No. 11)]. The fact, then, that this letter (Exhibit P-4) was undoubtedly found in the *pagri* (Exhibit P-A) which was dug up at the spot indicated by Thakar Singh, must be taken as strong circumstantial proof that Natha Singh met with a violent death and that Thakar Singh at all events was concerned in the murder.

The next question is whether participation in this murder has been satisfactorily brought home to the appellant, Tara Singh. The learned Sessions Judge, in finding that it has, has relied very largely upon the statement alleged to have been made by Tara Singh to the Sub-Inspector to the effect that "he would point out the spot where he had committed the murder," a statement which, in the opinion of the learned Judge, was admissible in evidence in its entirety. Upon this point we cannot agree with the Sessions Judge. Section 27 of the Indian Evidence Act provides (as an exception to the general rules laid down in sections 25 and 26) that "when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a Police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

In the present case the appellant is alleged to have said: "I will point out the spot where I committed the murder," and thereafter he conducted the Police and the other witnesses to a spot where earth was found saturated with blood. Obviously the words, "where I committed the murder," did not in themselves "distinctly relate" to the discovery of that spot, as the *locus delicti* could have been discovered just as easily had he merely stated "I will show you the scene of the murder," or "I will take you to a particular place where you will find blood." A person who had no hand in the murder but had chanced to witness its commission might well have been able to lead the Police to the spot in question, and, other considerations apart, the learned Sessions Judge was not justified in assuming that it would have been impossible for Tara Singh to direct the Police to the spot, had he not taken part in

the murder. It has frequently been laid down that it was not the intention of the Legislature to allow the Police, by an ingenious perversion of the provisions of section 27, to get rid of the safeguards thrown round prisoners by sections 24, 25 and 26 of the Act, and that the exception to the general rule must be very strictly confined within its legitimate limits. [See *Empress* v. *Rama Birapa* (1), *Reg.* v. *Jora Hasji* (2), *Queen-Empress* v. *Kamalia* (3), *Queen-Empress* v. *Commer Sahib* (4) and *Abdul Jamal* v. *Emperor* (5)] In the case last cited it was definitely held by a Division Bench of this Court that an accused's statement that "he would point out a certain spot would be relevant, and that at the spot indicated blood would be found, would be admissible, but not the further statement that it was at this spot that he had committed the murder." With this exposition of the law we entirely agree, and we are unable to appreciate the Sessions Judge's difficulty as to recording a "partial confession of this character." We hold, therefore, that so much of the Sub-Inspector's evidence as relates to the alleged confession by the appellant that he committed the murder, was wrongly admitted in evidence.

The fact, however, remains, and is proved satisfactorily, that the appellant actually took the Police and the investigating party to a spot where the earth appeared to be soaked with blood and that earth taken from this spot was subsequently found by the Chemical Examiner to bear traces of mammalian blood (see Exhibit P-VIII). Appellant has not attempted to explain how it was that he knew that blood would be found at this spot, and his defence consists in a total denial of everything. In the circumstances the only inference possible is that he actually participated in the murder, and to that extent his conduct in pointing out the spot corroborates the evidence of the approver, and establishes his guilt.

We are not, however, prepared to accept the evidence of the approver at its face value or hold that appellant was the prime-mover and principal in this crime. As supplying the motive for the murder, the Sessions Judge refers to Tara Singh's *liaison* with Natha Singh's wife, *Musammat* Nihali, and in proof of this intimacy relies upon the evidence of Partap Singh (P. W. No. 27), Sham Singh (P. W. No. 28), Hukam Singh (P. W. No. 26), Chet Singh (P. W. No. 7), Kundan Singh (P. W. No. 5) and Wasawa Singh (P. W. No. 6). But of these witnesses, Sham Singh and Hukam Singh say nothing about the alleged *liaison*; Kundan Singh and Chet Singh suggest that Thakar Singh had also an intrigue with *Musammat* Nihali, and Wasawa Singh positively asserts that such was the case. Furthermore, Kundan Singh in the report which he made to the Police (page 3) distinctly stated that both Tara Singh and Thakar Singh had intimacy with the woman, and the latter, in the statement made by her to Lala Labhu Ram, Magistrate, first class, admitted the fact and further added that it was on her account that Thakar Singh had sent his own wife away to her parents' home. The learned Sessions Judge in his judgment does not allude to Thakar Singh's intimacy with *Musammat* Nihali, but that there was such intimacy is fully proved and its existence tends to negative Thakar Singh's statement that he was taking but a secondary part in the commission of the murder and this, too, with reluctance. He and *Musammat* Nihali are of about the same age; Tara Singh is some five years younger; and the man who got rid of his own wife in order to carry on his intrigue with Natha Singh's wife had obviously just as strong a motive for murdering Natha Singh as Tara Singh had. As a matter of fact it appears to us that in all probability it was Thakar Singh, the elder man, who took the leading part in his murder, and that he has ascribed to Tara Singh acts which he himself committed. He had to admit that it was he himself who buried the clothes—an act which in itself shows that he retained his presence of mind on the occasion because Tara Singh had not disclosed, or had been unable to disclose, to the Police the fact that the clothes were buried at a particular place.

Taking all the circumstances into consider-

(1) 3 B. 12 at p. 17.
(2) 11 B. H. C. R. 242.
(3) 10 B. 595 at p. 597.
(4) 12 M. 153; 2 Weir 738.
(5) 18 Ind. Cas. 667; 13 P. W. R. 1913 Cr.; 14 Cr. L. J. 107; 68 P. L. R. 1913.

ation we are satisfied that Tara Singh actively abetted the murder of Natha Singh, but that Thakar Singh was the more guilty party of the two, and upon the view we take, we cannot but regret that the principal offender has, by his astuteness in refusing to make any admission unless granted a free pardon, succeeded in escaping scot-free. But as matters stand, we have no hesitation in agreeing with the Sessions Judge and the majority of the Assessors that Tara Singh was present at and abetted the murder of Natha Singh (sections 114, 302, Indian Penal Code). As, however, we regard him as the less guilty of the two, and as there is no direct evidence of the actual death of Natha Singh (though we have no reason whatever to doubt that fact), we feel justified in substituting the sentence of transportation for life for the capital sentence awarded by the Sessions Judge. Except to this extent, the appeal of Tara Singh is rejected.

Appeal rejected; Sentence modified.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 1706 OF 1913.

January 17, 1914.

Present:—Sir Alfred Kensington, KT., Chief Judge, and Mr. Justice Rattigan.

EMPEROR—PROSECUTOR

versus

SHER SINGH AND ANOTHER—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 110, 121,514—Security for good behaviour—Subsequent conviction under s. 325, Penal Code—Forfeiture of bond of sureties.

Where a man was placed on security under section 110, Criminal Procedure Code, not merely as being a receiver of stolen goods but also as being a dangerous man and the son of a notorious dacoit, and was subsequently convicted of a bad offence under section 325, Indian Penal Code:

Held, that there was nothing in law to prevent the forfeiture of the bond of sureties under the circumstances. [p. 822, col. 1.]

Udham Singh v. *Emperor*, 21 Ind. Cas. 175; 334 P. L. R. 1913; 14 Cr. L. J. 575; 15 P. R. 1913 Cr; 39 P. W. R. 1913 Cr., explained and distinguished.

Case reported by the Additional Sessions Judge, Lahore Division, with his No. 927, dated the 20th September 1913, under section 438 of the Criminal Procedure Code.

FACTS.—On 13th January 1912, Mohan Singh, son of Bur Singh, was called upon to give security amounting to Rs. 1,000 for good behaviour for a period of one year, under section 110, Criminal Procedure Code, and the two petitioners, Sher Singh and Mangal Singh, were accepted as his sureties. During the period of security (*i. e.*, on the 30th July 1915) Mohan Singh was convicted under section 325, Indian Penal Code, and the two accused petitioners were ordered on 22nd April 1913 to pay Rs. 500 on their bonds.

The accused on conviction by Sardar Jiwan Singh, exercising the powers of a Magistrate of the first Class in the Lahore District, were ordered, by order dated 22nd April 1913, under section 514 of the Criminal Procedure Code, to pay Rs. 500 on their bonds. On appeal to the District Magistrate of Lahore, the petitioners were ordered to forfeit Rs. 250 each.

The proceedings are forwarded for revision on the following

GROUNDS.—Revision is sought in this Court on the grounds:—

(1) that in view of *Gul Khan* v. *Emperor* (1), the order confiscating the security was illegal. On this point I agree with the opinion of the District Magistrate for the reason stated by him;

(2) that the amount ordered to be forfeited is excessive and that the offence of Mohan Singh was not against property.

In this latter connection the case is on all fours with *Udham Singh* v. *Emperor* (2) and, if the principles laid down by Kensington, J., in that judgment are to be followed, and so far as subordinate Courts are concerned they must, of course, be followed, the petitioners are entitled to urge that the order of the District Magistrate is wrong. I accordingly recommend that it be set aside and if the whole or any part of the sum of Rs. 250 demanded from petitioners have been paid, that they be refunded.

ORDER.

REID, C. J. (*October 14th*, 1913.)—Notice, before a Division Bench constituted by Mr. Justice Kensington and myself. If the hear-

(1) 26 P. R. 1904 Cr.; 1 Cr. L. J. 1100.

(2) 21 Ind. Cas. 175; 15 P. R. 1913 Cr.; 334 P. L. R. 1913; 14 Cr. L. J. 575; 39 P. W. R. 1913 Cr.

ing does not come on while I am in the Court, Mr. Justice Rattigan who was a party to *Emperor* v *Mawaz* (3) should take my place on the Division Bench.

The *Government Advocate*, for the Crown.

Lala *Nihal Chand*, for the Accused.

JUDGMENT.—We cannot altogether follow the learned Sessions Judge in his reference to the ruling *Udham Singh* v. *Emperor* (2). The head-note of that ruling is no doubt misleading* and goes beyond the terms of the judgment, but a perusal of the judgment itself should make it clear that the Chief Court has not, as he appears to think, prohibited the forfeiture of security under certain circumstances. Liability to forfeiture, with reference to section 121, Criminal Procedure Code, was recognised, and all that the ruling indicated was the necessity for moderation and the exercise of reasonable discretion where so rigorous a measure as forfeiture from sureties was contemplated.

The facts of the present case have been examined at some length. We find that they differ materially from those dealt with in the ruling referred to as *Udham Singh* v. *Emperor* (2).

The convict was here previously placed on security under section 110, Criminal Procedure Code, not merely as being a receiver of stolen goods but also as being a dangerous man and the son of a notorious dacoit. He was subsequently convicted of a bad offence under section 325, Indian Penal Code, which showed that this character was well deserved.

We are not prepared to say that there is anything wrong here in the reduced penalty exacted from the sureties by the District Magistrate. They must have known quite well that they ran a serious risk in becoming sureties for a man of this class, and their liability can be properly enforced to that extent.

We decline to interfere on revision and direct that the records be returned to the Sessions Court without further action.

Revision rejected.

(3) 18 Ind. Cas. 403; 13 P. R. 1913 Cr.; 7 P. W. R. 1913 Cr.; 14 Cr. L. J. 67; 39 P. L. R. 1913.

*The reference apparently is only to the head-note as given in the Punjab Record.—*Ed.*

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 775 OF 1913.

May 22, 1914.

Present:—Sir George Shaw, KT., J. C.

MAHOMED JAMAL—PETITIONER

versus

EMPEROR—RESPONDENT.

Wild Birds Protection Act (X of 1887)—Wild Birds and Animals Protection Act (VIII of 1912), s. 3—Rules framed under Act of 1887 not superseded by new rules under Act (VIII of 1912)—Old rules to be interpreted by sections of later Act—Burden of proof.

Though the rules framed under the Wild Birds Protection Act of 1887 have not been superseded by the rules framed under Act VIII of 1912, they are to be interpreted by the sections of the later Act. [p. 822, col. 2.]

The burden of proving that the egrets whose feathers were alleged to have been imported into Monywa Municipality were captured or killed during the close season contrary to the rules lies on the prosecution and it is illegal to lay it on the accused. [p. 823, col. 1.]

Mr. *J. N. Basu*, for the Applicant.

ORDER.—Applicant has been convicted under section 3 of the Wild Birds Protection Act, 1912, and sentenced to pay a fine of Rs 50 or to suffer rigorous imprisonment for one month in default, on a charge of having imported into Monywa Muncipality 50 ticals of egrets' feathers during July 1913, that is, during the breeding season according to the rules then in force, namely, those contained in General Department Notification No. 105, dated the 30th May 1901.

These Rules were framed under the Wild Birds Protection Act, 1887, but at the date of the institution of this case were still in force, not having yet been superseded by rules under Act VIII of 1912.

Rule 2 of these Rules declares that the breeding season of egrets shall be held to extend from the 15th of April to the 31st of October, and Rule 3 prohibits possession or sale within the limits of a Municipality of any egret recently killed or taken, or the importation into a Municipality of the plumage of an egret during its breeding season. But this rule must be interpreted by the provisions of section 3 of Act VIII of 1912. As it stands, it goes beyond that section, which makes it unlawful to capture an egret during the close time, or to kill during the close time an egret which has not been captured before the commencement of such close time, or to sell or buy or offer to

sell or buy or to possess any such bird which has not been captured or killed before the commencement of such close time or the flesh thereof, or if any plumage has been taken from any such bird captured or killed during such close time, to sell or buy or to offer to sell or buy or to possess such plumage. The applicant, therefore, could only be convicted if the egrets which supplied the plumage in question were captured or killed during the close season as laid down in that section.

The District Magistrate held, on the ground that the applicant was found in possession of egrets' feathers two months after the beginning of the close season, that the burden of proving that they were not killed during the breeding season was upon him.

It is contended on applicant's behalf that this was illegal. The District Magistrate has not instructed the Government Prosecutor to support the conviction as he might very well have done. The Act is a new one and the point is important.

On consideration, I am of opinion that section 3 of Act VIII of 1912 is not framed in such a way as to lay the burden of proof upon the accused in cases under section 3. It would have been easy to frame the definitions of offences with reference to section 105 of the Evidence Act. As the section stands, it does not do this, and I think it must be taken that the burden of proof is on the prosecution.

Now in the present case, there was no evidence against the accused except the opinion of a Forest Ranger that many of the feathers in question are this year's feathers, that these feathers come on at the breeding season and fall in Tawthalin or Thadingyut, and that from the appearance of the feathers in question, they would seem to have been taken from birds that had been shot, and the improbabi ity of any one taking feathers obtained, as applicant says he obtained those in question, in Rangoon to Monywa for sale.

The Deputy Conservator of Forests and the second of the two witnesses already referred to were unable to give any sort of opinion as to the age of the feathers. This neutralises to a great extent the opinion of the Forest Ranger who is not shown to be an expert.

The applicant proved that his brother in Rangoon had purchased egrets' feathers to the extent of about four times the quantity of those in question at Government auctions on the 30th November 1912 and 7th December 1911 and he said that the feathers in question were some of those.

It follows from the foregoing that the case against the applicant really rests on the improbability before mentioned and I do not think that a conviction can safely be based on such a ground. It might have been an extremely foolish thing to do to bring egrets' feathers to Monywa for sale, and at the same time applicant might have done this. The conviction, therefore, in my opinion, cannot be sustained.

I set aside the conviction and sentence and direct that the fine be refunded, and that the order confiscating the egrets' feathers be set aside and the feathers returned to the applicant.

Conviction set aside.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION NO. 240 OF 1915.

February 16, 1915.

Present: – Justice Sir Donald Johnstone, KT.

NATHA SINGH AND OTHERS—PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 157, 165—Locking of doors of accused's house by Police of one Police station in jurisdiction of another Police station, whether ultra vires

Although the wording of section 165, Criminal Procedure Code, limits the powers of a Police officer to the places within the limits of the station of which he is in charge or to which he is attached and although the locking of the doors of an accused's house is a step which would facilitate the search of the house and would make the search a thing of some value, yet the locking of the doors and the keeping of guard over the house are also a part of the ordinary duties of the Police under the words in section 157 "to investigate the facts and circumstances of the case and to take such measures as may be necessary for the discovery and arrest of the offender;" and in section 157 there is no provision preventing the Police of one Police station from acting under that section in the jurisdiction of another Police station. [p. 824, col. 2.]

NATHA SINGH *v.* EMPEROR.

Petition for revision from an order of the Sessions Judge, Montgomery Division, at Lahore, dated the 11th January 1915.

Mr. *Taj-ud-Din*, for the Petitioners.

JUDGMENT.—This case comes before me at the petition stage, but I write a formal judgment because of the importance of the point raised. I do no think I need issue notice, or have the case further argued, because the true interpretation of the powers of the Police in investigating cases seems to me quite clear.

It seems that the Police Inspector of the Tarn Taran Circle sent certain Head Constables and Police Constables to the house of Sawan Singh and Natha Singh, accused, which lies in the jurisdiction of the Sharakpur Police station in the Gujranwala District. The matter before the Police was a burglary, which was under investigation in the Tarn Taran *thana* of the Amritsar District. The Police officers concerned on reaching the village found the house in question and locked the doors and despatched a note to the local *thana* for the usual assistance in making the search. This was done in view of the provisions of section 165 of the Criminal Procedure Code. That night the said Constables kept guard over the house along with two *lambardars* and a *chaukidar*, and in the middle of the night were attacked by a number of armed men who overpowered them, broke open one of the rooms that had been closed and took away two bundles which are reasonably supposed to have contained stolen property.

The first class Magistrate exercising powers under section 30, Criminal Procedure Code, convicted the three accused before him, having discharged certain others, and sentenced them to various terms of imprisonment and to fine. They appealed to the Sessions Court, which made some alterations in the convictions, etc., but substantially left things as they were.

The revision in this Court practically proceeds upon one point, namely, that the Police of Tarn Taran were acting *ultra vires* in closing the house of Sawan Singh and Natha Singh, and that, therefore, the accused had a right of private defence of property and were justified in assaulting the Constables. This point was also taken before the learned Sessions Judge who gave a very brief answer, namely, that the Police did not search the house.

Before me it was very persistently argued that section 165, Criminal Procedure Code, was infringed by the Police in view of the words: "In any place within the limits of the station of which he is in charge or to which he is attached." It is argued that, though no doubt the Tarn Taran Police did not actually search the house in the absence of the local Police, yet the closing of the doors was a step preliminary to search and was, therefore, illegal. It is also suggested that the closing of the doors was an act of criminal trespass. Such an argument as this is only possible if one ignores other relevant provisions of the Code of Criminal Procedure. I need only refer to section 157 of the Code, which says that if an officer in charge of a Police station has reason to suspect the commission of an offence of a cognizable nature he shall proceed in person or shall depute one of his subordinate officers to proceed to the spot to investigate the facts and circumstances of the case and to take such measures as may be necessary for the discovery and arrest of the offender. No doubt the locking of the doors of the accused's house was a step which would facilitate the search of the house and would make the search of the house a thing of some value; but the locking of the doors of the house and the keeping of guard over the house were also certainly a part of the ordinary duties of the Police under the words in the section 157 "to investigate the facts and circumstances of the case and to take such measures as may be necessary for the discovery and arrest of the offender"; and in section 157 there is no provision preventing the Police of one Police station from acting under that section in the jurisdiction of another Police station.

I, therefore, overrule the objection, and, inasmuch as the learned Counsel has no further arguments to offer, I reject the revision.

Revision rejected.

NGA HEIN *v.* EMPEROR.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION CASE NO. 229 OF 1915.

March 18, 1915.

Present:—Mr. Saunders, A. J. C.

NGA HEIN—APPLICANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 110—Charge to be communicated to accused—Reputation, nature of, evidence of—Order without reasonable grounds as to prevent accused from furnishing security, legality of—Sureties, qualifications of.

An order under section 110 of the Criminal Procedure Code should not be made unless the charge which the accused has to meet is communicated to him. [p. 825, col. 1.]

When it is sought to prove the reputation of a person, the evidence which is required is the evidence of respectable persons who are acquainted with the person on his trial, who live in the same neighbourhood and are aware of his reputation, and these persons, should ordinarily not be officials. [p. 825, col. 2.]

An order under section 114 framed without reasonable grounds or with the express intention of preventing the accused from furnishing security is *ultra vires*. [p. 826, col. 1.]

The sureties required in a case under section 110 of the Criminal Procedure Code are persons who are in a position to influence the accused and likely to be able to restrain him and who, if they fail to do so, can forfeit the amount mentioned in the bond. [p. 826, col. 1.]

It is not to be supposed that only holders of landed property can be in such a position. [p. 826, col. 1.]

Mr. *S. Vasadevan*, for the Applicant.

ORDER.—The District Magistrate has commented upon some of the grosser errors of the Magistrate who tried this case. He has also raised an objection, which was perhaps hardly justified, to the form in which the order setting forth the substance of the information received was recorded.

The order was in the words of section 110 (*a*), Criminal Procedure Code, and was in the nature of an alternative charge. The applicant knew what he had to meet and there can be no doubt that he was not prejudiced. It is extraordinary that having displayed so much solicitude on the applicant's behalf lest he should have been prejudiced by an order containing a charge which was communicated to him, the District Magistrate should have upheld the proceedings of the Sub-Divisional Magistrate on the ground that the applicant was a dangerous character a charge under section 110 (*f*), Criminal Procedure Code, which was never communicated to him. On this ground alone, it appears to me that the order cannot stand. But the proceedings appear to reek with everything with which proceedings of this kind should not.

The applicant was charged with being by habit a robber, house-breaker or thief. He has never been convicted, and it is apparently sought to prove the fact by evidence as to his reputation. The witnesses called were three Police officers and three ward-headmen. Only one of the latter is a resident in the same quarter as the applicant. Where it is sought to prove the reputation of a person, the evidence which is required is the evidence of respectable persons who are acquainted with the person on his trial, who live in the same neighbourhood and are aware of his reputation and, as the District Magistrate notes, these persons should ordinarily not be officials. Reputation may be due to the fact that the respondent is suspected of having committed certain acts, but such evidence is not generally of great value; where it is the evidence of persons who are responsible for the maintenance of order and who have attempted unsuccessfully to procure the conviction of the respondent, it is probably of very little value indeed.

Here, the Magistrate in his order states supicions as facts and proceeds to argue upon them. He says:—'The facts as established by the evidence for the prosecution are that he is in possession of two revolvers." And he then proceeds to argue that because revolvers had been used in certain crimes the applicant-respondent must have been concerned in them, and so on. The Magistrate appears to have been of the opinion that the present condition of the country made it necessary for the protection of the well-disposed members that "a man of accused's class" should be put upon security. What the condition of the country is, or whether the Magistrate supposes that, because he thinks that the condition requires it, the provisions of the law should be overridden is not clear. What does appear to be clear is that the Police look upon the applicant-respondent as a clever scoundrel and they have been unable to convict him of any particular offence, and they, therefore, desire to have him locked up. Section 110 of the Code of Criminal Procedure, no doubt, provides for such proceedings, but it does not provide for an order being made without reasonable grounds.

MUHAMMAD SHARIF *v.* EMPEROR.

Moreover, it appears probable that the order of the Magistrate as to security was framed with the express intention of preventing the applicant from furnishing security, and if so, I can only say that it was in keeping with the rest of the Magistrate's procedure, in which he admitted evidence which can have had no object but to prejudice the applicant and apparently held that a conviction was a conviction whether it was upset in appeal or not.

The order both of the Magistrate and of the District Magistrate requiring the sureties to be respectable holders of landed property was also an improper order. The sureties required in a case of this kind are persons who are in a position to influence the respondent and likely to be able to restrain him and who, if they fail to do so, can forfeit the amount mentioned in the bond. It is not to be supposed that only holders of landed property can be in such a position. Such a restriction should not be made in the order, but it is for the Magistrate when security is offered to consider whether sureties are persons of the kind described.

The order of the Magistrate is set aside and if the applicant is in custody he will be released, or if he has executed a bond, the bond will be cancelled.

Order set aside.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 865 OF 1914.

February 25, 1915.

Present:—Sir Alfred Kensington, KT., Chief Judge, and Mr. Justice Rattigan.

MUHAMMAD SHARIF—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 75, 59—Sentence—Transportation for life or for ten years.

Under section 75 of the Indian Penal Code, the Court, if it awards a sentence of transportation, must sentence the convict to transportation for life. [p. 826, col. 2.]

Arura v. *Emperor*, 31 P. R. 1903 Cr.; 14 P. L. R. 1904; 1 Cr. L. J. 89; *Queen* v. *Naiada*, 1 A. 43 (F. B.), referred to.

In lieu, however, of such sentence it may sentence the convict to imprisonment of either description for a term which may extend to ten years, and under the provisions of section 59 of the Code, it may, in every case in which the offender is punishable with imprisonment for a term of seven years or upwards, instead of awarding sentence of imprisonment, sentence the offender to transportation for a term not less than seven years, and not exceeding the term for which under the Code such offender is liable to imprisonment. [p. 826, col. 2.]

Appeal from an order of the Sessions Judge, Rawalpindi Division, dated the 14th October 1914.

JUDGMENT.—The appellant, Muhammad Sharif, aged 29, has been convicted by the Sessions Judge, Rawalpindi Division, of an offence punishable under section 380, Indian Penal Code; and in view of his four previous convictions (the last of which was had on the 3rd April 1908 when he was sentenced to 7 years' rigorous imprisonment) has been sentenced, under section 75, Indian Penal Code, to transportation for 14 years.

The Judge in Chambers before whom this appeal came in the first instance was satisfied that the appellant's guilt had been clearly established, but referred the question of the legality of the sentence to a Division Bench for determination, as under the rules of this Court he had himself no jurisdiction to interfere therewith.

There can be no doubt that the sentence passed by the Sessions Judge is illegal, as under section 75 of the Code (as amended by Act III of 1910), the Court, if it awards a sentence of transportation, must sentence the convict to transportation for life [see *Arura* v. *Emperor* (1) and *Queen* v. *Naiada* (2)].

In lieu, however, of such sentence, it may sentence the convict to imprisonment of either description for a term which may extend to ten years, and under the provisions of section 59 of the Code, it may, in every case in which the offender is punishable with imprisonment for a term of seven years or upwards, instead of awarding sentence of imprisonment, sentence the offender to transportation for a term not less than seven years and not exceeding the term for which under the Code such offender is liable to imprisonment.

In the present case the appellant undoubtedly deserves a severer punishment, but as the Sessions Judge was apparently of opinion that it was necessary to sentence him to transportation for life, we do not propose to enhance the sentence awarded. The provisions of the law must, however,

(1) 31 P. R. 1903 Cr., 14 P. L. R. 1904; 1 Cr. L. J. 89.
(2) 1 A. 43 (F. B.)

be observed, and we, therefore, so far accept this appeal as to set aside the sentence passed by the Sessions Judge and in lieu thereof we sentence the appellant, under the combined provisions of sections 380, 75 and 59 of the Code, to transportation for ten years. In all other respects the appeal is rejected.

Appeal partly accepted.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION PETITION NO. 269 OF 1914.

December 12, 1914.

Present:—Sir Henry Drake-Brockman, KT., J. C.

EMPEROR—APPELLANT

versus

DALLI—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 125, 406, scope of—Order to execute bond for keeping peace—District Magistrate's power to cancel bond.

The terms of section 125 of the Criminal Procedure Code are sufficiently wide to cover a case where the District Magistrate finds that the materials before the Subordinate Magistrate were not sufficient to justify an order for taking security.

Section 406 of the Code gives an appeal to the District Magistrate from an order to furnish security for good behaviour, while section 125 relates to orders for keeping the peace as well as to those from which section 406 allows an appeal.

Nabu v. *Emperor*, 4 C. L. J. 428; 11 C. W. N. 25; 34 C. 1 (F. B.); 4 Cr. L. J. 399; 1 M. L. T. 368, referred to.

Case reported by the District Magistrate of Balaghat under section 438 of the Criminal Procedure Code.

JUDGMENT.—Two persons, who had been ordered by the Sub-Divisional Magistrate, Balaghat, to execute bonds for keeping the peace, moved the District Magistrate under section 125, Criminal Procedure Code, to cancel the bonds on the ground that they ought not to have been required. The District Magistrate considered the evidence for the prosecution too weak to justify the order complained of, but held that under the section cited he could not direct the cancellation of the bonds except on the ground that they were no longer necessary. He has, therefore, reported the case for the order of this Court under section 438, Criminal Procedure Code.

The learned District Magistrate holds that section 406 of the Code would be superfluous if section 125 confers a power of cancellation. The former section gives an appeal to the District Magistrate from an order to furnish security for good behaviour, while the latter relates to order for keeping the peace as well as to those from which section 406 allows an appeal. It is evident that the decision of the Full Bench of the Calcutta High Court in *Nabu* v. *Emperor* (1) was not brought to the District Magistrate's notice. I agree with the view there expressed that the terms of section 125 are sufficiently wide to cover a case like the present, where the District Magistrate finds that the materials before the Subordinate Magistrate were not sufficient to justify an order for taking security. The need for a right of appeal from orders to give security for being of good behaviour is doubtless based on the fact that persons affected by such an order are often unable to give any security and so never execute a bond at all. On the other hand, persons ordered to execute a bond for keeping the peace have generally no difficulty in meeting the requirement.

The case is remitted to the District Magistrate for disposal of the application made to him under section 125, Criminal Procedure Code.

Ordered accordingly.

(1) 4 C. L. J. 428; 11 C. W. N. 25; 34 C. 1 (F. B.); 4 Cr. L. J. 399; 1 M. L. T. 368.

PUNJAB CHIEF COURT.

SPECIAL BENCH.

CRIMINAL MISCELLANEOUS CASE NO. 11 OF 1915.

February 26, 1915.

Present:—Justice Sir Donald Johnstone, KT., Mr. Justice Chevis and Mr. Justice LeRossignol.

AMAR SINGH—PETITIONER

versus

EMPEROR—RESPONDENT.

Press Act (I of 1910), ss. 4 (1), Expl. II, 20—Particular passages, whether to be specified in notice—Evidence—Proof—Other articles in paper, admissibility of—Disaffection to be excited must be against Indian Government—Relevancy of disaffection excited against other authorities.

The particular passage objected to in an article need not be specified in a notice issued under section 4 (1) of the Indian Press Act, 1910. [p. 828, col. 2.]

Mahomed Ali v. *Emperor*, 20 Ind. Cas. 977; 14 Cr. L. J. 497; 18 C. W. N. 1, referred to.

AMAR SINGH *v.* EMPEROR.

Explanation II to section 4 of the Act does not apply to a case where the gravamen of the charge made by Government against the article is not so much that it contains 'comments' on the acts of the authorities, as that it consists of an account of certain events so inaccurate, so misleading and so unfair to those authorities as to be likely, apart from all 'comments', to excite the feelings mentioned in the notice. [p. 828, col. 2.]

Other articles from other issues of the paper containing the article in question are admissible for the purpose specified in section 20 of the Act alone, *i. e.*, 'in aid of the proof of the nature or tendency' of the said article. [p. 828, col. 2.]

Ghulam Kadir Khan v. *Emperor*, 24 Ind. Cas. 578; 27 P. R. 1914 Cr.; 210 P. L. R. 1914; 36 P. W. R. 1914 Cr.; 15 Cr. L. J. 490, referred to.

The hatred and contempt and disaffection likely to be excited must be shown to be against the Indian Government, and not against the Canadian authorities or the Governor of Hong Kong, is true in a sense, but where the article complained of in giving an account of the voyage and adventures of the "Komagata Maru" and of the Budge Budge riot, aimed at literary effect and worked up to a climax by narrating the alleged oppressive conduct of Canada and Hong Kong and distinctly leaving the impression of a massacre by the Police in India of a number of unarmed and helpless man, the inaccurate and unfair statement of that conduct becomes relevant. [p. 829, col. 1.]

Application under section 17 of the Indian Press Act, 1910, to set aside an order of the Local Government, dated 14th October 1914, forfeiting the security deposit of Rs. 1,000 made by the Loyal Printing Press of Lahore.

Bawa *Sewa Ram Singh*, for the Petitioner.

The *Government Advocate*, for the Crown.

JUDGMENT.—On 6th October 1914 the Urdu paper *Sher-i-Punjab*, published in Lahore and printed in the "Loyal Printing Press" at that place, included an article headed "The Victims of Suspicion"; and 8 days later the Local Government, by notice under section 4 (1) of the Indian Press Act, 1910, confiscated the Press's security deposit of Rs. 1,000 and declared all copies of the paper of 6th October 1914 "forfeited to His Majesty," the reason stated being that the article aforesaid was, in the opinion of the Local Government, likely to bring into hatred and contempt the Government established by law in British India and to excite disaffection towards the said Government.

Under section 17 of the same Act an application to set aside the Local Government's aforesaid order has been filed on behalf of the Proprietor and Keeper of the said press, and we have heard the arguments laid before us on his behalf by his learned Pleader, Mr. Sewa Ram Singh, with the result that, in our opinion, the order of forfeiture was fully justified and that the application must fail. The matter, indeed, seems to us so clear that we have not thought it necessary to call upon the learned Government Advocate to answer Mr. Sewa Ram Singh.

A few of the principal points raised in argument may be touched upon. It is complained that the particular passage objected to in the article should have been specified in the notice; but the ruling *Mahomed Ali* v. *Emperor* (1) fully meets this contention. However, in order that the applicant might suffer no unfair disadvantage, the Government Advocate at our suggestion indicated the specially objectionable passages, at the same time saying that the whole tone of the article was bad.

Then Explanation II to section 4 of the Act was invoked; but it seems to us that the gravamen of the charge made by Government against the article is not so much that it contains "comments" on the acts of the authorities, as that it consists of an account of the voyage and adventures of the "Komagata Maru" and of the Budge Budge riot so inaccurate, so misleading and so unfair to those authorities as to be likely, apart from all "comments", to excite the feelings mentioned in the notice.

In the printed paper-book we have, at the instance of the applicant, some five other articles from other issues of the paper, put forward as showing that the general tone of the paper is, if anything, extravagantly loyal. The learned Government Advocate objected to the admissibility of these articles, pointing to certain remarks in *Ghulam Kadir Khan* v. *Emperor* (2). As to this we must lay it down that the articles are admissible for the purpose specified in section 20 of the Act alone, *i.e.*, "in aid of the proof of the nature or tendency" of the article of 6th October 1914; and after reading the said articles we can only express the view that they do not in any way prove that the article now under consideration is harmless or innocent.

(1) 20 Ind. Cas. 977; 14 Cr. L. J. 497; 18 C. W. N. 1.

(2) 24 Ind. Cas. 578; 27 P. R. 1914 Cr.; 210 P. L. R. 1914; 36 P. W. R. 1914 Cr.; 15 Cr. L. J. 490.

Then Mr. Sewa Ram Singh contends, on the strength of the wording of the Act, that the hatred and contempt and disaffection likely to be excited must be shown to be against the *Indian Government* and not against the Canadian authorities or the Governor of Hong Kong. This is true in a sense; but the article aims at literary effect and works up to a climax thus—*first*, the Hong Kong people tried to prevent the ship from sailing to Vancouver, owing to "suspicion"; *secondly*, the ship arrived at Vancouver, the passengers were not allowed to land, they made a strike "from starvation," the people of Canada were callous to their sufferings, and the Police there "attacked the passengers at the dead of night," the ship being driven away next day by a parade of warships; *thirdly*, arrived at Yokohama, the passengers, called "oppressed (*sitam rasida*) and unfortunate men", were ill-treated by the Japanese and told they would not be allowed to land at Hong Kong, though never before had the laws of Hong Kong been used in this way; *fourthly*, the "bad end," "the plainful and dreadful circumstance the poor victims of suspicion had to face, on reaching their home, owing to mere suspicion. The end of their hardships at last came in the form of bloodshed at Budge Budge, where 16 of these affliction-stricken men were hit by gun bullets and gave up their lives writing with pain. Many were wounded, etc., etc."

When the alleged oppressive conduct of Canada and Hong Kong is made use of in this way, we cannot accede to the contention that the inaccurate and unfair statement of that conduct is irrelevant in such a case as the present.

We need not, however, labour this point, for the part of the article given in brief above as "*fourthly*" proves Government's case without more. The Editor knew, for he had full cognizance of the Government *Communique* of 2nd October 1914, printed in the *Civil and Military Gazette* and in many newspapers, and reproduced (so Mr. Sewa Ram Singh tells us) in the *Sher-i-Punjab* itself on October 5th, that it was the returned passengers who opened fire on the Police and on the British officers at Budge Budge, that many of them were armed with deadly weapons, and that they were not fired upon "owing to mere suspicion." Instead of telling the story in a fair and impartial way, the article entirely suppresses all mention of the weapons in the hands of, and used with deadly effect by, the passengers, and distinctly leaves the impression of a massacre by the Police of a number of unarmed and helpless men. The feelings such a story, if believed, must arouse against the British authorities are obvious.

The last paragraph of the article, which consists of "comments," makes the matter even worse. "They were not given an opportunity for trying to remove the suspicion." It is idle for the apologist of a body of men armed with loaded guns and pistols to talk of those men *removing the suspicion* resting upon them. "The barbarians of Kabul and Yaghistan are not accorded such treatment.....are free to move about and go anywhere they like, etc?" It is hardly fair comment for the paper to try to make its readers think that it was barbarous and oppressive for the Government of India to take order with a gang of armed desperadoes, and, under a lawful Ordinance, to arrange for their return to their homes under special control in special trains. "In short, these affliction-stricken men became victims of suspicion and had to face this last calamity without any fault?". As to the last three words we need only say that they may be in keeping with the facts as given in the article, but they are not in keeping with the *real facts as known to the Editor*, and the "comment" proves to the hilt the evil intention in the misstatement of the facts. These men committed a 'fault" in landing in British India with arms, for which they had no licenses; and they went further, and, in using those arms to kill Policemen, who were merely doing their duty, they committed another and greater "fault," which proved their undoing.

The application is dismissed with costs, Rs. 80.

Application dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 206 OF 1915.

April 16, 1915.

Present:—Mr. Justice Tudball.

SITAL PRASAD GHOSH—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Agra and Oudh Water Works Act (I of 1891), s. 46—Waste water used in garden—Offence.

Waste water may be used for the purposes of a garden as it cannot be used for a second time for domestic purposes.

In cold weather the garden of the applicant was found well watered but the *pacca* reservoir and channel connected with a well in the garden were dry and full of leaves:

Held, that this circumstance was not sufficient for conviction of the applicant for having used for gardening the water supplied for domestic purposes.

Criminal revision from an order of a Magistrate, first Class, Allahabad.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—This application arises out of a conviction under section 46 of the Water Works Act. The facts on which the conviction is based are as follows:—

The applicant, Mr. Sital Prasad Ghosh, has a house and a garden. In the garden there is a well, attached to it there is a *pucca* reservoir and a *pucca* channel. Part of the garden is used for the purposes of growing vegetables. The Chairman and Assistant Secretary of the Municipal Board visited the premises on the 5th December 1914. They saw that the vegetable garden was well watered and found the reservoir dry and the channel containing a large amount of leaves. They saw a pair of bullocks entering the compound. Half an hour before this the Chairman and Assistant Secretary had been visiting the other houses in the neighbourhood.

The Court below has drawn, on these facts, the inference that the water which was supplied for domestic purposes had been used for the purpose of watering the garden. The Assistant Secretary stated that in his opinion the reservoir and the channel could not have been used for a fortnight because they were dry and there was a large amount of leaves in the channel. I take it for granted that waste water may be used for the purpose of the garden as it could not be used for a second time for domestic purposes. In my opinion these facts do not legitimately raise the inference that Mr. Sital Prasad Ghosh had used the Municipal water. It was cold weather when the premises of the applicant were visited and land watered then continues to be wet for a considerable length of time and the bare fact of the garden being wet at the time is not in itself a sufficient fact even with the presence of leaves in the water channel for the conviction of the applicant of the offence of which he has been convicted. I am, therefore, of opinion that the facts found are insufficient to support the applicant's conviction. I set aside the order of the Court below. The fine will be refunded.

Conviction set aside.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 27 OF 1915.

CRIMINAL REVISION PETITION No. 23 OF 1915.

April 19, 1915.

Present:—Mr. Justice Kumaraswami Sastri.

In re NATESA PADAYACHI—COMPLAINANT —PETITIONER.

Criminal Procedure Code (Act V of 1898), ss. 417, 435—Acquittal in Sessions case tried with aid of Assessors—Revision petition to High Court against order of acquittal—Power of High Court to interfere in revision—Sessions Judge and assessors concurring—Important witnesses disbelieved—Sessions Judge, power of, to stop prosecution—Revision by private person.

Ordinarily a High Court has jurisdiction to interfere on revision with an order of acquittal but it should exercise this jurisdiction sparingly and only where it is urgently demanded in the interests of justice. [p. 831, col. 2.]

Thandavan v. *Perianna*, 14 M. 363; 2 Weir 571; *Sinnu Gounden, In re*, 23 Ind. Cas. 188; (1914) M. W. N. 273; 15 Cr. L. J. 236; 26 M. L. J. 160, dissented from.

Sukho v. *Durga Prasad*, 2 A. 448; *Emperor* v. *Madar Bakhsh*, A. W. N. (1902) 200; 25 A. 128; *In the matter of Sheikh Aminuddin*, 24 A. 346; A. W. N. (1902) 89; *Heera Bai* v. *Framji Bhikaji*, 15 B. 349; *Municipal Committee of Dacca* v. *Hingoo Raj*, 8 C. 895; *Deputy Legal Remembrancer* v. *Karuna Baistobi*, 22 C. 164; *Rupa Mandal* v. *Keshab Mandal*, 5 C. L. J. 452; 5 Cr. L. J. 349; *Bellew F. D.* v. *Mrs. Parker*, 7 C. W. N. 521; *Rakhal Das* v. *Kailash Banu*, 5 Ind. Cas. 721; 11 Cr. L. J. 213; 11 C. L. J. 113; *Kangali Sardar* v. *Bama Charan Bhattacharjee*, 12 Ind. Cas 985; 12 Cr. L. J. 609; 38 C. 786; *Sheikh Bazu* v. *Raika Singh*, 26 Ind. Cas. 170; 15 Cr. L. J. 722; 18 C. W. N. 1244, followed.

In re NATESA PADAYACHI.

The power of a Court to stop a case if it thinks it a waste of time to go on with it is undoubted and, therefore, where in a Sessions case two of the important witnesses for the prosecution were disbelieved by the Judge and the Assessors and the prosecution was stopped, there was no such patent miscarriage of justice as to call for interference by the High Court. [p. 831, col. 2.]

It is very doubtful if a private party should, as a matter of right, be allowed to move the High Court in such cases. [p. 831, col. 1.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of Session of the Trichinopoly Division, in Sessions Case No. 52 of 1914.

Mr. *R. Kuppusawmi Aiyar*, for the Petitioner.

ORDER.—This is a petition to revise the order of the Sessions Judge of Trichinopoly acquitting the accused. The chief ground is that the Judge did not examine all the prosecution witnesses but made up his mind after two of them were examined.

As both of the Assessors were of the same opinion as the Sessions Judge, it would require very strong grounds for the High Court to interfere even if such a power exists. It is significant that the Government has not appealed against the acquittal.

It is very doubtful if a private party should, as a matter of right, be allowed to move the High Court in such cases. In *Thandavan* v. *Perianna* (1) it was held that an appeal against an acquittal by way of revision was not contemplated by the Criminal Procedure Code, and their Lordships refused to hear the petitioner's Counsel. In the case of *Sinnu Gounden, In re* (2) Mr. Justice Miller observes as follows:—"It seems to me that to entertain proceedings by way of revision on a District Magistrate's report in a case when an appeal would lie from an acquittal is contrary to the spirit, if not, to the letter of sub-section 5 of section 435 of the Criminal Procedure Code".

The restricted view taken by the Madras High Court as to the scope of sections 417 and 439, Criminal Procedure Code, in *Thandavan* v. *Perianna* (1) has not been accepted by other Courts and while the power of the High Court is recognised, it has been confined within very narrow limits. I need only refer to *Sukho* v. *Durga Prasad* (3); *Queen-Empress* v. *Ala Bakhsh* (4); *Emperor* v. *Madar Bakhsh* (5): *In the matter of Sheikh Amin-ud-din* (6); *Heera Bai* v. *Framji Bhikaji* (7); *Municipal Committee of Dacca* v. *Hingoo Raj* (8); *Deputy Legal Remembrancer* v. *Karuna Baistobi* (9); *Rupa Mandal* v. *Keshab Mandal* (10); *Bellew F. D.* v. *Mrs. Parker* (11); *Rakhal Das* v. *Kailash Banu* (12); *Kangali Sardar* v. *Bama Charan Bhattacharjee* (13); *Sheikh Bazu* v. *Raika Singh* (14).

Though in some of the cases above cited the Calcutta High Court went much further than the other Courts as to the extent of the powers of the High Court, the latest case on the point, *Faujdar Thakur* v. *Kasi Choudhui* (15), lays down that the powers of revision should be exercised when it is urgently demanded in the interests of public justice.

I entirely agree with the following observation, of Jenkins, C. J., in the above case: "I am not prepared to say that the Court has no jurisdiction to interfere on revision with an acquittal, but I hold it should ordinarily exercise this jurisdiction sparingly and only where it is urgently demanded in the interests of public justice."

In the present case I do not think that there has been such a patent miscarriage of justice as to call for interference by the High Court. Two of the important witnesses for the prosecution were disbelieved by the Judge and the Assessors and I cannot say they were wrong. The power of the Court to stop the case if it thinks it a waste of time to go on is undoubted, though the stage at which it ought to do so may be a matter of opinion.

I do not think this is a fit case for interference and dismiss the petition.

Petition dismissed.

(1) 14 M. 363; 2 Weir 571.
(2) 23 Ind. Cas. 188; 26 M. L. J. 160; (1914) M. W. N. 273; 15 Cr. L. J. 236.
(3) 2 A. 448.
(4) 6 A. 484.
(5) 25 A. 128; A. W. N. (1902) 200.
(6) 24 A. 346; A. W. N. (1902) 89.
(7) 15 B. 349.
(8) 8 C. 895.
(9) 22 C. 164.
(10) 5 C. L. J. 452; 5 Cr. L. J. 349.
(11) 7 C. W. N. 521.
(12) 5 Ind. Cas. 721; 11 C. L. J. 113; 11 Cr. L. J. 213.
(13) 12 Ind. Cas. 985; 38 C. 786; 12 Cr. L. J. 609.
(14) 26 Ind. Cas. 170; 18 C. W. N. 1244; 15 Cr. L. J. 722.
(15) 27 Ind. Cas. 186; 19 C. W. N. 184; 21 C. L. J. 53; 16 Cr. L. J. 122; 42 C. 612.

In re VENKAPPA.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 149 OF 1913.

CRIMINAL REVISION PETITION No. 129 OF 1913.

August 18, 1913.

Present:—Mr. Justice Ayling.

In re VENKAPPA AND OTHERS—ACCUSED—PETITIONERS.

Penal Code (Act XLV of 1860), s. 283—Obstruction left on public road—Obstruction likely to be caused—Inference—Individual obstruction, proof of, necessity of.

Where a *prabha* left lying in a public road could not fail to cause obstruction to any person who had occasion to pass along that road:

Held, that though obstruction to any individual was not expressly proved, it was a matter of necessary inference.

Petition, under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898), praying the High Court to revise the judgment of the Head-quarters Deputy Magistrate, Kurnool Division, in Calendar Case No. 1 of 1913.

Mr. *K. B. Ranganadha Ayyar*, for the Petitioners.

Mr. *J. C. Adam*, for the Public Prosecutor.

ORDER.—The petitioners have been convicted of an offence under section 283, Indian Penal Code, by leaving a "*prabha*" lying in a public road for 24 hours so as to cause obstruction.

The *first* point argued is that the abandonment of the "*prabha*" was due to the action of the Sub-Magistrate (prosecution witness No. 2), who stopped the procession of the accused and others accompanying it and that, therefore, the accused committed no offence. It is certain that the Sub-Magistrate apprehending a breach of the peace stopped the progress of the procession. According to his own account (which there seems no reason to distrust), he simply told the accused to go and bring their elders. According to the defence version, he threatened to fire on the processionists if they persisted in going on. In neither case can it be said that the Magistrate's action justified or excused those carrying the "*prabha*" in leaving it in the middle of the street in such a way as to cause obstruction even for a short time, to say nothing of 24 hours. This plea cannot be accepted.

It is *next* represented that the accused were prejudiced by the hurried nature of the trial. I find no ground for holding that this was the case.

Lastly, it is argued, on the authority of *Queen* v. *Khader Moidin* (1), that in the absence of evidence of obstruction to any particular individual a conviction under section 283, Indian Penal Code, cannot stand. The evidence on record shows that the road at the place in question is three yards wide, while the "*prabha*" was two yards wide. Consequently as long as the "*prabha*" remained on the road no vehicle could pass, and even a foot passenger could not pass without inconvenience. This amounts to saying that the "*prabha*" could not fail to cause obstruction to any person who had occasion to pass along the road, which is admittedly a public one: and though obstruction to any individual is not expressly proved, it is a matter of necessary inference. I very much doubt whether the ruling in the case above quoted was ever intended to apply to a case of this kind: and, if it were, with due deference to the learned Judges responsible for it, it seems to me to go too far (*cf.* Mayne's Criminal Law of India, 3rd Edition, paragraph 403). The only other Madras case quoted to me is *Queen-Empress* v. *Virappa Chetti* (2). That was an appeal against acquittal. The Court, while expressing some doubt as to the applicability of section 283, Indian Penal Code, pointed out that the case undoubtedly fell under section 290, Indian Penal Code, and ordered a re-trial.

In the present case also, there is clear evidence to support a conviction under section 290, Indian Penal Code, which renders the offender liable to exactly the same punishment as section 283.

Under these circumstances there seems to be no ground for interference, and the petition is dismissed.

Petition dismissed.

(1) 4 M. 235; 1 Weir 911.
(2) 20 M. 433; 1 Weir 233.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 660 OF 1914.

March 18, 1915.

Present:—Mr. Justice Walmsley.

BISWESSOR SEN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

IMAMUDDI CHOWDHURI AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation—Suit or proceeding, limitation applicable to.

The law of limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding, unless there is a distinct provision to the contrary.

Lala Soni Ram v. *Kanhaiya Lal*, 19 Ind. Cas. 291; 17 C. W. N. 605; 11 A. L. J. 389; 13 M. L. T. 437; (1913) M. W. N. 470; 15 Bom. L. R. 489; 25 M.L.J. 131; 35 A. 227; 17 C. L. J. 488 (P. C.); 40 I. A. 74, followed.

Appeal against the decree of the Subordinate Judge, first Court, Backergunj, dated the 16th of December 1913, affirming that of the Munsif, second Court, Barisal, dated the 9th of June 1913.

Babu *Bepin Behary Ghose* (Senior), for the Appellants.

JUDGMENT.—The plaintiff brought a suit to recover *khas* possession of some land. The Court of first instance held that the suit was not barred by limitation. The learned Subordinate Judge, however, held that it was barred by limitation. The matter turns upon the question whether the law applicable to the case is the present Limitation Act or the Act of 1877. The argument of the lower Appellate Court is that according to the old Limitation Act, the defendants' possession became adverse to the plaintiff from the date of the sale and that, therefore, when the suit was instituted more than twelve years had already expired. So that the defendant's title by adverse possession was complete. The plaintiff contends that he is entitled to the benefit of the new Act and he quotes in support of his view the case of *Lala Soni Ram* v. *Kanhaiya Lal* (1). In that case it was said by their Lordships of the Privy Council that "the High Court rightly held that the law of limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding, unless there is a distinct provision to the contrary." Adopting that principle it

(1) 19 Ind. Cas. 291; 17 C. L. J. 488; 17 C. W. N. 605; 11 A. L. J. 389; 13 M. L. T. 437; (1913) M. W. N. 470; 15 Bom. L. R. 489; 25 M. L. J. 131; 35 A. 227 (P. C.); 40 I. A. 74.

appears that the plaintiff is right in contending that he is entitled to the benefit of Article 138 as it now stands and that he has twelve years from the date from which it was confirmed instead of the date on which the sale actually took place. I, therefore, set aside the decision of the learned Subordinate Judge holding that the suit was barred by limitation, and remand the appeal to be heard by that Court in regard to the other contentions.

As nobody appears on behalf of the respondents the plaintiff will bear his own costs in this Court, whatever the result may be.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 693 OF 1913.

January 26, 1915.

Present:—Mr. Batten, A. J. C.

KASHIBAI—PLAINTIFF—APPELLANT

versus

KANNOO AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 12 (2)—Appeal—Exclusion of time requisite for obtaining copies.

The judgment of the first Court was delivered on the 15th May, and the decree was signed late on that day. The Courts were closed, except for copying purposes, from the 16th May to the 15th June, inclusive. The defendant applied for copy on the 16th June, received it on the 18th, and filed the appeal to the District Judge on the 19th *idem*:

Held, that the appeal was within time. [p. 834, col. 1.]

Venkata Row v. *Venkatachella Chetty*, 28 M. 452; 15 M. L. J. 109, distinguished.

Appeal against the decree of the District Judge, Betul, dated the 18th August 1913, reversing that of the Munsif, Betul, dated the 15th May 1913.

Rao Bahadur *V. R. Pandit*, for the Appellant.

The Hon'ble Mr. *M. B. Dadabhoy*, for the Respondent.

JUDGMENT.—On the merits the appellant has no case in second appeal. She is admittedly the daughter of *Musammat* Kega and Raghoba. *Musammat* Kega was the widow of Dhondu, the absolute occupancy tenant of the field in suit. The District Judge has held that *Musammat* Kega was not married to Raghoba. She, therefore, held the field as a Hindu widow and not

adversely to the reversioners, the respondents-defendants.

But it is urged that the appeal to the District Judge was time-barred. The facts are that the judgment of the first Court was delivered on the 15th May, and the decree was signed late on that day. The Courts were closed, except for copying purposes, from the 16th May to the 15th June inclusive. The defendants applied for copy on the 16th June, the day the Court opened, they received the copy of decree on the 18th and filed their appeal on the 19th. The appeal would have been in time if presented on the 16th June, according to section 4 of the Limitation Act, 1908, without any deduction made for the time occupied in obtaining copies under section 12 (2). The right of appeal thus subsisted on the day on which application for copy was made, and as the day on which the copy was granted was rightly excluded, Vide *Maharajah Beer Chunder Joobraj* v. *Mohamed Asgur* (1), the appeal was in time, according to *Tukaram* v. *Pandurang* (2) and *Pandharinath* v. *Shankar* (3). The case of *Venkata Row* v. *Venkatachella Chetty* (4) is to be distinguished, as in that case the judgment was not delivered on the last day before the vacation. It makes no difference that in this case the appeal was presented on the day after the day on which copy was granted, since that day was properly excluded. Moreover, the Madras case is in conflict with the Bombay cases, and also with *Siyadat-un-nissa* v. *Muhammad Mahmud* (5).

The appeal to the District Judge was in time. This appeal is dismissed with costs.

Appeal dismissed.

(1) (1864) W. R. 145.
(2) 25 B. 584; 3 Bom. L. R. 143.
(3) 25 B. 586; 3 Bom. L. R. 244.
(4) 28 M. 452; 15 M. L. J. 109.
(5) 19 A. 342; A. W. N. (1897) 76.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 759 OF 1914.

May 28, 1915.

Present:—Sir Asutosh Mookerjee, KT., and Mr. Justice Roe.

BROJABASI KOER—PLAINTIFF—APPELLANT

versus

RAM SANKAR DAS AND ANOTHER—DEFENDANTS—RESPONDENTS.

Assam Land and Revenue Regulation (I of 1886), ss. 6, 71, scope of—Ejectment—User for agricultural purpose—True test—Occupancy right, acquisition of, by 12 years' possession, effect of.

Section 71 of the Assam Land and Revenue Regulation does not entitle a purchaser to eject any tenant having a right of occupancy under the rent law for the time being in force, or to enhance the rent of any such tenant, otherwise than in the manner prescribed by that law. [p. 835, col. 1.]

Where the defendants are found to be cultivators holding the entire tract for a period of more than twelve years, and a portion has been used for grazing purposes while the remainder is still covered by jungle:

Held, that the defendants are *raiyats* within the meaning of section 6 of the Assam Land and Revenue Regulation and that the use of the land for grazing purposes entitles them to claim a right of occupancy; [p. 835, cols 1 & 2.]

Hedayet Ali v. *Kalanand Singh*, 20 Ind. Cas. 332; 17 C. L. J. 411, followed.

that the true test is to determine whether the user of the land has been for an agricultural purpose; [p. 835, col. 2.]

that the mere fact that a part of the land is still covered by jungle and has not been actually brought under tillage does not take the case out of the operation of section 6, which applies to land "cultivated or held." [p. 835, col. 2.]

A *raiyat* who has occupied and cultivated land for more than 12 years under a landlord who had no title to the land, nevertheless acquires a right of occupancy under section 6 of Act X of 1859 or Act VIII of 1869, B. C. [p. 835, col. 2; p. 836, col. 1.]

Zoolfun Bibee v. *Radhica Prosonno Chunder*, 8 C. 566; 1 C. L. R. 388; 2 Ind. Jur. 859; *Ameer Hossein* v. *Sheo Suhae*, 19 W. R. 338 and *Sheo Prokash Misser* v. *Ram Sahoy Singh*, 8 B. L. R. 165; 17 W. R. 62, referred to.

Appeal against the decree of the Additional District Judge, Sylhet, dated the 11th December 1913, reversing that of the Munsif of Habiganj, dated the 30th September 1912.

Babu *Gopal Chandra Das*, for the Appellant.

Babu *Hemendra Kumar Das*, for the Respondents.

BROJABASI KOER *v.* RAM SANKAR DAS.

JUDGMENT.—This is an appeal in an action in ejectment by the plaintiff, who holds a *putni* from a purchaser at a sale, for arrears of revenue of the residuary share of an estate under the Assam Land and Revenue Regulation, 1886, and seeks to evict the defendants as trespassers. The defendants resist the claim on a two-fold ground, namely, *first*, that the lands are included within, not the residuary estate purchased by the grantor of the plaintiff, but a separate account which has not been sold, and *secondly*, that they are, in any event, occupancy *raiyats* as they have been in possession as cultivators for more than twelve years. The Courts below have concurrently found that the disputed lands lie within the residuary estate, but while the trial Court held that the plaintiff was entitled to a decree for ejectment, the Subordinate Judge has taken a contrary view. On the present appeal, the decree of the lower Appellate Court has been assailed substantially on two grounds, *first*, that as the land has been used for grazing purposes, the defendants are not occupancy *raiyats*, and *secondly*, that as the defendants claimed to hold the land under the proprietor of the separate account, they cannot set up a right of occupancy within the residuary estate. In our opinion, there is no foundation for either of these contentions.

As regards the first ground, we observe that section 71 of the Assam Land and Revenue Regulation provides that property sold under section 70 for arrears of revenue shall be sold free of all incumbrances previously created therein by any other person than the purchaser. But this rule is not to apply to entitle a purchaser to eject any tenant having a right of occupancy under the rent law for the time being in force or to enhance the rent of any such tenant, otherwise than in the manner prescribed by that law. The rent law in force in the district where the land is situated is contained in Act VIII of 1869 (B. C.). Section 6 provides that every *raiyat* who shall have cultivated or held land for a period of twelve years shall have a right of occupancy in the land so cultivated or held by him, whether it be held under *pattah* or not, so long as he pays the rent payable on account of the same. In the present case, it has been found that the defendants are cultivators; they are consequently *raiyats* within the meaning of section 6. It has also been found that they have held the entire tract for a period of more than twelve years, a portion has been used for grazing purposes while the remainder is still covered by jungle. The question thus arises, whether the use of the land for grazing purposes entitles the defendant to claim a right of occupancy under section 6. The answer must be in favour of the defendants, on the principle explained in *Hedayet Ali* v. *Kalanand Singh* (1) where reference is made to the earlier decisions in *Fitzpatrick* v. *Wallace* (2) and *Latifar Rahaman* v. *Forbes* (3). The true test is to determine whether the user of the land has been for an agricultural purpose. The land may have been used for the grazing of cattle required for an agricultural pursuits, or it may have been used for the grazing of cattle required for avocations totally unconnected with agriculture. In the former contingency, but not in the latter, the holding has been used for an agricultural purpose and a right of occupancy has been acquired therein. The mere fact that a part of the land is still covered by jungle and has not been actually brought under tillage does not take the case out of the operation of section 6, which applies to land "cultivated or held." The first ground assigned to support the contention that a right of occupancy has not been acquired in the land cannot consequently prevail.

As regard the second ground, we find that the defendants have been in occupation of the land from at least 1876. Since 1900, when the separate account was opened the defendants have, it appears, on some occasions, paid rent to the proprietor of the separate account under the mistaken notion that the land was comprised in that account and not in the residuary estate. This, however, does not affect their position, because as was pointed out in *Zoolfun Bibee* v. *Radhica Prosonno Chunder* (4), *Ameer Hossein* v. *Sheo Suhae* (5) and *Sheo Prokash Misser* v. *Ram Sahoy Singh* (6) a *raiyat* who has

(1) 20 Ind. Cas. 332; 17 C. L. J. 411.
(2) 11 W. R. 231; 2 B. L. R. A. C. 317.
(3) 5 Ind. Cas. 783; 14 C. W. N. 372.
(4) 3 C. 560; 1 C. L. R. 388; 2 Ind. Jur. 859.
(5) 19 W. R. 338.
(6) 8 B. L. R. 165; 17 W. R. 62.

occupied and cultivated land for more than twelve years under a landlord who had no title to the land, nevertheless acquires a right of occupancy under section 6 of Act X of 1859 or Act VIII of 1869, B. C. Consequently the defendants have acquired the status of occupancy *raiyats*.

The plaintiff-appellant has finally asked that a declaration may be appended to the decree to the effect that as proprietor he is entitled to realize rent from the defendants. The defendants do not object to this prayer. We direct accordingly that a declaration to this effect be added to the decree. Subject to this adition, the decree of the District Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 345 OF 1913.

April 6, 1915.

Present:- Mr. Batten, A. J. C.

GOPAL DAS—DEFENDANT—APPELLANT

versus

RAMUSA—PLAINTIFF—RESPONDENT.

Central Provinces Tenancy Act (XI of 1898), s. 88—Ejectment—Claim by sub-tenant to recover compensation for crops—Jurisdiction of Civil or Revenue Court.

The method by which a tenant gets compensation for crops raised by him and reaped by the landlord is laid down in section 88 of the Central Provinces Tenancy Act, which is plainly a section, when the ejectment is on a decree for arrears of rent, in relation to the execution of decrees transferred to a Revenue Officer. [p. 837, col. 2.]

An ejectment of a tenant on legal grounds is binding on a sub-tenant, and the sub-tenant is not entitled to any remedy not open to the tenant. His only valid cause of action is as representative of the tenant within the meaning of section 47 of the Civil Procedure Code. [p. 837, col. 2; p. 838, col. 1.]

Appeal against the decree of the Divisional Judge, Nagpur Division, dated the 20th March 1913, confirming that of the Junior Subordinate Judge, Wardha, dated the 30th August 1912.

Mr. *P. S. Kotwal*, for the Appellant.

JUDGMENT.- The circumstances out of which the suit and appeal arise are as follows.

Babusa Teli sub-leased his ordinary holding to the plaintiff by a registered deed of lease for the year 1910-11. The defendant is the *malguzar*. The defendant had a decree for arrears of rent against Babusa, and in execution of that decree ejected Babusa (and the plaintiff) on the 11th October 1910. Babusa was restored to possession in May 1911, but in the meantime the defendant *malguzar* had removed the crops raised by the plaintiff sub-tenant. The plaintiff sued the *malguzar* for the value of the crops so reaped, and got a decree for Rs. 550, which sum represented the value of the crops less the expenses incurred by the defendant in harvesting the crops. The 3rd and 4th issues were:—

III.—Did the Commissioner pass an order of reinstatement of the tenant and was that, if any, subject to any qualification, and if so what?

IV.—Will the present suit lie for restoration of the crops, or will section 88 of the Tenancy Act bar the present suit?

The learned Subordinat Judge held there was nothing in the order of the Commissioner to favour the view that the reinstatement was conditional. As to the jurisdiction of the Civil Court the Subordinate Judge said: "The order of ejectment was set aside by the Tahsildar and Deputy Commissioner, so that in fact there was no ejectment at all. The provisions of section 88 only apply when an order of ejectment is passed. In this case the order, if any, was cancelled, so that the parties are relegated to their former position and there can be no bar to the enforcement of their civil rights in a Civil Court."

On appeal the learned Divisional Judge discussed these questions as follows: "It is first argued that the suit is not cognizable by a Civil Court, a remedy being given for such cases by section 88 of the Tenancy Act. Section 88 directs that expenses should be repaid to the tenant when a proper order for ejectment is passed. It is true that the Commissioner has suggested that the Revenue Court should determine these expenses. But apparently rent was still owing, a fresh application for execution was to be expected and in equity the Revenue Court would have to consider the re-payment before ordering execution. The Commissioner's order is not based solely on the Tahsildar's neglect to consider the question of standing crops and it is, therefore, clear that it was not conditional on Babusa satisfying the present plaint-

iff and recovering only the expenses of sowing, etc. It must be held then that the defendant's possession was wrongful and he is bound to compensate the plaintiff. I add that fortunately no injury has been inflicted on the defendant as the result of the Tahsildar's order, and its subsequent reversal: the plaintiff is suing for the crops which the defendant admittedly gathered, and which he would not have gathered had the Tahsildar not passed the order. It seems to me that in equity the appellant has no case, particularly as his expenses in gathering the crops are allowed. A civil suit then lies, and I see nothing in the provisions of the Tenancy Act to obstruct the suit."

The only order of a Revenue Officer on the record being the order of the Commissioner, I called for the whole of the revenue records in the case. On the 8th October 1910 the Tahsildar passed an *ex parte* order, under section 85 of the Tenancy Act, to eject the tenants. They were actually ejected on the 11th October. On the 14th October the Tahsildar dismissed as too late an application asking to set aside the *ex parte* order and offering to pay the claim in full. On the 22nd December 1910 the Deputy Commissioner ordered that the tenant's application to set aside the *ex parte* order of ejectment should be disposed of on the merits. The Tahsildar set aside his own *ex parte* order on the 20th May 1911. On the 26th May 1911 Babusa deposited the amount due by him and he was reinstated in possession. Meanwhile the *malguzar* had harvested the crops, as appears in the present suit. The *malguzar* appealed against the order setting aside the *ex parte* order of ejectment. The Deputy Commissioner declined to interfere, and in the course of his order remarked that whether the reasons for non-attendance were sound or not, the Tahsildar was inconsiderate in passing an *ex parte* order of ejectment, as the arrears of rent were Rs. 288 or so, the property was worth about Rs. 4,000, and one of the judgment-debtors (Babusa Teli's nephew) was a minor. The *malguzar* appealed to the Commissioner, whose order runs as follows: "I am unable to hold that the Tahsildar exercised a sound discretion in ordering the immediate ejectment of the tenants at the very first hearing on the 8th October 1910. The land is rented at Rs. 76, and is situated near Arvi. One of the judgment-debtors was a minor, and though his uncle, the other judgment-debtor, may have represented him in the Civil Court, the fact of his minority required consideration. Also in the beginning of October the question of standing crops (section 88) had also to be considered. Babusa's statement that he appeared on the 10th October is apparently contradicted by the Tahsildar's order, dated the 14th October 1910, but the contradiction is not direct and it seems rather improbable that Babusa should state in writing on the 11th that he appeared before the Tahsildar on the very day before without any foundation. However, it seems to be unnecessary to call for a specific answer from the Tahsildar as to Babusa's appearing on the 10th, as it seems to me that the order of the 8th was passed without due consideration. I dismiss the appeal.

"As the Revenue Court ordered ejectment without regard to the provisions of section 88 it seems to me that the Revenue Court should settle the amount payable by the landlord under that section, in respect of the ejectment ordered by it. But this must form the subject of a separate application."

The Financial Commissioner finally refused to interfere with the order setting aside the *ex parte* ejectment order.

It appears from the above orders that the Divisional Judge was wrong in thinking that any rent was still due from the tenant.

The decree for ejectment was dated the 26th June 1910, the sub-lease to the plaintiff was effected on the 9th June 1910, during the pendency of the suit.

The principal ground of appeal to this Court is that a Civil Court has no jurisdiction to entertain the suit.

Under section 95 of the Tenancy Act no Civil Court can take cognizance of any dispute or matter in respect of which authority is given to a Revenue Officer. The method by which a tenant gets compensation for crops raised by him and reaped by the landlord is laid down in section 88, which is plainly a section, when the ejectment is on a decree for arrears of rent, in relation to the execution of decrees transferred to a Revenue Officer. Any dispute in connection with the execution of a decree must be dealt with by the officer executing the decree, and cannot form the subject of a separate suit. An ejectment of a tenant on legal

grounds is binding on a sub-tenant, and the sub-tenant is not entitled to any remedy not open to the tenant. His only valid cause of action is as representative of the tenant within the meaning of section 47 of the Civil Procedure Code. The ejectment order of the Tahsildar put an end to the tenancy and hence also to the sub-tenancy. There was no privity of contract between the landlord and the sub-tenant. The decree for ejectment was as binding on the sub-tenant as it was on the tenant. Here the tenant was a defaulter, and the Tahsildar had the power under the decree to eject him. He was ejected by due process of law and by an executing Court and it was the same executing Court which reinstated him. Any question, therefore, which arose as the result of the action of the executing Court would have to be determined by that Court and not by a separate suit. Moreover the principles of section 144 of the Civil Procedure Code as to restitution seem to be applicable.

The sub-tenant (especially as he got his lease after the institution of the suit against the tenant) claims through the tenant, and cannot possibly be in a better position than the tenant. The dispute is between the parties to the decree of ejectment, as a result of the action of the Revenue Court executing the decree, and, therefore, cannot, under section 47, Civil Procedure Code, form the subject of a separate suit in a Civil Court.

For these reasons I reverse the decrees of the lower Courts and dismiss the suit with costs in all Courts.

Decree reversed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 1179 OF 1913.

June 9, 1915.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice N. Chatterjea.

KURARAM DATTA—PLAINTIFF—APPELLANT

versus

BANOMALI PATRA AND OTHERS—DEFENDANTS—RESPONDENTS.

Fraud—Suit for setting aside decree obtained by fraud not brought—Fraud can be still relied upon.

A party can rely on fraud even though he has not brought a suit to set aside the decree alleged to have been obtained by fraud.

Appeal against the decree of the District Judge, Bankura, dated the 23rd December 1912, reversing that of the Munsif, first Court, Bishunpur, dated the 21st of December 1911.

Babu *Shoroshi Charan Mitter*, for the Appellant.

Babu *Rupendra Kumar Mitter*, for the Respondents.

JUDGMENT.—This case is really concluded by the finding of fact of the lower Appellate Court, and nonetheless so, because that finding may have been very timidly expressed. It is objected that the defendant cannot rely on fraud in the absence of a suit brought by him to set aside the decree. But that does not seem to be a sound appreciation of the position. It has been decided otherwise in the case of *Rangnath Sakharam* v. *Govind Narasinv* (1).

The appeal must, therefore, be dismissed with costs.

Appeal dismissed.

(1) 28 B. 639; 6 Bom. L. R. 592.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 352B OF 1913.

January 29, 1914.

Present:—Mr. Mittra, Offg. A. J. C.

HUKAM CHAND—DEFENDANT—JUDGMENT-DEBTOR—APPELLANT

versus

RADHA KISAN AND ANOTHERS—PLAINTIFFS DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), s. 375—Adjustment of suit—Interpretation—Agreement not to execute decree previous to decree, effect of.

An agreement not to execute a decree, if effect is sought to be given to such agreement in execution proceedings, must be a transaction between the parties subsequent to the decree and not one which would make the decree itself void as being in its contravention. [p. 839, col. 2; p. 840, col. 1.]

Chhoti Narain Singh v. *Musammat Rameshwar Koer*, 6 C. W. N. 796, followed.

Laldas Narandas v. *Kishordas Devidas*, 22 B. 463, dissented from.

The words 'adjustment of a suit' in section 375, Civil Procedure Code, refer not only to the form in which the decree is to be drawn up but also the manner in which the rights of the parties are to be enforced in the execution proceedings of that suit. Therefore, under section 91 of the Evidence Act, no extraneous evidence, oral or

HUKAM CHAND v. RADHA KIHSN.

documentary, regarding the terms of the compromise is admissible in that suit and its execution proceedings. [p. 840, col. 1.]

Appeal against the decree of the Additional District Judge, West Berar, dated the 24th June 1913, confirming that of the Subordinate Judge, Khamgaon, dated the 29th April 1907.

Mr. *G. V. Deshmukh*, for the Appellant.

Dr. *H. S. Gour*, for the Respondent.

JUDGMENT.—The respondents, Sitaram and Gulab Chand, filed Civil Suit No. 402 of 1906 in the Court of the Subordinate Judge, Khamgaon, on the basis of a mortgage executed by the defendant-appellant, Hukam Chand. One Ram Gopal Beharilal, who was the purchaser of the mortgaged property other than the house and stables in dispute, was the second defendant in the suit. On 29th April 1907 Hukam Chand filed an application to the effect that he has compromised the suit and prayed that a decree may be passed in the plaintiffs' favour as claimed in the plaint. The Court then recorded the statements of the Pleaders for the parties regarding the compromise. An issue, however, had to be framed as between the plaintiffs and the second defendant regarding the latter's right to the marshalling of securities.

On the same day, judgment was delivered. The judgment recites that the compromise entitled the plaintiffs as against the defendant No. 1 to a decree for Rs. 4,000 and costs to be passed against the mortgaged property, in case the sum is not paid within six months. A decree for sale was drawn up for Rs. 4,000 and costs declaring the entire mortgaged property liable to sale. This decree has been executed from time to time. In 1908, when the house of the judgment-debtor was attached, the latter applied for its release on the ground that on account of the famine, the house was not then likely to fetch a proper price. The judgment-debtor, therefore, prayed the Court to sell the fields first. This has been now done, and the decree is still unsatisfied. The decree-holder has again applied for the attachment of the house and stables. On the 18th January 1912, Hukam Chand for the first time pleaded that prior to the passing of the decree on the 29th April 1907, there was an agreement between the plaintiffs and himself to the following effect:—

1. That in satisfaction of the amount of rupees three thousand out of the decretal amount of Rs. 4,000 the decree-holder was to purchase the mortgaged fields by bidding at the auction sale.

2. That the decree-holder was to give up his claim for Rs. 1,000.

3. That in satisfaction of the amount of costs the decree-holder was to take the stables.

On this ground Hukam Chand has applied for the release of the house from attachment. The Courts below have held that such an agreement cannot be inquired into under section 47 of the Civil Procedure Code.

Hukam Chand has filed this second appeal. His learned Counsel relies on the Full Bench decision of the Bombay High Court in *Laldas Narandas* v. *Kishordas Devidas* (1). But the weight of authority is distinctly in favour of the opposite view. I need only refer to the following decisions of the Calcutta High Court:—*Benode Lal Pakrashi* v. *Brajendra Kumar Saha* (2), *Chhoti Narain Singh* v. *Musammat Rameshwar Koer* (3), *Hassan Ali* v. *Gauzi Ali Mir* (4).

I entirely agree with what has been laid down by Pratt and Mitra, JJ., in *Chhoti Narain Singh* v. *Musammat Rameshwar Koer* (3). An extract from that judgment is given below:

"A contract made between the parties to a suit in derogation of a decree which may be passed in future cannot form the subject of an inquiry under section 244, Civil Procedure Code, in a proceeding for the execution of the decree. Questions under section 244, clause (*c*), relating to the execution of a decree and arising between the parties to a suit in which the decree was passed or their representatives, must be such as have reference to matters arising subsequent to the passing of the decree and not antecedent to it. An agreement not to execute a decree, if effect is sought to be given to it in execution proceedings, must be a transaction between the parties subsequent to the decree: *Mukund Harshet* v. *Haridas Khemji* (5) and not one

(1) 22 B. 463.
(2) 29 C. 810; 6 C. W. N. 838.
(3) 6 C. W. N. 796.
(4) 31 C. 179.
(5) 17 B. 23.

which would make the decree itself void as being in contravention of the agreement."

There is an additional ground for dismissing this appeal. The agreement now pleaded in bar of execution was arrived at on the 29th April 1907, when the compromise was recorded by the Court under the provisions of section 375, Civil Procedure Code, 1882. It was part and parcel of the same compromise which was recorded that day. I think the words "adjustment of a suit" refer not only to the form in which the decree is to be drawn up but also the manner in which the rights of the parties are to be enforced in the execution proceedings of that suit. In other words, an agreement not to execute the decree is part of the adjustment of the suit within the meaning of section 375. It was the duty of the parties to have set forth the terms of the compromise fully and to have got them recorded. This was a matter required by section 375 to be reduced to the form of a document, namely, the record of a Court. Therefore, under section 91 of the Evidence Act, no extraneous evidence, oral or documentary, regarding the terms of the compromise is admissible in that suit and its execution proceedings. Parties cannot under section 375 ask the Court to draw up a solemn decree which is not meant to be enforced in execution.

The appeal fails and is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL RULES NOS. 58 AND 59 OF 1915.

April 9, 1915.

Present:—Mr. Justice Sharfuddin and Mr. Justice Richardson.

SURENDRA NARAYAN SINGH—DECREE-HOLDER—PETITIONER

versus

IN RULE NO. 58 OF 1915

Musammat LACHMI KOER AND ANOTHER—JUDGMENT-DEBTORS—OPPOSITE PARTY

IN RULE NO. 59 OF 1915

BHAGALU SINGH AND ANOTHER—JUDGMENT-DEBTORS—OPPOSITE PARTY.

Bengal Tenancy Act (VIII of 1885), s. 174—Deposit to be made by judgment-debtor himself—Transferee, whether can make a valid deposit.

A deposit made under section 174 of the Bengal Tenancy Act must be made by the judgment-debtor himself and by no other person. A transferee of the judgment-debtor does not come under the section. [p. 841, col. 1.]

Ranjit Kumar Ghosh v. *Jogendra Nath Roy*, 15 Ind. Cas. 561; 16 C. L. J. 546, followed.

Rules against the decrees of the Court of the Munsif of Katihar.

Dr. *D. N. Mitra* and Babu *Rishendra Nath Sark r*, for the Petitioner.

JUDGMENT.

RULE NO. 58 OF 1915.

This Rule was issued on the opposite party to show cause why the order of the Munsif, dated the 22nd October 1914, should not be set aside on the ground that the opposite party was not the judgment-debtor within the meaning of section 174 of the Bengal Tenancy Act.

It appears that the petitioner obtained a decree against an occupancy *ryot* for arrears of rent and in execution of that decree, the holding was sold on the 8th September 1914 and was purchased by the petitioner. On the 22nd October 1914 a deposit of the decretal amount was made by the wife of the transferee of the tenant in question and on that day in consequence of the deposit thus made, the sale was set aside by the Munsif of Katihar in the following terms: "The judgment-debtor has deposited the entire decretal amount and compensation within time. Let the sale be set aside and the case dismissed after full satisfaction of claim."

The petitioner obtained the present Rule on the ground that section 174 of the Bengal Tenancy Act under which the deposit in question was made, refers only to a deposit by the judgment-debtor himself and hence the transferee of the judgment-debtor does not come under section 174 of the Act. It was contended that the deposit that was made by him was no deposit by the judgement-debtor and that the sale, therefore, should not have been set aside.

In *Ranjit Kumar Ghosh* v. *Jogendra Nath Roy* (1) it was held that the application under

(1) 15 Ind. Cas. 561; 16 C. L. J. 546.

section 174 of the Bengal Tenancy Act can be made by the judgment-debtor alone and by no other person.

We, therefore, make the Rule absolute, set aside the order of the Munsif and confirm the sale.

This order will govern the other Rule No. 59 of 1915.

Rules made absolute.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1271 OF 1911.

April 23, 1915.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Richardson.

Babu RAM SUMNUN PROSAD—

PLAINTIFF—APPELLANT

versus

GENDA LAL RAI AND OTHERS—

DEFENDANTS—RESPONDENTS.

Title, declaration of—Possession, recovery of—Mortgage, if can be questioned against a bona fide *purchaser for value without notice—Estoppel—Limitation Act (IX of 1908), Sch. I, Art.* 137, *scope of.*

Those who have derived title subsequent to a mortgage cannot be permitted to impeach the genuineness of that transaction to the detriment of a *bona fide* purchaser, for value without notice from a purchaser in a Court sale. [p. 842, col. 1.]

Ram Charan Das v. *Joy Ram Majhi*, 16 Ind. Cas. 825; 16 C. L. J. 185 at p. 190; 17 C. W. N. 10; *Akhil Prodhan* v. *Manmatha Nath Kar*, 22 Ind. Cas. 86; 18 C. L. J. 616 and *Gresham Life Assurance Society* v. *Crowther*, (1914) 2 Ch. 219; 83 L. J. Ch. 867, followed.

A *bona fide* transferee for value from an ostensible owner is allowed to protect himself against a claim by the real owner. [p. 842, col. 1.]

Mohamed Mozuffer Hossein v. *Kishore Mohun Roy*, 22 C. 909; 22 I. A. 129, *Varden Seth Sam* v. *Luckpathy Royjee*, 9 M. I. A. 303; Marsh. 461; 1 Suth. P. C. J. 480; 1 Sar. P. C. J. 857; 19 E. R. 756 and *Colonial Bank* v. *Cady*, 60 L. J. Ch. 131; 63 L. T. 27; 39 W. R. 17; 15 A. C. 267, referred to,

Appeal against the decree of the District Judge, Bhagalpur, dated the 16th March 1911, confirming that of the Subordinate Judge, Additional Court, Monghyr, dated the 26th May 1910.

Babu *Joges Chandra De*, for the Appellant.

Dr. *Rash Behari Ghose*, Babus *Gonesh Dutt Singh* and *Baidyanath Narain Singh*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff for declaration of title to land and for recovery of possession thereof. The property in dispute admittedly belonged to a family of Jhas, now represented by the defendants second party. In 1881 the Jhas mortgaged the property to Manoji Narain Singh, the predecessor-in-interest of the first party defendant. The mortgagee sued in due course, obtained a decree, and at the sale which followed thereon purchased the mortgaged property on the 27th July 1891. The sale was confirmed on the 26th September 1891. There was some delay in the issue of the certificate of sale, which was not granted till the 26th April 1892. Symbolical possession was thereafter delivered to the purchaser on the 4th February 1894. Meanwhile, on the 28th March 1892 the purchaser included the property in a mortgage executed by him in favour of one Barhamdeo Prosad, now represented by the plaintiff. A decree was obtained on this mortgage on the 29th April 1897 and at the execution sale which followed, the decree-holder became the purchaser on the 10th May 1904. The sale was confirmed on the 19th December 1904 and symbolical possession was thereafter delivered to the purchaser on the 18th January 1905. The plaintiff was, however, unable to obtain actual possession, and consequently instituted this suit on the 27th August 1909. His claim was resisted by some of the defendants, who claimed to have acquired the right, title and interest of the Jhas by various transactions subsequent to the mortgage of 1881. Their defence was substantially two-fold namely, *first*, that the mortgage of 1881 which is the root of the title of the plaintiff was a fictitious transaction and, *secondly*, that the suit was barred by limitation. The Courts below have concurrently found in favour of the defendants upon each of these points and have

dismissed the suit. On the present appeal the decision of the District Judge on both the points has been questioned as contrary to law.

As regards the first ground of defence, it is plain that the defendants, who have derived title from the Jhas subsequent to the mortgage of 1881, cannot be permitted to impeach the genuineness of that transaction to the detriment of a *bona fide* purchaser for value without notice. It may be conceded that as between the mortgagors and the mortgagee of 1881, the former could show against the latter, so long as the rights of no third party intervened, the fictitious nature of the transaction; but they cannot be allowed to do so when an innocent stranger has in good faith acquired a title for value on the faith of the reality of the mortgage. This position is amply supported by the decisions in *Ram Charan Das* v. *Joy Ram Majhi* (1), *Radha Madhab Paikara* v. *Kalpataru Roy* (2) and *Akhil Prodhan* v. *Manmatha Nath Kar* (3). To the same effect is the decision in *Gresham Life Assurance Society* v. *Crowther* (4). The situation here is, in fact, stronger than even a case where the true owner has placed an ostensible transferee in a position to mislead a *bona fide* purchaser for value without notice of the secret title; the mortgage, the suit thereon, the execution sale, and the delivery of possession through Court, constitute an elaborate network of devices sufficient to induce the belief that the title of the Jhas has vested in Monoji Narain Singh. Consequently the rule applies by which a *bona fide* transferee for value from an ostensible owner is allowed to protect himself against a claim by the real owner. *Ram Coomar* v. *John and Maria Mcqueen* (5), *Mahomed Mozuffer Hossein* v. *Kishore Mohun Roy* (6), *Sarat Chunder Dey* v. *Gopal Chunder* (7); *Varden Seth Sam* v. *Luckpathy Royjee* (8); *Colonial Bank* v. *Cady* (9) and *Cairncross* v. *Lorimer* (10). We must, consequently, hold that the title of the plaintiff is not impeachable at the instance of the defendants as the representatives of the original proprietors.

As regards the second ground of defence, it is plain that Article 137 of the first Schedule of the Indian Limitation Act, 1908, governs the case. That Article provides that a suit by a purchaser at a sale in execution of a decree for possession of immoveable property, when the judgment-debtor was out of possession at the date of the sale, must be instituted within twelve years from the date when the judgment-debtor is first entitled to possession. The Courts below have concurrently found that notwithstanding the delivery of symbolical possession to Monoji Narain Singh on the 4th February 1894, the Jhas continued in possession, and they were in possession even when symbolical possession was delivered to the predecessor of the plaintiff on the 18th January 1905. This latter delivery of possession was operative as against the then judgment-debtor, namely, Monoji Narain Singh, but was wholly ineffectual to affect the title or interrupt the actual possession of the Jhas. *Juggobundhu Mukerjee* v. *Ram Chunder Bysack* (11) and *Joggobundhu Mitter* v. *Purnanund Gossami* (12). The plaintiff was subsequently bound to sue within twelve years from the date when his judgment-debtor, Monoji Narain Singh, was first entitled to possession, *i.e.*, within twelve years from the 4th February 1894 when symbolical possession was delivered to Monoji Narain Singh as against the Jhas. The plea of limitation would have been of no avail if the suit had been instituted on or before the 4th February 1906. The inference follows that the suit, instituted as it was on the 27th August 1909, is barred by limitation under Article 137. In this view it is needless to consider a question of considerable nicety which was argued at the Bar and which has led to considerable divergence of judicial opinions, namely, whether possession adverse to the mortgagor also operates to the prejudice of the

(1) 16 Ind. Cas. 825; 17 C. W. N. 10; 16 C. L. J. 185 at p. 190.
(2) 16 Ind. Cas. 811; 17 C. L. J. 209.
(3) 22 Ind. Cas. 86; 18 C. L. J. 616.
(4) (1914) 2 Ch. 219; 83 L. J. Ch. 867.
(5) 11 B. L. R. 46; 18 W. R. 166; I. A. Supp. Vol. 40.
(6) 22 C. 909; 22 I. A. 129.
(7) 20 C. 296; 19 I. A. 203.
(8) 9 M. I. A. 303; Marsh. 461; 1 Suth. P. C. J. 480; 1 Sar. P. C. J. 857; 19 E. R. 756.
(9) 15 A. C. 267; 60 L. J. Ch. 131; 63 L. T. 27; 39 W. R. 17.
(10) 3 Mcq. H. L. 827; 7 Jur. (N. S.) 149; 3 L. T. 130; 123 R. R. 906.
(11) 5 C. 584; 5 C. L. R. 548; 3 Shome L. R. 68.
(12) 16 C. 530.

mortgagee, and, if so under what circumstances and subject to what qualifications.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 533 OF 1913.

July 27, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Chapman.

ABDUL MAJID AND OTHERS—PRINCIPAL DEFENDANTS—APPELLANTS

versus

KSHERODE CHANDRA PAL AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Mortgage-bond, suit on, for recovery—Hard and unconscionable bargain—Contract Act (IX of 1872), s. 16—Security, if ample, effect of—Undue influence, presumption of—Rate of interest, excessive, effect of—Personal loans—Compound interest, stipulation of, when a penalty—English Money Lenders' Act compared—English Judge's dicta to be followed.

The Courts have ample powers under the amended Contract Act to go behind hard and unconscionable bargains on the ground that where there is ample security, the exaction of excessive and usurious interest in itself raises a presumption of undue influence which it requires very little evidence to substantiate. [p. 844, col. 1.]

The attempt to conceal the real rate of interest by describing it as one pice in the rupee per mensem or, as in the present case, Rs. 5 per mensem is evidence of an intention to get the better of the debtor, and the law seems to be that there must be a footing of complete equality between debtor and creditor and they must be, so to speak, at arm's length to make a bargain, which is in itself harsh and unconscionable enforceable at law. [p. 844, col. 2.]

Carringtons Limited v. *Smith*, (1906) 1 K. B. 79; 75 L. J. K. B. 49; 54 W. R. 424; 93 L. T. 779; 22 T. L. R. 109 and *In re a Debtor*, (1903) 1 K. B. 795; 72 L. J. K. B. 382; 51 W. R. 370; 88 L. T. 401; 19 T. L. R. 288; 10 Manson 130, referred to.

Under the amended section 16 of the Contract Act the question of a harsh and unconscionable bargain can only be considered in reference to undue influence. [p. 844, col. 2.]

Where there is ample security an excessive rate of interest has been held to be anything over 10 per cent. Where there is no security, no rate of interest can be considered excessive. There can be no standard rate on personal loans. [p. 844, col. 2.]

Where the parties are reasonably on terms of equality, a Judge cannot do better than adopt what they themselves have agreed on. [p. 845, col. 1.]

A presumption of undue influence could arise from the fact that a security of over Rs. 3,000 with mortgage already on it for a much smaller amount was given for a loan of Rs. 80. [p. 845, col. 1.]

Where a contract is for a temporary accommodation, the stipulation that interest is to run at Rs. 5 month, is one which necessitates the payment of interest not at 60 per cent. per annum but at Rs. 5 in each month, and a stipulation that in default of 12 months' instalments of interest compound interest would begin to run at 60 per cent. is in the nature of a penalty. [p. 845, col. 1.]

It is the duty of the Courts in India to enforce the letter of the law against obviously harsh and unconscionable bargains of this nature. [p. 845 col. 1.]

Avathani Muthukrishnier v. *Sankaralingam Pillai*, 18 Ind. Cas. 417; 36 M. 229; 13 M. L. T. 20; 24 M. L. J. 135 and *Samuel* v. *Newbold*, (1906) A. C. 461; 75 L. J. Ch. 705, 95 L. T. 209; 22 T. L. R. 703, followed.

Excess of interest or charges may itself be evidence of a harsh and unconscionable bargain and particularly, if it is unexplained. If no justification be established the presumption hardens into a certainty. [p. 845, col. 2.]

The amendments in the Indian Law of Contract go further in the direction of relief against harsh and unconscionable bargains than those of the English Money Lenders' Act and, therefore, the dicta of English Judges under that Act might be accepted. [p. 846, col. 1.]

Where it is found that there is technically a penalty in the bond, Judges should go behind the contract, which is one and indivisible, as to interest and refuse compound interest altogether. [p. 846, cols. 1 & 2.]

Kesavulu Naidu v. *Arithulai Ammal*, 22 Ind. Cas. 769; 36 M. 533, approved and followed.

Appeal against the decree of the District Judge, Noakhali, dated the 19th of September 1912, modifying that of the Subordinate Judge of that District, dated the 30th of November 1911.

Babu *Romesh Chandra Sen*, for the Appellants.

Babu *Gunoda Charan Sen*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff to recover Rs. 1,300 being principal Rs. 80, and interest, Rs. 1,220, on a mortgage bond executed by three defendants on 1st *Jaistha* 1312.

The transaction was an unusual one and the facts found require to be carefully stated as well as the circumstances which are admitted in connection with the giving of the mortgage-bond and recited in the bond itself.

It appears that Abdul Majid, defendant No. 1, mortgaged 6 annas of a *raiyati jote* in which his brother, defendant No. 2, was also interested while defendant No. 3 a relative, mortgaged three 6-anna shares of *jotes* and an 8-anna share of a *howla* belonging exclusively to him.

The three defendants had bid successfully at a sale of the land of one Nagarbashi Kundu and had deposited the earnest money.

They were in immediate need of Rs. 80 to complete the purchase and applied to the former creditor of defendant No. 3, one Harish Chandra Pal who had a mortgage on properties Nos. 1 to 4, on which he has according to the plaint recently got a decree for a heavy claim, and by him they were introduced to the plaintiff, another moneylender. The Rs. 80 was obviously only required as a temporary accommodation and the security given was worth over Rs. 3,000, for the property No. 5 was sold under Harish Chandra Pal's decree for Rs. 650 and there are three similar *jotes* and a larger *taluki* interest also mortgaged. Yet interest at 60 per cent. with compound interest was agreed to. The defendants' story is that the land they had purchased was released from sale by deposit of the decretal money by the original owner and they, therefore, tendered the principal Rs. 80 and Rs. 8 interest to the plaintiff who took the Rs. 8 and pursuaded defendant No. 1 to let the principal sum stand over on promising to forego compound interest and to reduce the simple interest by half. This story has been disbelieved by the lower Courts as far as the payment of Rs. 8 and the oral agreement is concerned, but no finding has been come to as to the probability of the defendants having desired to pay off the debt when they had the money.

The lower Court has also held that no fraud was practised on the defendants because defendant No. 1 is a very clever man and able to take care of himself and entered into the bond with his eyes open. But here the lower Court has fallen into the error of not considering the position of defendant No. 3, who had a far larger interest in the property mortgaged than anybody else and who is an ordinary cultivator.

Every presumption must be made in his favour and the lower Court appears to have erred in not applying the doctrines of undue influence and penalty very strictly to his case. The trend of modern decisions is to hold that the Courts have ample powers under the amended Contract Act to go behind harsh and unconscionable bargains on the ground that where there is ample security, the exaction of excessive and usurious interest in itself raises a presumption of undue influence which it requires very little evidence to substantiate. Further, it has been held that the attempt to conceal the real rate of interest by describing it as one pice in the rupee per mensem or, as in the present case, Rs. 5 per mensem is evidence of an intention to get it better of the debtor and the law seems to be that there must be a footing of complete equality between debtor and creditor and they must be, so to speak, at arm's length to make a bargain which is in itself harsh and unconscionable, enforceable at law. We may refer to the case of *Carringtons Limited* v. *Smith* (1) and the discussion at page 87 of the meaning of the terms 'harsh' and 'unconscionable'. It is pointed out that in *In re a Debtor* (2) the Master of the Rolls and Cozens Hardy, L. J., each say that under the section of the Money Lenders Act which deals with harsh and unconscionable bargains the interest charged might be so excessive as of itself to render the bargain harsh and unconscionable. This does not mean that if only it is shown that a high rate of interest has been charged by a moneylender a Judge has complete power at his discretion to make a new contract for the parties. But it may mean that a very high rate of interest might raise a presumption that that rate had been extorted by conduct harsh and unconscionable, or it may mean that the same circumstances which showed that the rate was excessive might and often would show that the transaction was harsh and unconscionable. At the end of the judgment of Cozens Hardy, L. J., he expressly says that the Court must have regard to all the circumstances of the case and this, says Channell, J., is the proposition upon which the whole matter turns.

Now under the amended section 16 of the Contract Act, this question of a harsh and unconscionable bargain can only be considered in reference to undue influence. Where there is ample security an excessive rate of interest has been held to be anything over 10 per cent., where there is no security no rate of interest can be considered excessive. There can be no standard rate on personal

(1) (1906) 1 K. B. 79; 75 L. J. K. B. 49; 54 W. R. 424; 93 L. T. 779; 22 T. L. R. 109.

(2) (1903) 1 K. B. 795; 72 L. J. K. B. 382; 51 W. R. 370; 88 L. T. 401; 19 T. L. R. 288; 10 Manson 130.

loan; and where the parties are reasonably on terms of equality, a Judge cannot do better than adopt what they themselves have agreed on, though of course when that is not the case he has to adjudge what is reasonable as best he can under all the circumstances.

Applying these principles to section 16 and to the case before us, we think that a presumption of undue influence could arise from the fact that a security of over Rs. 3,000 with mortgage already on it for a much smaller amount was given for a loan of Rs. 80 and although on the findings of fact of the lower Courts such a presumption would in no way help defendant No. 1 nor possibly his brother, defendant No. 2, who is his co-sharer in property No. 5, it certainly applies in full force to defendant No. 3 against whom there is no finding that he knew what he was doing and who gave the greater part of the security without any idea that 60 per cent. compound interest would be running against him for six years. We must take it from the terms of the bond that the intention of the parties was to pay Rs. 5 a month interest for a few months until the small principal of Rs. 80 was paid off, and we cannot believe that no attempt was made by defendant No. 3 to pay this money and there is no finding whatever against him in either of the judgments.

Further, the contract being for a temporary accommodation the stipulation that interest was to run at Rs. 5 a month, was one which necessitated the payment of interest not at 60 per cent. per annum, but at Rs. 5 in each month and a stipulation that in default of 12 months' instalments of interest compound interest would begin to run at 60 per cent, is in the nature of a penalty.

However technical this may be, we think it is the duty of the Courts in India to enforce the letter of the law against obviously harsh and unconscionable bargains of this nature. The contract failing, therefore, as regards defendant No. 3 and being a joint mortgage, it equally fails against the other defendants.

Our view upon both these points has recently been propounded by the Madras High Court. In the case of *Avathani Muthu Krishnier* v. *Sankaralingam Pillai* (3) the question of penalty was dealt with and the remarks of Sadasiva Aiyar, J., in making the reference to the Full Bench have our entire concurrence. If we may respectfully say so, it is a masterly exposition of the intentions of the Legislature in India and a complete answer to the somewhat timid reluctance of the Courts in the earlier decisions to take a more extended view of their powers under section 74 of the Contract Act. We entirely agree that "the exploitation of the necessitous, the careless and inexperienced is a trade to be extirpated in the interest of the whole community as contrary to individual morality as well as to public policy."

At the risk of repetition we cite the words of Lord Loreburn, L. C., in *Samuel* v. *Newbold* (4): "In my opinion this contention cannot be maintained, nor ought a Court of Law to be alert in placing a restricted construction upon the language of a remedial Act. The section means exactly what it says, namely, that if there is evidence which satisfies the Court that the transaction is harsh and unconscionable, using those words in a plain and not in any way technical sense, the Court may re-open it, provided, of course, that the case meets the other conditions required. There are many illustrations and as in the case of fraud, it is neither practicable nor expedient to attempt any exhaustive definition. What the Court has to do in such circumstances is, if satisfied that the interest or charges are excessive, to see whether in truth and fact and according to its sense of justice the transaction was harsh and unconscionable. We are asked to say that an excessive rate of interest could not be of itself evidence that it was so. I do not accept that view. Excess of interest or charges may itself be such evidence and particularly, if it is unexplained. If no justification be established the presumption hardens into a certainty".

Now in the case before us no explanation whatever is offered of the harsh and unconscionable interest charged in a case where the fullest security covering the loan

(3) 18 Ind. Cas 417; 13 M. L. T. 20; 24 M. L. J. 135; 36 M. 229.

(4) (1906) A. C. 461; 75 L. J. Ch. 705; 95 L. T. 209; 22 T. L. R. 703.

forty times over was given and no explanation is given why the money-lender whom the defendants apparently trusted, handed them over to another shark who was able to ruin them entirely. It was the opinion of the Full Bench that the amendments in the Indian Law of Contract went further in the direction of relief against harsh and unconscionable bargains than those of the English Money Lenders' Act and that, therefore, the dicta of English Judges under that Act might be accepted and Sadasiva Aiyar, J., summed up the judgment of the Full Bench by saying, "I do not intend to go further than I have done in my reference order into all the English and Indian cases in which learned Judges have, by the use of refined, subtle language and the enunciation of variously worded tests and principles, tried to persuade themselves that they were acting on any other principles in giving relief against *prima facie* unconscionable bargains, except the one intelligible principle that the provision relieved against was unreasonable in the view of ordinary men of the world possessing the usual quantum of common sense."

Having found that there is technically a penalty in the bond before us, we propose to go behind the contract as to interest and to refuse compound interest altogether.

But we would go further in reference to section 16 which was dealt with in the case of *Kesavulu Naidu* v *Arithulai Ammal* (5).

The learned Chief Justice points out that the Judge in the Court of Appeal below found against fraud as in this case and does not find that there was undue influence, but he assumes for the purposes of the appeal before him, as we must assume in this appeal, that it is open to the High Court to deal with the case as if there had been a plea of undue influence raised. In the end the learned Judges held that the presumption arising from the unconscionable nature of the bargain for 60 per cent. interest had been rebutted and gave the plaintiff a decree, but the principle that such a presumption would arise was upheld and on the facts found in this case, we cannot say that it has been rebutted.

The parties were not at arm's length. The defendants needed the money on the spot, their own money-lender took advantage of them and made them over to a confederate who, by representing that the loan was a temporary one at 5 per cent. per mensem was enabled to pile up 60 per cent. compound interest by not asking for payment. Had it been open to us to go into the facts we should probably have been able to find that only Rs. 88 was due and had been tendered, but we are precluded from doing this in second appeal. We can only find that having regard to the very large security given, to the ignorance and want of knowledge of defendant No. 3 and to the conduct of the parties even if defendant No. 1 has no defence, it must certainly be held that defendant No. 3 did not enter into a valid contract to pay 60 per cent. compound interest. The contract being one and indivisible, we must go behind it as a whole and give reasonable interest, which we fix at 30 per cent. simple interest as that was what defendants themselves were prepared to admit. This will work out at Rs. 80, principal, and interest for seven years 6 days, Rs. 168-6-5. There will, therefore, be a mortgage-decree for Rs. 248-6-5 with costs to the plaintiff in proportion to his success.

The defendants Nos. 1 and 2 will get no costs on the amount disallowed. The defendant No. 3 will get costs on the sum disallowed in proportion to the amount of his security.

Decree medified.

(5) 22 Ind. Cas. 769; 36 M. 533.

MADRAS HIGH COURT.
FULL BENCH.
LETTERS PATENT APPEAL No. 152 OF 1913.
March 26, 1915.
Present:—Sir John Wallis, Kt., Chief Justice, Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.
R. SRINIVASA IYENGAR—PETITIONER—APPELLANT
versus
S. K. M. R. M. RAMASWAMI CHETTIAR BY AGENT SOMASUNDARAM CHETTIAR RESPONDENT.

Letters Patent Act, s. 15—*High Courts Act* (24 & 25 *Vic., C.* 104), *s.* 13—*High Court exercising juris-*

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diction under s. 25 of Provincial Small Cause Courts Act (IX of 1887)—"Appellate jurisdiction"—Judgment—Appeal against such order, if maintainable—Discretionary power given to Subordinate Courts—Appellate Court, power of, to interfere.

A single Judge of the High Court, when disposing of an application to exercise the High Court's revisional jurisdiction over a subordinate Court under section 25 of the Provincial Small Cause Courts Act (IX of 1887), exercises "appellate jurisdiction" within the meaning of section 13 of the High Courts Act and his order is a judgment even when the Judge merely declines to interfere in revision, and it is immaterial whether before such refusal the records were called for or notice issued to the other side, and an appeal lies from such an order under section 15 of the Letters Patent. [p. 847, col. 2.]

Chappan v. *Moidin Kutti*, 22 M. 68; 8 M. L. J. 231, followed.

Tuljaram Row v. *Alagappa Chettiar*, 8 Ind. Cas. 340; 35 M. 1; (1910) M. W. N. 696; 8 M. L. T. 453; 21 M. L. J. 1, followed.

Venkatarama Ayyar v. *Madalai Ammal*, 23 M. 169; *Puthukudi Abdu* v. *Puvakka Kunhi Kutti*, 27 M. 340, overruled.

In matters of discretion the Court will not ordinarily interfere in appeal, though it has jurisdiction to do so. [p. 847, col. 2; p. 848, col. 1.]

Golding v. *Wharton Salt Works Co.*, 1 Q. B. D. 374; 34 L. T. 474; 24 W. R. 423, followed.

Appeal, under clause 15 of the Letters Patent, against the judgment of the Hon'ble Mr. Justice Miller, in Civil Revision Petition No. 110 of 1913, preferred from that of the Court of the Subordinate Judge of Kumbakonam, in Small Cause Suit No. 1922 of 1912.

Mr. *S. T. Srinivasa Gopalachariar*, for the Appellant.

Mr. *G. S. Ramachandra Aiyar*, for the Respondent.

This Letters Patent Appeal coming on for hearing on the 3rd March 1915, the Court (the Hon'ble Mr. Justice Seshagiri Aiyar and the Hon'ble Mr. Justice Napier), made the following

ORDER OF REFERENCE TO THE FULL BENCH.

In this case Mr. Justice Miller sitting in the Admission Court rejected the petition filed by the petitioner to revise the order of the Subordinate Judge exercising Small Cause Court jurisdiction. The question for consideration is, whether the said order of the learned Judge is a judgment within the meaning of section 15 of the Letters Patent. On the principle of *stare decisis*, I am inclined to the view that it is a judgment: but as my learned brother takes the contrary view, it is desirable that the question should be referred for the decision of a Full Bench. The point on which the opinion is requested is "whether the order of a single Judge of the High Court rejecting the petition to send for the records and to revise the judgment of the lower Court exercising Small Cause Court jurisdiction, is a judgment within the meaning of section 15 of the Letters Patent."

This Letters Patent Appeal coming on the 22nd March 1915 on the question referred to the Full Bench for decision, upon perusing the order of reference and upon hearing the arguments of Mr. *S. T. Srinivasa Gopalachariar*, Counsel, for the Appellant, and of Mr. *G. S. Ramachandra Aiyar*, Vakil, for the Respondent, and the case having stood over for consideration till this day, the Court expressed the following

OPINION.—We are bound by the decision of the majority of the Full Bench of five Judges in *Chappan* v. *Moidin Kutti* (1) to hold that in disposing of an application to exercise the High Court's revisional jurisdiction over a Court subordinate to it, a single Judge acts in the exercise of the appellate jurisdiction of the Court within the meaning of section 13 of the High Courts Act, and consequently that, if his order of disposal amounts to a judgment, an appeal lies from it under clause 15 of the Letters Patent.

We also think that we are bound by the decision of the Full Bench in *Tuljaram Row* v. *Alagappa Chettiar* (2) to hold that such order is a judgment even when the Judge merely declines to interfere in revision, and that it is immaterial whether before such refusal the records were called for or notice issued to the other side. The decisions in *Venkatarama Ayyar* v. *Madalai Ammal* (3) and *Puthukudi Abdu* v. *Puvakka Kunhi Kutti* (4) must, therefore, in our opinion, be treated as overruled.

At the same time we think it right to say that in matters of discretion such as this, the Court will not ordinarily interfere

(1) 22 M. 68; 8 M. L. J. 231.
(2) 8 Ind. Cas. 340; 35 M. 1; (1910) M. W. N. 696; 8 M. L. T. 453; 21 M. L. J. 1.
(3) 23 M. 169.
(4) 27 M. 340.

on appeal though it has jurisdiction to do so. This is the practice of the Court of Appeal in England [See Annual Practice, 1915, page 1911, citing *Golding* v. *Wharton Salt Works Co.* (5)] and should, we think, be followed here.

This Letters Patent Appeal coming on for hearing on the 29th April 1915, after the return of the opinion of the Full Bench referred by this Court, the Court (Seshagiri Aiyar and Napier, JJ.) delivered the following.

JUDGMENT.—We see no sufficient reason for interfering with the discretion of the learned Judge in refusing to send for the records.

The appeal is dismissed. There will be no costs in this Court.

Appeal dismissed.

(5) 1 Q. B. D. 374; 34 L. T. 474; 24 W. R. 423.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 861 OF 1913.

February 24, 1915.

Present:—Sir Asutosh Mookerjee, KT., and Mr. Justice Richardson.

SURES KANTA BANERJEE CHOWDHURY—PLAINTIFF—APPELLANT

versus

NAWAB ALI SIKDAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Principal and agent—Suit for accounts—Agreement—Immovable property, hypothecation of—Transfer to wife—Re-transfer—Agent manager of properties—No demand—Suit within three years—Limitation Act (IX of 1908), Sch I, Art. 89—Principal, right of.

Where an agency was created on the 24th May 1896, for the management of a certain immoveable property, and in 1897 the principal transferred the property to his wife and two years later the wife re-transferred it to her husband, but the agent, continued to manage it as if no transfer had been effected and the agency was finally terminated in 1910, and the present suit was commenced on the 22nd March 1911 for accounts in respect of the years 1306 to 1317:

Held, that Article 89, Schedule I, of the Limitation Act, was applicable to the suit and that in the absence of any demand and refusal during the continuance of the agency as the suit was instituted within three years from the date of the termination of the agency, the plaintiff was entitled to the accounts claimed. [p. 849, col. 1.]

Shib Chandra Roy Chowdury v. *Chandra Narain Mukerjee*, 1 C. L. J. 232; 32 C. 719 and *Hafezuddin Mandal* v. *Jadu Nath Saha*, 35 C. 298; 7 C. L. J. 279; 12 C. W. N. 820, referred to

Jogesh Chandra v. *Benode Lal Roy*, 5 Ind. Cas. 59; 14 C. W. N. 122, dissented from.

Appeal against the decree of the Subordinate Judge, Backergunj, dated the 4th November 1912, modifying that of the Munsif of Barisal, dated the 10th February 1912.

Babus *Joges Chandra Roy* and *Prokas Chandra Mozumdar*, for the Appellant.

Moulvi *A. K. Fuzlul Haq* and *Babu Sarat Chandra Dutt*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff in a suit by a principal against his agent for accounts. The agency was created on the 24th May 1896, for management of immoveable property. In 1897 the principal transferred the property to his wife and two years later the wife re-transferred the property to her husband. The agent, however, continued to manage the properties as if no transfer had been effected. The agency was finally terminated in 1910, and the present suit was commenced on the 22nd March 1911 for accounts in respect of the years 1306 to 1317. The Court of first instance held that the terms of the agreement were enforceable and made a decree accordingly. By the agreement, which was embodied in a registered document, immoveable property had been hypothecated and the Court of first instance held that the suit was in essence a suit to enforce a charge against immoveable property within the meaning of Article 132 of the first Schedule to the Indian Limitation Act. On appeal, the Subordinate Judge has held that effect of the transfer of the property, for management whereof the agent was appointed, was to terminate the agency, and, that when the property was re-transfered by the wife to the husband, a new agency was created independently of the terms of the original contract: *Behari Lal* v. *Hara Kumar* (1). In this view, he has held that Article 132 was not applicable; he has thus treated the suit as one for accounts by a principal against his agent. At the same time, he has held not quite consistently with his view as to the effect of the transfer, that as under the original agreement accounts were to be rendered at the end of each year, the plaintiff was entitled to accounts only in respect of the three

(1) 29 Ind. Cas. 748; 21 C. L. J. 458.

years antecedent to the suit. On the present appeal, it has been argued that the judgment is inconsistent and that if the transfer by the husband in favour of the wife was a real transaction which terminated the agency and if a new agency was created in 1899 on the re-transfer by the wife to the husband, no reference can legitimately be made to the terms of the original agreement. The argument in substance is that Article 89 is applicable to the suit and that as it has been instituted within three years from the date of the termination of the agency, the plaintiff is entitled to the accounts claimed. In our opinion this contention is well founded and must prevail.

Article 89 provides that a suit by a principal against his agent for moveable property received by the latter and not accounted for must be instituted within three years from the date when the agency terminates or from the date when there has been a refusal to render accounts during the continuance of the agency. As in this case, there was no demand and refusal during the continuance of the agency, and as the suit has been instituted within three years of the date when the agency terminated, the plaintiff is clearly entitled to the accounts claimed. On behalf of the respondent it has been contended, however, that the accounts should be limited to the three years antecedent to the suit. For this proposition no authority has been cited and the terms of Article 89 do not support the contention; on the other hand, the view we take is supported by the decisions of this Court in the cases of *Shib Chandra Roy Chowdhury* v. *Chandra Narain Mukerjee* (2) and *Hafezuddin Mandal* v. *Jadu Nath Saha* (3). Reference has been made to the fact that a different view was taken in *Jogesh Chandra* v. *Benode Lal Roy* (4), where the decision in *Mati Lal Bose* v. *Amin Chand Chattopadhay* (5) was accepted as good law. As pointed out, however, in the case of *Troilukhyanath Mandal* v. *Abanish Chandra Roy*(6), the attention of the learned Judges who decided the case of *Jogesh Chandra* v. *Benode Lal Roy* (4) was not drawn to the earlier decision in *Hafizuddin Mandal* v. *Jadu Nath Saha* (3), and we are not prepared to accept it as good law.

The result is that this appeal is allowed and the decree of the Court below discharged. A preliminary decree is made in favour of the plaintiff for the accounts claimed in the suit. This decree is made on the assumption that a new agency was created in 1899 irrespective of the agreement of 1896. The case will now be remitted to the Court of first instance in order that the accounts may be taken. The appellant is entitled to his costs both in this Court and in the Court of the Subordinate Judge.

Appeal allowed; *Case remanded.*

(2) 1 C. L. J. 232; 32 C. 719.
(3) 7 C. L. J. 279; 35 C. 298; 12 C. W. N. 820.
(4) 5 Ind. Cas. 59; 14 C. W. N. 122.
(5) 1 C. L. J. 211.
(6) 24 Ind. Cas. 18; 21 C. L. J. 459.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1345 OF 1911.
October 21, 1914.
Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

MAHOMED GHOUSE SIDDIKH—PLAINTIFF—APPELLANT
versus
Sheik MOIDEEN SIDDIKH *alias* PAPA AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammdan Law – Waqf *property*—Mutawalli, *right of, to partition—Arrangement between* Mutawallis *as to enjoyment of* inam *lands—Right to question arrangement—Proper course—No* Mutawalli—*Court, jurisdiction of, how exercised—Suit for possession, maintainability of—Civil Procedure Code* (*Act V of* 1908), *s.* 92, *applicability of.*

There is no power in the *mutawalli* of a mosque to effect a partition of the land belonging to a mosque and where he purports to do this, his act is illegal. [p. 850, col. 2.]

Kazi Hassan v. *Sagun Balkrishna*, 24 B. 170; 1 Bom. L. R. 649, followed.

Where there is an alienation of the *waqf* property anybody interested in its due administration may question it, though he is not the *mutawalli* and not entitled to be put into possession of the property. [p. 851, col. 1.]

The texts of Muhammadan Law ordinarily contemplate only one *mutawalli*, but when two or more persons are appointed with the intention that they should jointly administer a single *waqf*—and there is nothing to prevent such an appointment—their position would be similar to that of any other body of co-trustees. A "partition" between them would not affect their legal position or joint responsibility. [p. 853, col. 1.]

Robinson v. *Harkin*, (1896) 2 Ch. 415; 65 L. J. Ch. 773; 74 L. T. 777; 44 W. R. 702, *Lewis* v. *Nobbs*, 8 Ch. D. 591; 47 L. J. Ch. 662; 26 W. R. 631, followed.

Where there is a *waqf* and no person is lawfully administering it, the Court can designate a person

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who, in accordance with the terms of the dedication, is entitled to act as *mutawalli* or, if there is no *waqfnamah*, it can appoint somebody as *mutawalli* and for the proper administration of the *waqf* can remove a *mutawalli*. [p. 853, col. 1.]

Phatmabi v. *Haji Abdulla*, 21 Ind. Cas. 964; 26 M. L. J. 115; 14 M. L. T. 568; (1914) M. W. N. 75; *Chintaman* v. *Dhondo*, 15 B. 612; *Damodar* v. *Bhat Bhogilal*, 22 B. 493; *Wrightson, In re*; *Wrightson* v. *Cooke*, (1908) 1 Ch. 789; 77 L. J. Ch. 422; 98 L. T. 799, followed.

Such jurisdiction can be exercised only by "directions necessary for the administration" of the trust. [p. 853, col. 2.]

Neti Rama Jogiah v. *Venkatacharlu*, 26 M. 450, followed.

A person without instituting a suit under section 92 of the Civil Procedure Code cannot seek to oust from possession, persons who claim to hold as trustees. [p. 853, col. 2.]

Second appeal against the decree of the District Court of Chingleput, in Appeal Suit No. 269 of 1909, preferred against that of the Court of the District Munsif of Conjeevaram, in Original Suit No. 664 of 1907.

Messrs. *T. R. Ramachandra Aiyar* and *T. R. Krishnaswami Aiyar*, for the Appellant.

Mr. *V. Ramadoss*, for the Respondents.

This second appeal coming on for hearing on the 21st April 1913 and the 3rd December 1913, and having stood over for consideration till 17th December 1913, the Court (Sir Arnold White, Chief Justice, and Mr. Justice Tyabji) delivered the following

JUDGMENT.

TYABJI, J.—This appeal arises out of a suit in which the plaintiff claimed to be *mutawalli* of the lands which admittedly formed part of *waqf* lands prior to Exhibit I, dated 27th May 1867, and which were then admittedly attached to a mosque. The lands referred to in the plaint formed a portion of those lands and are now in the possession of defendants Nos. 4 and 5. The issues raised in the suit, so far as at present material, are as follows:—

(1) "Whether the plaintiff is the present *mutawalli* of the plaint-mentioned *Masjid* and as such entitled to the possession of the suit lands;

(2) whether the defendants Nos. 4 and 5 are entitled to hold and enjoy the lands as managers of the plaint mentioned *Masjid*;

(3) is the suit barred by limitation?"

The District Musif found—

(1) that the plaintiff had failed to prove that he was solely entitled to the *mutawalli-ship* of the *Masjid*;

(2) that defendants Nos. 4 and 5 had acquired a title as against the plaintiff to hold the lands as trustees of the *Masjid*; and

(3) that the suit was barred by limitation.

The District Judge does not appear to have recorded any finding on the issues, but he refers to the fact that the District Munsif found that the plaintiff's suit was barred by limitation and says: "Were it necessary to give a finding on this point I should be inclined to hold..... .....that the plaintiff's suit would be barred by Article 144 of the II Schedule of the Limitation Act." Then he goes on to say: "The father of defendants Nos. 4 and 5 came into possession of the suit property under a family agreement entered into by the members of the family of the individual who was *mutawalli* at the time of the *inam* settlement;" and he refers to *Ramanathan Chetti* v. *Murugappa Chetti* (1). In concluding his judgment he says: "I am unable to see how the arrangement made under Exhibit I is prejudicial to the *Masjid* and I concur in the District Munsif's finding that the plaintiff cannot recover the suit land from defendants Nos. 4 and 5, unless he shows that the agreement entered into under Exhibit I has not been properly carried out." The only finding, therefore, that can be spelt out of the District Judge's judgment is that in his opinion the agreement under Exhibit I is a family arrangement and that it is legal and effective. I can only say that the District Judge is, in my opinion, entirely mistaken in law. There is no power in the *mutawalli* of a mosque to effect a partition of the lands belonging to a *waqf*, and, assuming that the District Judge states correctly the effect of the decision in *Ramanathan Chetti* v. *Murugappa Chetti* (1), I am unable to see how the rules applicable to arrangements made by co-trustees for the proper management of their trust amongst themselves can affect the question whether a *mutawalli* can divide up the trust properties themselves and apportion them between more persons than one as if they had been the private property of the *mutawalli*. Where a *mutawalli* purports to do this, in my opinion, there can be no doubt that

(1) 27 M. 192; 13 M. L. J. 341.

the act is illegal. See *Kazi Hassan* v. *Sagun Balkrishna* (2).

The District Judge has not recorded any finding on the question, whether by the operation of the Limitation Act the person who will rightful'y represent the trust can any more claim the properties in the possession of the 4th and 5th defendants on behalf of the trust. Nor has he recorded any finding on the question whether the plaintiff is the person rightfully entitled to represent the trust. The case must, in my opinion, go back for findings on these issues and on all the other issues framed in the suit.

I wish to point out that the questions involved in the first and second issues are entirely distinct. The real question involved in the 1st issue is whether, assuming that the lands which are the subject-matter of the suit are still part of the *waqf* lands, the plaintiff is entitled to represent the *waqf* and as such to be in possession of all the *waqf* lands. The 2nd and 3rd issues involve the question whether, assuming that the plaintiff is entitled to represent the *waqf*, these lands form part of the *waqf* lands or whether the title of the *waqf* to obtain possession of the lands is lost by limitation.

It must be pointed out that any person interested in the due administration of the *waqf* is entitled to sue for a decree that improper alienations of the *waqf* property should be set aside and that the property purported to be alienated should be declared to continue to belong to the *waqf*. If, therefore, the alleged partition-deed, Exhibit I, is in effect an alienation of the *waqf* property, it can be questioned by the plaintiff though the plaintiff may not be able to establish that he is the present *mutawalli* or that he is entitled as such to be put into possession of the property belonging to the *waqf*.

Findings in six weeks and seven days for objections.

WHITE, C. J.—I have read the judgment which has been written by my learned brother and I concur.

In compliance with the order contained in the above judgment, the District Judge of Chingleput submitted the following

FINDING.—In connection with Second Appeal No. 1345 of 1911 on the file of the High Court, I am directed to return findings upon the issues originally in suit as well as upon new issues as follows:

(*i*) Whether by the operation of the Limitation Act the person who will rightfully represent the trust can any more claim the properties in the possession of the 4th and 5th defendants on behalf of the trust.

(*ii*) Whether the plaintiff is the person rightfully entitled to represent the trust.

2. The suit property admittedly forms part of that granted as *inam* for a certain Muhammadan *Masjid* in the village of Ambi. The extract of the *Inam* Register, Exhibit A, shows that one Raja Hussain Siddikh was one of the two keepers for the time being in the year 1862. There is no evidence as to what became of the other keeper for the time being. Raja Hussain Siddikh had only two sisters, and in 1867 he partitioned the *Masjid inam*, giving the plaint land, representing the one-third share of his sister, Khadir Unissa, to her son in-law, Mahomed Apan Sahib, on condition that she got her share of *Masjid* service performed by the said Apan Sahib. The 4th and 5th defendants are sons of Apan Sahib and admit they hold the plaint land as a trust, the 5th defendant stating in his evidence that each of the three branches has a turn of ten years, that he had his turn fifteen to five years ago, that the plaintiff is doing his turn for the last five years, and that all the three branches together do repairs to the *Masjid*. There is, however, no evidence to prove this theory of turns, and I quote it merely as an admission against the 4th and 5th defendants that they hold the plaint lands as a trust attached to the office of *mutawalli* in the *Masjid*.

3. The plaintiff asserts that he is the sole *mutawalli*, and as such entitled to hold the plaint lands. He has not shown how he came to be *mutawalli* or who appointed him, except that he is a grandson of Raja Hussain Siddikh, and that his mother was holding the office for him, through a *gumastah* during his minority. The original first issue and the new second issue were answered by the District Munsif in the negative. My predecessor did not specifically answer this issue, but he presumably did not find it in the affirmative for he did not decree the suit,

(2) 24 B. 170; 1 Bom. L. R. 649.

I have examined the evidence on record and I am of opinion that the answer must be in the negative.

4. As regards the new first issue the 4th and 5th defendants admit that they hold the property on behalf of the trust, and I, therefore, find that the person who will rightfully represent the trust can claim the properties in the possession of the 4th and 5th defendants on behalf of the trust, and that such claim is not barred by the Limitation Act.

5. The important issues in the suit are the original second and third issues. It is now decided that the partition made by Raja Hussain Siddikh under Exhibits I and II in 1867 was utterly invalid under Muhammadan Law, and that point is, of course, no longer open to question. The fact remains, however, that the partition was actually effected and has continued in force until the present time. That is the finding of the District Munsif and of my predecessor and upon the evidence I cannot but concur. Muhammadan Law is but imperfectly known and understood in the Mofussil of Southern India, and it is not uncommon to find Muhammadans following the Hindu Law of joint family estate and of partition. A very common method of dealing with hereditary services is to partition the *inam* lands upon the understanding that the various branches of the family shall hold office in rotation for a period proportionate to the share in the estate. That is undoubtedly what was intended by Exhibits I and II, namely, that the family of Khadir Unissa took one-third of the service lands and was to perform one-third of the duties of office. The real question in the suit then is whether the 4th and 5th defendants are entitled to hold one-third of the office, and with it, the plaint lands. The finding of the District Munsif and of my predecessor is that the plaintiff is barred by limitation from recovering the one-third share of office from these defendants. I must concur in this finding. The arrangement is no doubt utterly illegal under Muhammadan Law, but until the situation is dealt with by a suit for a scheme of management or by some such method, it must continue. It does not appear to have been explained how the share of one sister, as against a brother and another sister, was one-third; but this possibly is merely another instance of how Muhammadan Law is misunderstood in the Mofussil.

6. The fourth issue was found against the 6th and 7th defendants and this finding has not been questioned in appeal, so remains good.

7. The other issues require no finding.

This second appeal coming on for final hearing on 13th of October 1914, after the return of the finding from the lower Appellate Court on the issues referred by this Court for trial and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

TYABJI, J.—The dismissal by the District Munsif of the plaintiff's suit for the recovery of the *waqf* properties mentioned in the plaint was upheld by the District Judge without any findings as to the necessary facts, on the untenable ground that a *mutawalli* may validly partition *waqf* lands and give effect to an arrangement that a person "should enjoy one-third of the *inam* lands and should do a share of the service due at the *Masjid*." Neither the *waqf* property nor the duties of the *mutawalli* can be lawfully "partitioned." The rights of the *mauqufalaih* or beneficiaries cannot be affected by such an arrangement, unless by operation of the Indian Limitation Act.

It became necessary, therefore, to ask for findings from the District Court.

The findings now submitted by another learned Judge appear to be: (1) that the parts of the *waqf* lands now in question are not lost to the *waqf* by adverse possession; (2) that the plaintiff is not "the sole *mutawalli*" nor "as such entitled to hold the plaint lands"; (3) that the 4th and 5th defendants are actually in possession of the lands under the "partition" already referred to; (4) that though the arrangement is "utterly illegal," it "must continue until the situation is dealt with by a suit for a scheme of management or by some such method" and (5) that "the plaintiff is barred by limitation from recovering the ½ share of office from" the 4th and 5th defendants.

The expression "sole *mutawalli*" is used by the learned District Judge not in contrast to a body of co-trustees administering the *waqf* as one collective possession

in their joint capacity, in whom the whole of the *waqf* property is jointly vested. The expression is evidently used by the learned Judge under the erroneous impression that both the plaintiff and the 4th and 5th defendants have some title to be separately in possession of parts of the *waqf* property "until the situation is dealt with by a suit for a scheme" or as above stated.

The texts of Muhammadan Law ordinarily contemplate only one *mutawalli*; but when two or more persons are appointed with the intention that they should jointly administer a single *waqf*—and there is nothing to prevent such an appointment—their position would be similar to that of any other body of co-trustees. Such a "partition" as is referred to above would not affect their legal position or joint responsibility: *Robinson* v. *Harkin* (3); *Lewis* v. *Nobbs* (4).

What the District Judge intends to find seems to be that no one person is entitled to claim the whole *waqf* property without there being a scheme.

There is no necessity, however, for a scheme in a case where there is a *waqf* and no person is lawfully administering it. For the law relating to *waqfs* makes it incumbent on the Court to designate the person who, in accordance with the terms of the dedication (or *waqfnama*), is entitled to act as *mutawalli*; and if there are no directions by the author of the *waqf* on this matter, it is for the Court to appoint a *mutawalli*: *Phatmabi* v. *Haji Abdulla* (5). It is also for the Court to insist upon the proper administration of the *waqf*, and for that purpose it will remove any *mutawalli* (much more an unauthorised person who is not lawfully clothed with the status of *mutawalli*) who is guilty of misconduct or whose removal is required for the welfare of the *waqf*: *Chintaman* v. *Dhondo* (6), *Damodar* v. *Bhat Bogilal* (7), even though the author of the *waqf* should have appointed himself *mutawalli* and even though he should have laid it down as a term of the dedication that the *mutawalli* should not be liable to be removed: Baillie's Digest, Vol. I, p. 592 (1st edition), Grady's Hedaya, p. 329, and even though the parties themselves by their pleadings do not ask for his removal, *Wrightson, In re*: *Wrightson* v. *Cooke* (8).

This jurisdiction, however, can only be exercised by way of "directions necessary for the administration" of *waqfs*: *Neti Rama Jogiah* v. *Venkatacharlu* (9), under section 92 of the Civil Procedure Code.

The error, therefore, of the District Judge, by which he considers the plaintiff to have made out some show of title to be recognised as *mutawalli* in regard to what he terms a share of the office, cannot be so utilised as to deprive the 4th and 5th defendants of their possession which has been supported on the same basis.

It is clear that but for the misapprehension of the law by the District Judge his finding would have been as unequivocally against the plaintiff as the District Munsif's. Invoking, therefore, (in so far as necessary) this Court's powers under section 103 of the Civil Procedure Code, the finding may be considered to be that given by the District Munsif. The fact that the basis on which the 4th and 5th defendants' claim is supported is also erroneous, does not affect the decision in a suit which is not instituted under section 92 of the Civil Procedure Code, and in which the plaintiff can only succeed on his own present title irrespective of any appointment by the Court.

The result will be that the appeal will be dismissed.

The defendants have made common cause against the plaintiff on the basis of an utterly illegal arrangement made in breach of trust. They will bear their own costs throughout.

This judgment will be communicated to the Advocate-General and the Collector (sections 92 and 93 of the Civil Procedure Code).

OLDFIELD, J.—I concur in my learned brother's decision and do not oppose the communication of a copy to the Advocate-General and the Collector.

Appeal dismissed.

(3) (1896) 2 Ch. 415; 65 L. J. Ch. 773; 44 W. R. 702; 74 L. T. 777.
(4) 8 Ch. D. 591; 47 L. J. Ch. 662; 26 W. R. 631.
(5) 21 Ind. Cas. 964; 26 M. L. J. 115; 14 M. L. T. 568; (1914) M. W. N. 75.
(6) 15 B. 612.
(7) 22 B. 493.
(8) (1908) 1 Ch. 789; 77 L. J. Ch. 422; 99 L. T. 799
(9) 26 M. 450.

JAHAN KHAN *v.* CHANDI SHAH.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1540 OF 1913.

June 5, 1915.

Present:—Mr. Justice Chevis and
Mr. Justice Shadi Lal.

JAHAN KHAN—DEFENDANT—APPELLANT
versus
CHANDI SHAH—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 132—Suit on mortgage for principal and interest—Mortgagee entitled to sue for arrears of interest—Waiver, omission to sue, whether amounts to.

A mere omission to sue is not sufficient proof of waiver of the right to sue.

Khairuddin v. *Atu Mal*, 188 P. R. 1883, referred to.

Where a mortgage-bond dated 11th August 1890 provided that the interest on the mortgage-money would be paid yearly and the mortgagee could recover arrears of interest by suit and after 10 years, if the land was not redeemed, he could recover principal and interest by suit and get the land attached and sold in execution, and only a small sum having been paid towards interest in the early years of the mortgage the mortgagee sued the mortgagor:

Held, that, inasmuch as the plaintiff held the option of suing every year, the suit was governed by Article 132 of the first Schedule of the Limitation Act and the plaintiff could not recover interest that had become due 12 years before the institution of the suit.

Second appeal from the decree of the Divisional Judge, Attock, dated the 24th of April 1913 confirming that of the District Judge, Attock, dated the 11th October 1912, decreeing the claim.

Dr. *Muhammad Iqbal*, for the Appellant.

Mr. *Nand Lal*, for the Respondent.

JUDGMENT.—This is a claim based on a mortgaged-deed, dated 11th August 1890, by which defendants mortgaged certain land to plaintiff for Rs. 600. The mortgagors were to retain possession, the money was to carry interest at 12½ annas per Rs. 100 per mensem, interest was to be paid yearly, the mortgagee could recover arrears of interest by suit, and after ten years if the land was not redeemed, the mortgagee could recover principal and interest by suit and get the land attached and sold in execution of decree. Rupees 175-8 was paid towards interest in the early years of the mortgage. Nothing else has been paid. The lower Courts have given the plaintiff a decree for principal and interest calculated from date of mortgage to date of institution of suit, less the Rs. 175-8 paid, with costs and with lien on the land and future interest at 6 per cent. from date of decree of first Court to date of payment. The defendants appeal.

The only questions raised in appeal relate to the interest. First as regards interest which fell due more than twelve years prior to suit. Now the plaintiff had the option of suing for each year's interest as it fell due. No doubt he could have waived his option but there is absolutely nothing on the record to show that he did waive the option. All that can be said is that he omitted to sue, and this is not sufficient proof of waiver, see *Khairuddin* v. *Atu Mal*(1). Thus for the year's interest due on 11th August 1899 he could have sued anywhere after 11th August 1899, and applying Article 132 the claim for this year's interest is time-barred as the limitation is twelve years *from the time when the money becomes due i.e.*, when the plaintiff could have claimed it. So we find that all the yearly instalments of interest are time-barred up to and including the interest for the years 1898-1899. But the interest for the years 1899-1900 is within the time as this could not be claimed till 11th October 1900, which is a date within twelve years of institution of suit.

But for the defendants it is urged that the conditions of interest provided in the deed should only hold good for the first ten years of the mortgage. But Counsel for defendants admits that after the first ten years interest can be allowed at a reasonable rate, and we do not regard the rate entered in the deed, which is a rate of 9-6/16 per cent. per annum as unreasonable. We shall, therefore, not interfere except as regards interest for the period up to 11th August 1899, which we hold to be time-barred. Interest after that date to date of institution of suit (thirteen years less a few days) comes to Rs. 730. We so far accept the appeal as to reduce the amount of the decree from Rs. 1,661-9-3 to Rs. 1,330, (Rs. 600, principal and Rs. 730, interest). In all other respects the decree of the lower Courts will stand, except that as regards costs we direct that the parties, each of whom has partially succeeded in appeal, shall bear their own costs in this Court and in the lower Appellate Court. Costs in the first Court to be as ordered by that Court.

Decree modified.

(1) 188 P. R. 1883.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL No. 67 OF 1915.

February 26, 1915.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Richardson.

KRISHNA CHANDRA SAHA SARDAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

HEM CHANDRA RAI CHOWDHURY—PLAINTIFF—RESPONDENT.

Interlocutory injunction—Holding of market—Principle to be followed—Equitable grounds—Discretion of Court—No general rule—Substantial question to be investigated—Balance of convenience—Delay without satisfactory reason—Court's duty.

The only thing to be considered by the Court in cases of interlocutory injunctions in aid of the legal right is, if the case is so clear and free from objection on equitable grounds that it should interfere without waiting for the legal right to be established. No general rule can be laid down on the subject by which the discretion of the Court should in all cases be regulated. It is quite sufficient if the Court finds a case showing that there is a substantial question to be investigated and that matters should be preserved in *status quo* until the final disposal of that question. [p. 856, col. 1.]

Where the plaintiff fails to prove that the damage he might sustain if the injunction is refused and he should ultimately turn out to be right, is likely to be greater than the damage which the defendants would suffer if the injunction were granted and they should finally turn out to be right, the balance of convenience is against the grant of an injunction. [p. 856, col. 1.]

Child v. *Douglas*, (1854) 2 Jur. (N. S.) 950; 1 Kay 560; 5 De G. M. & G. 739 at pp. 741, 742; 2 W. R. 701; 43 E. R. 1057; 101 R. R. 736, referred to.

A plaintiff making considerable delay without sufficient reason is not to be assisted at the expense of the defendant. [p. 856, col. 1.]

Cooper v. *Hubbuck*, (1860) 30 Beav. 160; 31 L. J. Ch. 123; 7 Jur. (N. S.) 457; 9 W. R. 352; 54 E. R. 849; 132 R. R. 223 and *Hilton* v. *Granville*, (1841) 4 Beav. 130; Cr. & Ph. 283 at p. 292; 10 L. J. Ch. 398; 49 E. R. 288; 54 R. R. 297, referred to.

Appeal against an order of the Subordinate Judge of Dacca, dated the 15th February 1915.

Babus *Mohendra Nath Ray*, *Surendra Nath Guha* and *Prokas Chunder Pakrasi*, for the Appellants.

Dr. *Rash Behary Ghose* and Babus *Dwarka Nath Chakrabarti*, *Biraj Mohan Mojumdar* and *Ramani Mohan Chatterjee*, for the Respondents.

JUDGMENT.—This appeal is directed against an order granting an interlocutory injunction. The case for the plaintiff-respondent is that under an ancient Crown grant, antecedent to the time of the Permanent Settlement, he is entitled to hold a market on every Thursday on his property known as Ram Chandradi and the defendants have maliciously started a new market on their property known as Gopaldi, which is situated at a distance of two miles. The plaintiff accordingly seeks a permanent injunction to restrain the defendants from holding their market on Thursdays, and also asks for an interlocutory injunction during the pendency of the suit. He further claims substantial damages for loss of profit from his market, due to the establishment of the new market.

It is not disputed that the market started by the defendants was opened in February 1912 and the present suit was not instituted till the 18th November 1914. In the interval, there had been attempts at breach of the peace and criminal cases had resulted. On behalf of the plaintiff and his servants, eight criminal cases were instituted against the defendants and their people. The first of these was instituted on the 1st March 1912, that is, within a few days of the establishment of the new market and the last was instituted on the 18th January 1913. Every one of these cases was dismissed, and in some instances, the complainants were prosecuted and were convicted on the ground that they had instituted false cases. On the other hand, there were two counter-cases instituted by the defendants and their men, and in both instances the accused were convicted, on the 30th June 1913 and the 31st July 1913 respectively. Since then, so far as we can gather from the materials on the record, there have been no fresh disturbances. The Subordinate Judge, however, has granted an interlocutory injunction which restrains the defendants from holding their market on Thursdays. On behalf of the defendants-appellants, it has been argued, *first*, that the Subordinate Judge has in substance prejudged the case and has expressed an opinion on the merits; *secondly*, that as there has been considerable delay on the part of the plaintiff in the institution of this suit, no interlocutory injunction should be granted; and *thirdly*, that the application should be refused, as it has not been made *bona fide* by the plaintiff for the preservation of his right, but rather with a view to secure the destruction of the property of the defendants. We have anxiously considered the circumstances of this case and arrived at the conclusion that the injunction must be discharged.

The principle applicable to cases of this description is well settled and may be briefly stated. In cases of interlocutory injunctions in aid of the legal right, all the Court usually has to consider is whether the case is so clear and free from objection on equitable grounds that it should interfere without waiting for the legal right to be established. This depends upon various circumstances, and it is impossible to lay down any general rule on the subject by which the discretion of the Court should in all cases be regulated. It is not necessary that the Court should find a case which would entitle the plaintiff to relief at all events; it is quite sufficient if the Court finds a case which shows that there is a substantial question to be investigated and that matters should be preserved in *status quo* until the final disposal of the question. There is no room for doubt that in the present case there is a substantial question to be investigated in the suit; but can it be contended that the interlocutory injunction is sought with a view to preserve the *status quo*. The defendants have held their market every Thursday now for three years and have incurred expenses in its establishment and maintenance. The injunction as granted by the lower Court, if maintained, will undoubtedly destroy the market started by the defendants. On the other hand, there is nothing to show that if the defendants are not restrained, at this stage, further injury would be caused to the market founded by the plaintiff; no doubt, the loss in income may continue, but in that respect the plaintiff would, if successful, be amply compensated by a decree for damages. There has been considerable delay on the part of the plaintiff for which no satisfactory reason has been assigned, and he should not now be assisted to the serious detriment of the defendants: *Cooper* v. *Hubbuck*(1), *Hilton* v. *Granville* (2). The balance of convenience is clearly against the grant of the injunction; the plaintiff has failed to prove, as he was bound to do, that the damage he might sustain if the injunction is refused and he should ultimately turn out to be right, is likely so be greater than the damage which the defendants would suffer if the injunction were granted and they should finally turn out to be right. *Child* v. *Douglas*(3). It is further worthy of note that the defendants have readily submitted to the terms we imposed on them as a condition of withholding the injunction, and have brought into Court a sum of Rs. 500 for the satisfaction of the claim for damages, should the plaintiff be ultimately successful: *Rigby* v. *G. W. Ry. Co.* (4). He will be sufficiently protected, if, in addition, the trial of the suit is expedited and we shall make an order in that behalf.

It has finally been argued on behalf of the plaintiff that an interlocutory injunction should be granted to restrain the defendants from interfering with the traders and customers who might desire to attend the market held on the property of the plaintiff. That, however, would be an injunction for a purpose entirely different from what is contemplated in the injunction granted; we are clearly of opinion that we should not discharge the order of the Court below and substitute for it an entirely different injunction, the grant whereof can be justified only upon proof of facts not yet investigated. There is nothing on this record to indicate that recently there have been such acts and conduct on the part of the defendants as would necessitate the grant of such an injunction as that now proposed.

The result is that this appeal is allowed and the order of the Court below discharged. The record will be sent down at once and the Subordinate Judge directed to take up the suit for early disposal. The costs of this Court as also of the Court below will abide the result of the suit. We assess the hearing fee at two gold *mohurs*.

The amount deposited by the defendants in this Court will be transmitted to the Court below to be invested in Government securities and retained in that Court till the disposal of the suit.

Appeal allowed.

(1) (1860) 30 Beav. 160; 31 L. J. Ch. 123; 7 Jur. (N. S.) 457; 9 W. R. 352; 54 E. R. 849; 132 R. R. 223.

(2) (1841) 4 Beav. 130; Cr. & Ph. 283 at p. 292; 10 L. J. Ch. 398; 49 E. R. 288; 54 R. R. 297.

(3) (1854) 2 Jur. (N. S.) 950; 1 Kay 560; 5 De G. M. & G. 739 at pp. 741, 742; 2 W. R. 701; 43 E. R. 1057; 101 R. R. 736.

(4) (1846) 2 Ph. 44 at p. 50; 1 Coop. Temp. Cott. 3; 10 Jur. 531; 41 E. R. 858; 15 L. J. Ch. 266; 78 R. R. 12.

GHAUS *v.* FAJJI.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 919 OF 1913.

March 30, 1915.

Present:—Mr. Justice Shadi Lal and Mr. Justice LeRossignol.

GHAUS—DEFENDANT—APPELLANT

versus

Musammat FAJJI *alias* MARIAM—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Marriage—Apostasy, effect of—Motive, immaterial.

Under the Muhammadan Law the fact of either or both of the parties to a Muhammadan marriage renouncing the Muhammadan religion has the effect of dissolving the marriage *ipso facto*. [p. 857, col. 2.]

Imam Din v. *Hasan Bibi*, 85 P. R. 1906; 148 P. L. R. 1906; *Amin Beg* v. *Saman*, 7 Ind. Cas. 342; 7 A. L. J. 956; 33 A. 90; *Abdul Ghani* v. *Azizul Haq*, 14 Ind. Cas. 641; 39 C. 409; 15 C. L. J. 263; 16 C. W. N. 451; 13 Cr. L. J. 257, followed.

If the apostasy is an accomplished fact and if it is not proved to be a colourable transaction, the Court cannot decline to give effect to it because the underlying motive was not a proper one. [p. 858, col. 2.]

Second appeal from the decree of the Additional Divisional Judge, Shahpur Division at Lyallpur, dated the 14th March 1913, reversing that of the Munsif, first Class, Lyallpur, dated the 21st December 1912, dismissing plaintiff's claim.

Mr. *Fazal-i-Husain*, for the Appellant.

Lala *Durga Das*, for the Respondents.

JUDGMENT.—The main question, which requires determination in this second appeal and in the connected Appeal No. 920 of 19 3, is whether the conversion of the respondent, *Musammat* Fajji, to Christianity dissolves her marriage with her Muhammadan husband. Now it is beyond dispute that there is an array of authorities of this Court and High Courts which answer the question in the affirmative, and Mr Fazal-i-Husain frankly admits that he is unable to cite a single judicial dictum in favour of the contrary view. He, however, contends that the law has not been correctly laid down in those judgments and draws our attention to certain passages in the original Arabic text books, the result of which has been stated by Mr. Ameer Ali in the third edition of his book on Muhammadan Law. After giving our careful consideration to the opinion of the learned author and to the arguments advanced before us, we are unable to accept the contention that the rule consistently followed by the Courts in India in a series of judgments and acted upon all along is erroneous and that a different rule should now be laid down.

The case-law on the subject up to 1906 is fully dealt with in the judgment of a Division Bench of this Court reported as *Imam Din* v. *Hasan Bibi* (1), and it would be an act of supererogation if we were to repeat here all the cases and the arguments which have been examined in that case in support of the view that the effect of either or both of the parties to a Muhammadan marriage renouncing the Muhammadan religion is to dissolve the marriage *ipso facto*. It will be observed that the case of 1906 and that reported as *Musammat Khan Bibi* v. *Pir Shah* (2) are those of a wife's apostasy and have, therefore, a direct bearing on the matter in issue in this case. In 1910 the same question came up for decision before the Allahabad High Court and that Court after considering the *pros et cons*, and more especially the opinion of Mr. Ameer Ali referred to above, came to the conclusion that under the Muhammedan Law a wife's conversion from Islam to Christianity effects a complete dissolution of marriage with her Muhammedan husband [vide, *Amin Beg* v. *Saman* (3)]. This view is further supported by the principle enunciated by the Calcutta High Court in their judgment in *Abdul Gani* v. *Azizul Haq* (4), in which Mr. Justice Sharf-ud-Din after examining the relevant passages from the original Arabic books makes the following observations: "On reference to the different authorities we are of opinion that *Musammat* Jaitan's marriage with the complainant became absolutely null at the moment he apostatised, and that from the date of his apostasy he was not her husband."

In addition to the above-mentioned judicial authorities we observe that the text-book writers on the Muhammadan Law as obtaining in India have stated the rule in exactly similar terms; *Vide*, for example, Baillie's Digest of Muhammadan Law, page 182; Hamilton's Translation of Hedaya, page 66; Sir Roland Wilson's Digest of Anglo-Muhammedan Law, 4th Edition, page 164;

(1) 85 P. R. 1906; 148 P. L. R. 1906.
(2) 132 P. R. 1884.
(3) 7 Ind. Cas. 342; 7 A. L. J. 956; 33 A. 90.
(4) 14 Ind. Cas. 641; 39 C. 409; 15 C. L. J. 263; 16 C. W. N. 451; 13 Cr. L. J. 257.

Tyabji's Principles of Muhammadan Law, page 166, section 195; Institutes of Muhammadan Law by Abdur Rahman, page 172, Article 303; and Ameer Ali's Muhammadan Law, first and second Editions, in both of which the learned author definitely states that "Under the Muhammadan Law, if a Muslim husband or a Muslim wife apostatise from Islam, the apostasy has the effect of dissolving the marriage-tie between the parties." In his 3rd Edition, as observed already, he takes a different view and states at pages 431 that "Among the *Hanafis* some of the old lawyers whose views are reflected in the Hedaya, the Fatawa Alamgiri and other works, considered that apostasy from Islam of either husband or wife, whether it takes place before or after consummation, dissolves, *ipso facto*, the marriage-tie. This view, however, has been considerably modified in modern times." He then refers to the great divergence of opinion as to the effect of the wife's abjuration of Islam on the status of marriage, and sums up by saying that the opinion of the jurists of Balkh and Samarkand should be preferred to that of the lawyers of Bukhara. It is clear that among the Muhammadan jurists there was a difference of opinion on the subject and it is further clear that the view taken by the jurists of Bukhara has been accepted by the Fatawa Alamgiri and almost all the Indian writers on Muhammadan Law. This exposition of law has been followed by the Courts in India and we are, in the circumstances, bound by the rule contained in the above authorities, and the fact that a rival school of law is in favour of a different opinion does not appear to us to be a sufficient ground for disturbing the long and continuous current of judicial decisions.

It is, therefore, manifest that if *Musammat* Fajji did actually embrace Christianity, then according to the Muhammadan Law she ceased to be the wife of the respondent Ghano. In regard to her conversion to the Christian religion, the baptismal certificate and the evidence of the witnesses Reverend Beli Ram and Mahbub Masih make it clear that she went through the prescribed form relating to the change of religion. In view of the fact that she adopted the new religion just about the time when her husband wanted her to come back and live with him, we are inclined to think that the motive which prompted her action was her desire to put an end to the matrimonial relationship which was brought about during her minority by her mother and to get rid of her husband whom she did not like for more reasons than one.

The learned Divisional Judge has, however, held that the motive for conversion is immaterial and this finding has not been impugned by the learned Counsel for the appellant. It seems that if the conversion was an accomplished fact and that if it is not proved to be a colourable transaction, the Court cannot decline to give effect to it because the underlying motive was not a proper one.

The evidence of the witnesses referred to above shows that the woman professes the Christian religion and has adopted it not as a device or as a temporary measure, but with the intention of remaining a Christian for ever. In the absence of any evidence to the contrary, we are unable to hold that the conversion should be regarded as a colourable transaction and that it should not be acted upon. The Courts of Law have no other means of finding out a person's intention than that indicated by his acts and conduct, and in the present case though the motive may excite suspicion there is nothing to show that *Musammat* Fajji's change of faith is not a genuine affair.

For the reasons set forth above, we are of opinion that *Musammat* Fajji renounced Islam and became a Christian and that according to the Muhammadan Law her conversion *ipso facto* dissolved the marriage-tie with her Muhammadan husband. We accordingly uphold the decree of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

ABDULLA *v.* KUTBAN.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1376 OF 1895.

May 11, 1897.

Present:—Mr. Justice Rampini.

Sheikh ABDULLA *alias* CHUNDA—PLAINTIFF—APPELLANT

versus

Musammat KUTBAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Homestead land, recovery of possession of—Landlord, dispossession by—Occupancy raiyat—*Bengal Tenancy Act (VIII of* 1885), *s.* 182, *Sch. III, Art.* 3—*Limitation.*

Where the plaintiff bought only the house and the homestead land of a person (who had a *raiyati* holding and some homestead land and house in a certain village) and the plaintiff was dispossessed by the landlord, who claimed the house through some other tenant, and the plaintiff sued to recover possession of the homestead land:

Held, that as the plaintiff did not claim to recover possession either as a settled *raiyat* or as an occupancy *raiyat* and did not occupy the disputed plot of homestead land for 12 years and the land was not alleged to be the subject of an occupancy right transferable by custom, the two years' rule of limitation laid down in Article 3, Schedule III, of the Bengal Tenancy Act was not applicable. [p. 859, col. 2; p. 860, col. 1.]

Appeal against the decree of the Subordinat Judge, second Court, Bhagalpur, dated 28th June 1895, affirming that of the Munsif, Jamui, dated the 17th September 1894.

Babu *Digambar Chatterjee*, for the Appellant.

Moulvi *Serajul Islam*, for the Respondent.

JUDGMENT.—In this case the plaintiff sues to recover possession of a small plot of homestead land. He alleges that this plot of land formerly formed part of a *jote*, which belonged to an old resident cultivator named Haril Kahar. It devolved on his heir, Khuban, who sold the *jote* to defendant No. 5, who sold it to defendant No. 6, who sold the homestead land only to the plaintiff. The plaintiff then took possession but was dispossessed by the defendant No. 1 who is one of the landlords of the land—the others being defendants Nos. 1 to 3. Both the lower Courts have found that the plaintiff was dispossessed more than two years before suit, and that the suit, therefore, is barred by the two years' rule of limitation laid down in Article 3, Schedule III of the Tenancy Act. The plaintiff now impugns this finding. The question then is "does the plaintiff sue as an occupancy *raiyat*"?

I do not think that he does. He does not do so expressly. He is a cultivator, it is true. But the land which he has purchased, and which he seeks to recover possession of, is homestead land. Now, under section 182 when a *raiyat* holds his homestead otherwise than as part of his holding as a *raiyat*, the incidents of his tenancy of it shall be regulated by local custom or usage by the provisions of the Act applicable to land held by a *raiyat*. But the plaintiff does not profess to hold the homestead land in dispute as part of his own *jote*, if he has any, and it is no longer part of the old *jote* of Haril Kahar, for the defendant No. 6 retained the agricultural land of that *jote* in his own possession or at all events, he did not sell it to the plaintiff when he sold him the homestead land. The old *jote* of Haril Kahar was, it seems, 1 *bigha* 10 *cottahs* in extent. That being so, the plaintiff holds his land otherwise than as part of his holding as a *raiyat* and the incidents of his tenancy of it must be regulated by local custom or usage and, subject to local custom or usage, by the provisions of the Act. In this case no local custom or usage has been set up in the plaint. Therefore the provisions of the Act are applicable to the land. But under the Act the plaintiff can only have an occupancy right in the land if (1) he is a settled *raiyat* of the village or (2) has occupied the land in suit for 12 years, or (3) the land in question is the subject of an occupancy right transferable by local custom against the will of the landlord. Now (1) the plaintiff in his plaint does not call himself either a settled *raiyat* or an occupancy *raiyat*; (2) *ex-hypothesi* he has not occupied the disputed plot of homestead land for 12 years; and (3) it is not alleged that the land is the subject of an occupancy right transferable by custom. It may be that Haril Kahar had an occupancy right in the *jote* but it is not alleged, far less proved, that it was one transferable by custom against the will of the landlord. Therefore, the plaintiff can have no occupancy right in the land in suit. He cannot bring this suit as an occupancy *raiyat* and the two years' rule of limitation

laid down in Article 3, Schedule III, of the Act is not applicable.

I accordingly set aside the finding of the lower Appellate Court, and remand the case for a decision on the other issues arising in it. Costs to abide the result.

Appeal allowed; Case remanded.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 669 OF 1913.

October 1, 1914.

Present:—Mr. Justice Napier.

SUBRAMANIA AIYAR—PLAINTIFF—PETITIONER

versus

POOPPARAM LALA—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), s. 12 (4)—Suit to set aside award—Application for copy—Time requisite for obtaining it, whether deducted.

In an application to set aside an award filed in Court the time requisite for obtaining a copy of the award may be taken into account under section 12 (4) of the Limitation Act in calculating the period of limitation provided the attention of the Court is drawn to this.

Petition under section 115 of Act V of 1908, praying the High Court to revise the decree of the Court of the District Munsif of Trichinopoly, in Original Suit No. 278 of 1912.

Mr. *T. V. Muthukrishna Aiyar*, for the Petitioner.

Mr. *C. V. Ananthakrishna Aiyar*, for the Respondent.

JUDGMENT.—The Court gave judgment in a suit in accordance with an award filed. The plaintiff had put in an application to set it aside, which was on the face of it out of time. The Court's attention was not drawn to any application for copy which would have constituted "time requisite" within the meaning of section 12 (4) of the Limitation Act. He, therefore, computed the time as appeared on the record. It is urged that there was such an application and the time should have been excluded. That is the plaintiff's own fault and the Munsif's decision cannot

be interfered with under section 115 of the Code of Civil Procedure.

The petition is dismissed with costs.

Petition dismissed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 91 OF 1912.

December 10, 1913.

Present:—Sir Arnold White, KT., Chief Justice, and Mr. Justice Sankaran Nair.

M. SAMBANDA MUDALIAR—DEFENDANT—APPELLANT

versus

A. CHINNASAWMI SAH—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 92—Agreement out of Court to compromise suit—Order of adjournment—Additional evidence, whether legally admissible—Transfer of interest in immoveable property—Registration.

An order of Court adjourning a case and incidentally noting the fact of an agreement made out of Court between the parties as a ground of adjournment does not purport to be and is not a record of the terms of the compromise; and additional evidence to add to the terms of the compromise is not inadmissible under section 92 of the Evidence Act. [p. 861, col. 1.]

Where in a suit for possession of a house the parties arrived at an agreement that the defendant should deliver possession of the house on payment of Rs. 500 by the plaintiff and on the defendant failing to do so, the plaintiff sued on the basis of this agreement:

Held, that the suit was maintainable even though the agreement was not registered inasmuch as

(*i*) it did not contemplate any transfer of interest in immoveable property; and

(*ii*) the suit was one for possession and not for a declaration of title. [p. 862, col. 1.]

Appeal from the decree of the Hon'ble Mr. Justice Wallis, dated the 26th September 1912, in the exercise of the ordinary original civil jurisdiction of the High Court and made in Civil Suit No. 352 of 1912.

Mr. *K. Naraina Row*, for the Appellant.

Mr. *S. Varadachariar*, for the Respondent.

JUDGMENT.

WHITE, C. J.—As regards the question of fact in dispute, namely, what were the terms of the compromise entered into be-

tween the Vakils of the parties in Civil Suit No. 155 of 1908, I think it is clear on the evidence that one of the terms of that compromise was that the present defendants were to deliver to the present plaintiff the house, the possession of which is asked for in the present suit. The two Vakils, who appeared for the parties in Suit No. 155 of 1908, gave evidence in this suit and their evidence is in substantial agreement that one of the terms of the compromise in the suit of 1908 was that delivery of the house in question should be given by the present defendants to the present plaintiff.

The point was taken on behalf of the appellant that inasmuch as the compromise in the suit of 1908 was reduced into writing, under the provisions of section 92 of the Evidence Act oral evidence for the purpose of adding terms to the compromise which are not to be found in the written document is inadmissible. The *first* answer to that contention appears to me to be that the compromise in the suit of 1908 was not reduced into writing. The appellant relies upon an endorsement made by Mr. Justice Sankaran Nair on the plaint in the suit of 1908. That endorsement is in these terms: "It is represented that the matter has been settled by the defendants Nos. 2 and 3 agreeing to withdraw the suit. Adjourned to to-morrow for payment of the money". It seems perfectly clear that that does not purport to be, and is not a record of the terms of the compromise. It is merely a note of the learned Judge as the ground on which he was prepared to make an order of adjournment. In this endorsement, there is no reference either to an undertaking by the plaintiff to pay Rs. 500 or to an undertaking by the defendants to deliver up possession of the house. Then we have a formal order made by the Registrar under the powers conferred on him under the rules allowing the plaintiff in the suit of 1908 to withdraw that suit. There, again, we have no reference either to the Rs. 500 or to the agreement to deliver up possession of the house. Even if there was any writing which recorded this compromise, inasmuch as the settlement was arrived at out of Court, it is not one of the matters which, under section 92 of the Evidence Act, was to be reduced into writing. Mr. Justice Wallis says with regard to this: "It appears to me that what happened really was, in the turn that events took, that the suit was withdrawn upon a settlement made out of Court." Then, he goes on to observe: "It is always open to the plaintiff to withdraw his suit, if he does not ask for permission to bring a fresh suit. The Court cannot prevent him from doing so, but he is liable to have an order made to pay costs of the other side, but subject to that, his withdrawing the suit is a matter in his own control, and so far as I know it is perfectly open to parties to settle a case out of Court and to withdraw the suit in consequence of the settlement."

The real crux of the case arises in connection with the point taken by the appellant, that, inasmuch as the settlement affected immoveable property, the plaintiff who relies on the settlement cannot succeed because there is no registered document in writing. The learned Judge, referring to this, says: "It is contended that this amounts to a transfer of immoveable property, which is invalid for want of registration under the terms of the Transfer of Property Act." It is not suggested that the compromise itself required registration in order to give it validity. But the contention is that, assuming the compromise to be valid, no title vests in the plaintiff by reason of the absence of a registered document as required by section 54 of the Transfer of Property Act. The learned Judge did not think it necessary to consider this question, because he came to the conclusion on the facts of this case that the defendants were estopped from setting up a title in themselves. The learned Judge says: "The whole basis of the settlement was that the plaintiff in that suit had no rights to transfer at all" (the original is 'rights' and the point is 'right'), What the learned Judge means is that the basis of the settlement was that there were no rights of property in the defendants and if there were no rights of property in the defendants, there was nothing to transfer and there was nothing that could bring into play the provisions of the Transfer of

Property Act. He goes on to say: "The compromise was that they were to abandon their claim to any rights and the basis of the settlement was that they had no rights". I may put it in this way, that the basis of the settlement was that any rights which the plaintiffs in that suit might claim to set up—that their conveyance to the man Talukana was not an effective conveyance—, or that any rights which they might set up, assuming that the conveyance to Talukana was an effective conveyance, that they had acquired rights by reason of possession as against Talukana or his representatives—the basis of the compromise was that all these rights were abandoned for good consideration. The learned Judge finds in so many words that the defendants were estopped on the facts of the case from setting up a title in themselves. He does not find in so many words that the defendants were estopped from setting up the case that as between them and the plaintiff, the plaintiff was not entitled to possession. But I think that is involved in his finding. I do not say that I do not agree with the learned Judge in his finding as to estoppel on the facts proved. But it seems to me that the decree of the learned Judge may be supported on *another* ground.

The plaintiff in this case asks for possession of certain property. He does not ask for a declaration of his title to the property. If in this case a plea had been formally raised that the plaintiff had no title because there had been no registered instrument, it seems to me that, as a matter of pleading, it would have been a good reply to that plea for the plaintiff to say: "I admit I have no registered instrument as evidence of my title to the property in question, but the plea that I have no registered instrument is immaterial because I am not asking for a declaration of my title to the property, but for possession of the property by virtue of an agreement between you and me under which you, in consideration of money paid by me to you, undertook to give me possession."

It seems to me that for these reasons we can support the judgment of the learned Judge, and I think that this appeal should be dismissed with costs.

SANKARAN NAIR, J.—I agree.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2189 OF 1912.

February 17, 1915.

Present:—Mr. Justice Fletcher and Mr. Justice Teunon.

GANDA SINGH—PLAINTIFF—APPELLANT

versus

CHUNI LAL SHAHA—DEFENDANT—RESPONDENT.

Animal—Injury caused by vicious horse—Defendant knowingly keeping vicious horse, liability of—Negligence, if necessary to support action—Damages, suit for.

The defendant knowingly kept a horse which was a vicious animal. The horse injured the plaintiff and he sued for damages:

Held, that the defendant must be held liable notwithstanding that he was not guilty of negligence, as negligence was not necessary to support a suit of this nature. [p. 863, col. 1.]

Appeal against the decree of the Subordinate Judge, second Court, Burdwan, dated the 20th of May 1912, reversing that of the Munsif, first Court, Katwa, dated the 17th of February 1911.

Babu *Surendra Chandra Sen*, for the Appellant.

Babu *D. N. Bagchi*, for the Respondent.

JUDGMENT.

FLETCHER, J.—This is an appeal from a judgment of the learned Subordinate Judge of Burdwan reversing the decision of the Munsif. The suit was brought by the plaintiff, who is the appellant, before us to recover Rs. 200 as damages for the injuries he suffered by reason of his having been bitten by a mischievious animal, to wit, a horse belonging to the defendant. The Munsif decreed the suit and awarded to the plaintiff Rs. 200 as damages. On appeal to the lower Appellate Court, the learned Subordinate Judge reversed that decision.

The first point is whether this was a vicious animal, and whether the defendant had knowledge of the propensities of the animal. The learned Subordinate Judge found that, on the admitted facts of the case, the horse had bitten three people on previous occasions, namely, twice a groom and, on one occasion, an outsider. Against this evidence, the learned Subordinate Judge held that that did not establish the fact that the animal was a vicious animal. That is a finding altogether contrary to the whole body of the evidence. On the admissions

of the defendant, it is quite clear that this animal, in fact, was a vicious animal and the learned Subordinate Judge ought to have so found on the evidence before him. The findings he has made are wholly unwarranted by the evidence.

The next point is "did this horse bite the plaintiff?" The learned Subordinate Judge agreeing with the Munsif has found that it did, in fact, bite the plaintiff. But he has come to the conclusion that the defendant was not guilty of negligence. That is not necessary to support a suit of this nature. If the horse was a vicious animal, and if that fact was known to the defendant and knowing this he kept the horse, and if it injured the plaintiff then the defendant must be held liable, notwithstanding that he has not been guilty of negligence. Negligence is not a necessary ingredient of a suit of this nature. Therefore, the finding of the Subordinate Judge that the plaintiff was bitten by the defendant's horse is *prima facie* sufficient to entitle the plaintiff to damages.

Then the learned Subordinate Judge makes a finding that the plaintiff has been guilty of contributory negligence. What he means is difficult to gather, but I suppose what he means is that the case comes under the maxim *volenti non fit injuria*, that the plaintiff deliberately placed himself in this position in trying to rescue his horse and, therefore, was bitten by the defendant's horse. There is nothing to show that the plaintiff so placed himself or that he was aware that the horse of the defendant was a vicious animal and that he incurred these injuries in his attempt to rescue his own horse well knowing that, if he did so, he would probably receive these injuries from the defendant's vicious horse. There is nothing to support any such finding and there is nothing to suggest that the plaintiff did, in fact, know that the defendant's horse was vicious. On the findings of fact, the learned Subordinate Judge ought to have, in my opinion, come to the same conclusion as the learned Munsif. We ought, therefore, to set aside the decree passed by the learned Subordinate Judge and restore the decree passed by the Munsif. The appeal will, therefore, be allowed, the decree of the lower Appellate Court will be set aside and that of the Court of first instance restored. The defendant must pay to the plaintiff his costs both in this Court and in the Courts below.

TEUNON, J.—I agree.

Appeal allowed.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 6 OF 1912.

April 6, 1914.

Present:—Sir Henry Hartnoll, KT., Offg. Chief Judge and Mr. Justice Twomey.

AUNG BYU AND ANOTHER—DEFENDANTS—APPELLANTS

versus

THET HNIN—PLAINTIFF—RESPONDENT.

Buddhist Law—Marriage—Imprisonment of husband Desertion—Dissolution of marriage—Right to claim divorce—Right to joint property.

Under the Buddhist Law there is no authority for holding that a man sentenced to imprisonment is thereby to be deemed to have deserted his wife. [p. 864, col. 1.]

During the imprisonment of the husband, his wife has no right to take a second husband, and if she does so, her conduct amounts to desertion and adultery, and she cannot claim a divorce by pleading the desertion. [p. 864, col. 1.]

The marriage is not dissolved by the desertion but from the day when the first husband on his release from jail demands the joint property from her. [p. 864, col. 2.]

Where the husband treats the marriage as at an end on the ground of his wife's desertion and adultery he is entitled to all the joint property of the parties. [p. 864, col. 2.]

Mr. *Hay*, for the Appellant.

Mr. *Dantra*, for the Respondent.

JUDGMENT.

TWOMEY, J.—The plaintiff-respondent, Maung Thet Hnin, was convicted of murder, and sentenced to transportation for life in 1899: but in 1911 the remainder of his sentence was remitted and he was released. At the time of his conviction he left a wife, Ma Aung Byu, with four young children, and the land and other joint property of the married couple was admittedly sufficient for the maintenance of Ma Aung Byu and the children. About three years after Thet Hnin's conviction Ma Aung Byu took another husband, Kyaw Zan Hla, with whom she has since lived. When Thet Hnin came back from transportation, he demanded the joint property from Ma Aung

Byu. She would agree only to give him a moiety of the joint property. There was a reference to arbitration but nothing came of it, and Thet Hnin brought the present suit against Ma Aung Byu and Kyaw Zan Hla for the recovery of the property acquired during the marriage of Thet Hnin and Ma Aung Byu.

The plaintiff's case is that Ma Aung Byu had no right to take a second husband and that in doing so she was guilty of adultery and desertion. Ma Aung Byu, on the other hand, contends that she was entitled to take another husband when three years had elapsed from the time of Thet Hnin's conviction, and that by taking a second husband she did not forfeit her share in the joint property. There is no authority for holding that a man sentenced to imprisonment is thereby to be deemed to have deserted his wife. The Dhammathats do not provide for such a contingency. But sections 244 to 249 and 390 to 393 of the *ex*-Kinwun Mingyi's Digest deal with cases in which a husband goes on a journey or goes to war, and they show that the wife must wait indefinitely for her husband's return—at any rate as long as she has adequate means of subsistence from the joint estate. Having regard to the spirit of these rules, I think it is clear that Ma Aung Byu had no right to take a second husband, and I would accept the decision of the District Court that her conduct in doing so amounted to desertion and adultery. It has been held, however, that desertion does not *ipso facto* and without any further and express act of volition on the part of either party dissolve the marriage-tie, *Thein Pe* v. *U. Pet* (1). We have, therefore, to consider when the marriage-tie was actually dissolved. Was it dissolved by the act of Ma Aung Byu in taking a second husband or did it subsist until 1911 when Thet Hnin returned from transportation? The Upper Burma case *Ma Thin* v. *Maung Kyaw Ya* (2) is good authority for the view that the deserting party cannot claim a divorce by pleading the desertion, and Sir Harvey Adamson expressed himself in favour of the same view in *Thein Pe* v. *U Pet* (1) though the point was not decided in that case. I would follow the interpretation adopted by the learned Judicial Commissioner, Upper Burma, and hold that the marriage-tie between Thet Hnin and Ma Aung Byu was not dissolved by her action in deserting him, but subsisted until Thet Hnin was released from jail and demanded the joint property from Ma Aung Byu. By that express act he took his stand upon the fact of the desertion and treated his marriage-tie with Ma Aung Byu as severed.

It is admitted that in the case of a divorce on the ground of the wife's adultery the husband is entitled to all the property, and where as in this case the husband treats the marriage as at an end on the ground of his wife's desertion and adultery there is no good reason to depart from the ordinary rule.

The District Court has decided that certain property to the value of Rs. 3,675 was in Ma Aung Byu's possession when she took Kyaw Zan Hla as her husband, and a decree has been given against both the defendants-appellants for this property. As regards the Yindaw paddy land and the Payagon paddy land there is no dispute. The Kundaw garden land was admittedly bought in the interval between Thet Hnin's conviction and the second marriage and it was rightly treated as part of the joint estate. The house built by Ma Aung Byu at Kundaw was built before the second marriage and that also was rightly included in the joint property. The moveable property decreed in Thet Hnin's favour consisted of: —

	Rs.
Two *tickals* of gold valued at ...	60
A cart	30
Cash	600
Eighty baskets of paddy ...	80
Debt paid by Ma To Le ...	500
Interest on this debt	150

As regards the gold and the cart and the paddy I think the value of these may be set against the expenses incurred by Ma Aung Byu in maintaining herself and the children after the second marriage. It is true that they also had the produce of the lands belonging to Thet Hnin. But even if this produce is taken into account, the aggregate amount available for maintenance was not excessive. I would, therefore, disallow these

(1) 3 L. B. R. 175.
(2) U. B. R. (1892—96) II 56.

three items of Rs. 60 and Rs. 30 and Rs. 80. Against the amount of cash, Rs. 600, which was admittedly in Ma Aung Byu's hands, should be set off the amount which were given to the two eldest children when they were married. Po Chon received Rs. 150 and Ma Mya got jewellery to the value of Rs. 130, total Rs. 280. The item Rs. 600 should, therefore, be reduced to Rs. 320. I cannot agree with the District Judge that the defendants should pay Rs. 500 *plus* Rs. 150 in respect of the transactions with Ma To Le. In dealing with this item the learned Judge has relied on Ma Aung Byu's alleged admissions in Exhibit B, a note of evidence taken by a clerk in the course of the abortive arbitration proceedings. Exhibit B was wrongly admitted in evidence. The proper course would have been to question Po Saw, the writer (P. W. No. 2), as to what Ma Aung Byu said at the time. Po Saw could then have refreshed his memory by referring to Exhibit B under section 159, Evidence Act. As the case stands, Exhibit B must be excluded from consideration altogether. According to Ma Aung Byu's evidence she received interest at Rs. 30 per cent. per annum for two years on the loan of Rs. 200 to Ma To Le. In the third year Ma To Le failed to pay interest and gave her land in usufructuary mortgage for Rs. 500, which sum presumably consisted of the original debt of Rs. 200 *plus* one year's interest, Rs. 60, *plus* cash, Rs. 240. Subsequently, a further sum of Rs. 300 was paid to Ma To Le who then sold the land outright to Ma Aung Byu and Kyaw Zan Hla. The second sum of Rs. 300 according to Ma Aung Byu was obtained by sale of the produce of her lands. If it were proved that the additional advances paid to Ma To Le came out of the joint estate, it would be reasonable to make Ma Aung Byu, who now has Ma To Le's land, refund the money to Thet Hnin. But there is no satisfactory proof on this point. Moreover, Thet Hnin did not demand these amounts from Ma Aung Byu. He asked only for the original loan of Rs. 200. In the circumstances I would hold Ma Aung Byu responsible only for Rs. 200, the amount of the original loan to Ma To Le, and Rs. 60, the amount of interest which Ma To Le could not pay. Both these amounts were afterwards merged in the sum of Rs. 800, the price for which Ma Aung Byu took over the land from Ma To Le, and I think she should pay these sums, aggregating Rs. 260, to Thet Hnin as part of the joint estate.

I would, therefore, modify the decree of the lower Court by awarding to the plaintiff as against both defendants—

	Rs.
Yindaw paddy land valued at ...	1,600
Payagon paddy land valued at ...	400
Kundaw garden land valued at ...	95
Kundaw house valued at	160
Cash Rs. 320 *plus* Rs. 260	580

together with costs on the aggregate amount, Rs. 2,835.

I see no sufficient reason to allow the defendants' costs on the difference between the amount decreed and the amount (Rs. 5,595) at which the relief claimed was valued in the plaint. The Court-fee payable on the plaint is Rs. 305 of which, however, only Rs. 170 (Court-fee on the amount now decreed) is payable by the defendants. The difference must be paid by the plaintiff. The Court-fees recoverable from the parties will be a first charge on the property decreed.

HARTNOLL, OFFG. C. J.—I concur.

Decree modified.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 3032 OF 1912.

February 18, 1915.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Richardson.

HERA LAL ROY CHOWDHURY—

PLAINTIFF—APPELLANT

versus

LOKENATH SHAHA AND OTHERS—

—DEFENDANTS—RESPONDENTS.

Easement—Latrine erected on another man's land—Enjoyment for long series of years—Right of easement, if acquired—Right unknown to law—New easement, if created—Pleadings.

Where the plaintiff along with some of the defendants erected latrines on land which did not belong to them, and used them for a long series of years and thereafter claimed a right of easement:

Held, that no question of easement arose in the case, for an easement of this description was unknown to law and the Court would not create a new species of easement. [p. 866, col. 1.]

Keppell v. *Bailey*, 2 Myl. & K. 517; Coop. Temp. Brough 298; 39 E. R. 1042; 39 R. R. 264; and *Hill* v. *Tupper*, 2 H. & C. 121; 32 L. J. Ex. 217; 9 Jur. (N. S.) 725; 8 L. T. 792; 11 W. R. 784; 133 R. R. 605, referred to.

Where, as in the present case, the act of the plaintiff was in the nature of trespass and it might perhaps have been open to him to contend that he

had acquired a good title to the disputed property by adverse possession, but where no such claim was set forth at any stage of the litigation:

Held, that the plaintiff could not be permitted to make a case inconsistent with the title alleged in the plaint and that the relief sought could not be granted [p. 866, col. 2.]

Appeal against the decree of the Subordinate Judge, Barisal, dated the 26th June 1912, reversing that of the Officiating Munsif, 7th Court, Barisal, dated the 16th of May 1911.

Babus *Mohendra Nath Ray* and *Brojendra Nath Chatterjee*, for the Appellant.

Babus *Jogesh Chandra Roy*, *Biraj Mohan Mozumdar* and *Asita Ranjan Ghosh*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff in a suit for enforcement of right of easement of a novel description. The case for the plaintiff is that he, along with some of the defendants, had erected these privies on the disputed property, that they had used the latrines for many years past and that on the 5th February 1908 the latrines were wrongfully demolished by the defendants who also raised an obstruction across the path which led to them. The claim was based on prescription, on implied grant and on necessity. The Subordinate Judge has dismissed the suit on the ground that an easement of this description is unknown to the law; he has also found that no grant can be implied in the circumstances of the case, that the alleged necessity has not been established, and that if the latrines were restored, they would constitute a nuisance to the residents of the neighbourhood. In our opinion, the view taken by the Subordinate Judge is manifestly right.

If, as is alleged by the plaintiff, he along with the defendants erected latrines on land which did not belong to them, and used them for a long series of years, no question of easement arises. An easement of this description is unknown to law, and it is well settled that the Court will not create a new species of easement [*Keppell* v. *Bailey* (1), *Hill* v. *Tupper* (2); Laws of England, edited by Halsbury, Volume XI, section 500]. In the present case, the act of the plaintiff was in the nature of trespass and it might perhaps have been open to him to contend that he had acquired a good title to the disputed property by adverse possession. No such claim, however, has been set forth at any stage of the litigation, and he cannot now be permitted to make a case inconsistent with the title alleged in the plaint. In our opinion, the relief sought cannot possibly be granted.

An application has finally been made to the Court for leave to withdraw the suit so that the plaintiff may have a fresh chance of litigation. We are of opinion that this application should not be granted. The Subordinate Judge has pointed out that there are Municipal latrines in the neighbourhood, and it is eminently undesirable that the plaintiff should have further opportunity to press an entirely unfounded claim.

The result is that the decree of the Court below is affirmed and this appeal dismissed with costs.

Appeal dismissed.

(1) 2 Myl. & K. 517; Coop. temp. Brough, 298; 39 E. R. 1042; 39 R. R. 264.

(2) 2 H. & C. 121; 32 L. J. Ex. 217; 9 Jur. (N. S). 725; 8 L. T. 792; 11 W. R. 784; 133 R. R. 605.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL No. 227 OF 1913.

May 8, 1914.

Present:—Mr. Justice Parlett.

RAHIMA BI *alias* MA TA—DEFENDANT—APPELLANT

versus

MAHAMED SALEH—PLAINTIFF—RESPONDENT.

Muhammadan Law—Marriage between a Hanafi *and a* Shafi *girl—Girl's father not consenting—Marriage, if valid*—Siyeeba.

Where the marriage ceremony between a *Hanafi* and a *Shafi* girl was hurriedly and clandestinely gone through with the knowledge that the girl's father did not and would not consent to it, and to satisfy the Mullah, should that be necessary, the story of her conversion to the *Hanafi* sect was invented:

Held, that the circumstances under which and the manner in which the so-called marriage was performed were such that the usual presumption in favour of its validity could not be made; [p. 868, col. 2.]

that it was invalid for want of consent of the girl's father; [p. 868, col. 2.]

that under *Shafi* Law a woman who under any circumstances had connection with a man became *Siyeeba*. [p. 868, col. 1.]

Mr. *Israil Khan*, for the Appellant.

Mr. *J. R. Das*, for the Respondent.

JUDGMENT.—Plaintiff in this case sued for restitution of conjugal rights. The parties are Muhammadans, plaintiff belong-

ing to the *Hanafi* sect, defendant to the *Shafi*. His case is that they eloped together from her aunt's house in Sitkegon, and went to a Burman, Maung Ba Tun's house in Daingwunkwin, where they were married according to Muhammadan custom on 21st July 1911. They then lived together for three weeks in plaintiff's father's house in Moulmein, and thereafter for one and a half months in her aunt's house. Then under her father's and aunt's influence she refused him access and he has not seen her since. Defendant denies that the marriage was valid, as her father was neither present at it nor consented to it. She admits cohabiting with plaintiff for a short time at his parent's house, and says she left him on account of his wife being there, and returned to her aunt's and father's houses; she denies that he visited her there. The District Court held that there was nothing to show that defendant was not a virgin at the time the marriage ceremony was gone through, and consequently by the *Shafi* Law there could be no valid marriage without the consent of her guardian, in this instance her father, and that admittedly was not obtained. The suit was, therefore, dismissed. On appeal the Divisional Court held that she had lost her virginity by cohabiting with plaintiff for some eight days before the ceremony of marriage, and had thereby become a *siyeeba* and that, therefore, her father's consent was unnecessary to the marriage, which in other respects was regular. Plaintiff was, therefore, granted a decree. Defendant now appeals on two grounds, *first*, that intercourse, after elopement with the man with whom the marriage ceremony was subsequently gone through, did not render her a *siyeeba* within the meaning of the Muhammadan Law, and *secondly*, that even if it did, her marriage without her father's consent would still be invalid under the *Shafi* Law.

The facts are that at the time of suit the girl was 19 or 20 years of age; her mother had long been dead, and she had been living with her aunt, Ma Aung. Her father had married again and had a wife and second family at Kyauktalon: when in Moulmein, however, he lived in the same house as Ma Aung and defendant. He had rejected a proposal from plaintiff for his daughter's hand. He says he objects to the match, as plaintiff already had a wife and gave himself out to defendant as a bachelor. The young couple then eloped and went and lived in one Ba Tun's house at Daingwunkwin. Some four days later plaintiff, his father, a *maistry* of theirs, named Abdulla, and a Pleader, named Abdul Rahim, a brother-in-law of plaintiff and a tenant of his father, went and called the Mullah from a mosque on admittedly false pretences and took him off in a *gharry* to Ba Tun's house. On the way Abdul Rahim and Abdulla told him he was wanted to perform a marriage ceremony. At the house he did not see the bride, but was told that plaintiff's father was her *vakil*, and that she was a *Shafi* but had been converted to the *Hanafi*, the bridegroom's sect. He performed the ceremony at ten o'clock at night with Abdul Rahim and Abdulla as witnesses, plaintiff, his father, acting as the girl's *vakil*, and a Burman being the only others present. Not having brought his register he wrote the marriage certificate on a loose sheet of paper which the bride is said to have signed (Exhibit A). The Mullah puts the date a day later than plaintiff, 22nd July 1911. It is admitted that the girl was hidden from her father and aunt and that the marriage was performed without their knowledge, as it was known that the father would not consent and it was feared he would take her away. About four days later the couple moved to plaintiff's father's house and lived there about three weeks. Then the young couple visited her father's and aunt's house. According to the plaint she remained there and plaintiff visited her regularly: defendant in her written statement denied that he so visited her there. In his evidence plaintiff tried to make out that the two of them lived together in her father's and aunt's house: his own witness, Ma Thein, who lives close to Ma Aung, did not, however, bear this out, and there is no doubt it is untrue. The point is unimportant except as showing how unscrupulous plaintiff and his father are. It is clear, therefore, that the marriage ceremony was hurriedly and clandestinely gone through with the knowledge that the

girl's father did not and would not consent to it. It is clear too that plaintiff's father, at any rate, had suspicions that a *Shafi* girl could only marry with her father's consent, and, therefore, he invented the lie that she was converted to the *Hanafi* sect to satisfy the Mullah, should that be necessary.

It was not denied in this Court that intercourse between the parties took place after the elopement and before the marriage ceremony. No authority was cited for the proposition that such intercourse would not constitute her a *siyeeba* in the eyes of Muhammadan Law. On the other hand I gather from a passage at page 35 of Hamilton's Hedaya that under *Shafi* Law a woman who has under any circumstances had connection with a man becomes a *siyeeba*. On this point I think the Divisional Court was right.

Very little light has been thrown by the arguments of Counsel upon the question whether though defendant was a *siyeeba*, her father's consent was still indispensable to her valid marriage. No evidence was given as to the source or authority of the various texts quoted in the lower Court on plaintiff's behalf, nor do they all by any means bear out the legal proposition on which he relies. Among them Exhibit B lays down that no guardian has power to compel a *siyeeba* woman of the *Shafi* sect to a marriage against her will: but it goes on to say that if she consents to any one else performing her marriage, he can do so as her agent. Exhibit C is against him as it says no *Shafi* marriage is valid which is contracted without the consent of the guardian and the presence of two upright witnesses. In the present case even the witnesses cannot be called independent. Exhibit E says that the guardian's authority ceases when a *Shafi siyeeba* woman attains her majority. Though, however, he may be unable any longer to compel her to a marriage, it does not necessarily follow that she can contract one without his consent. Exhibit G points out that a *siyeeba* being under no one's guardianship is incapable of pronouncing the proposal or acceptance required in a marriage ceremony: she must, therefore, give permission to some man to make the declaration on her behalf, Exhibit H also says that a *Shafi siyeeba* who has attained her majority can give assent to some one to effect her marriage. As the former text expressly notes that the *Hanafi* Law does not require her to authorize anyone, it may be that these passages, if authoritative, merely emphasize the difference between the *Shafi* and *Hanafi* schools as regards the necessity for the guardian's consent and refer to the case where the woman's natural guardian, *i. e.*, father, is no longer alive, which would frequently happen when the *siyeeba* had been previously married. Exhibit F alone states that "a virgin girl of the *Shafi* sect who has attained maturity marries a man of the *Hanafi* sect or of the *Shafi* sect and if her father is not willing, even if he desires to nullify the marriage, it will be valid notwithstanding," and this text so exactly fits the present plaintiff's case as to suggest the possibility that it may have been made to do so. Certainly its authority is not shown. On the other hand Sir Roland Wilson, a recognised authority on Muhammadan Law, writes that according to the *Shafi* doctrines "No woman, whether a virgin or not, can give herself in marriage without the intervention of a guardian" (Anglo Muhammadan Law, 4th Edition Article 392) and again "If a person has been contracted in marriage by an unauthorized agent, the transatcion cannot be rendered valid through the principal's ratification." (Anglo-Muhammadan Law, 4th Edition, Article 394). The circumstances under which and the manner in which the so-called marriage in this case was performed are such that the usual presumption in favour of its validity cannot be made. Authority has not been shown for holding that it was valid notwithstanding the want of defendant's father's consent, whereas there is good authority to show that it was not valid. I, therefore, hold that the validity of the marriage is not made out, and reverse the decree of the Divisional Court and restore that of the District Court with costs throughout, Advocate's fees in this Court two gold *mohurs*.

Decree reversed.

SHEO NANDAN LAL *v.* JAINUL ABDIN.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 245 OF 1911.

November 25, 1914.

Present:—Mr. Justice Coxe and Mr. Justice Richardson.

Lala SHEO NANDAN LAL—DEFENDANT No. 2—APPELLANT

versus

Moulvi JAINUL ABDIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), *s.* 55, *sub-sec.* (4), *cl.* (b)—*Charge, meaning of—Debt and security, if can be transferred.*

The charge mentioned in section 55, sub-section (4) clause (*b*) of the Transfer of Property Act, is not a personal right of the seller himself, and, therefore, can be transferred to an assignee. The debt itself can be transferred and also the security for it. [p. 869, col. 2.]

Hari Ram v. *Denaput Singh*, 9 C. 167; 11 C. L. R. 339 and *Motilal* v. *Bhagwan Das*, 3 Ind. Cas. 497; 6 A. L. J. 645; 31 A. 443, distinguished.

Appeal against the decree of the District Judge, Saran, dated the 24th of September 1910, modifying that of the Munsif, 2nd Court, Chapra, dated the 26th of February, 1910.

Dr. *Dwarka Nath Mitter* and Babu *Satindra Nath Mukherjee*, for the Appellant.

Moulvi *Muhammad Mustafa Khan*, for the Respondents.

JUDGMENT.

COXE, J.—This was a suit for the recovery of Rs. 1,000 said to be a portion of the unpaid purchase-money of *Mauza* Dumdama and, therefore, charged upon that village. This village was sold in 1902 by Ashraf Hossain and Abdul Haq to the appellant. Out of the purchase-money a sum of Rs. 1,000 was kept by the appellant on the understanding that he should in September 1903 pay it to one Mahomed Kazim in payment of a mortgage by conditional sale of two villages, which may briefly be described as Galile and Katsa. Abdul Haq died and this suit was brought by Ashraf Hossain as one of Abdul Haq's heirs and by the other heirs of Abdul Haq. The facts are not very definitely found by the Courts below, but, if I understand their judgment right, they think that Ashraf Hossain in 1904 gave the right of redeeming Galib and Katsa to his daughter, Bibi Azizan, in order that she might obtain those villages by paying the mortgage-money, *viz.* Rs. 1,000, from her own pocket; and that in 1905 he gave to Abdul Haq, his son, his interest in the right of recovering the sum of Rs. 1,000 which was in deposit with the appellant. The appellant had not paid the money although it was two years after the due date, and perhaps there seemed little likelihood of his doing so. In 1906 Abdul Haq gave the appellant notice to pay this money, but as he did not do so, the present suit was instituted. After the suit was instituted the appellant bought the equity of redemption of Galile and Katsa from Azizan and asserts that he gave her the sum of Rs. 1,000 to be paid by her to the original mortgagee. This allegation was supported by Azizan. The Court below does not believe that this sum was ever paid and has given the plaintiffs a decree.

On behalf of the appellant it is *first* contended that the suit cannot be maintained by the present plaintiffs on the ground that the charge mentioned in section 55 sub-section 4, clause (*b*), of the Transfer of Property Act, 1882, is a personal right of the seller himself, and cannot be transferred to an assignee. There is, however, no real authority in support of this view. The cases cited, *Hari Ram* v. *Denaput Singh* (1) and *Moti Lal* v. *Bhagwan Das* (2), are quite different and do not support the present contention. The debt itself could certainly be transferred and I see no reason why the security for the debt should not also be transferred with it.

Secondly, it is contended that, as the defendant says that he has paid Azizan and is supported by Azizan, the plaintiffs can have no right to the money. The Judge, however, finds as a fact that this payment was not made. And if it is the case, as the Courts below evidently think, that in consequence of the appellant's neglect to pay the money Ashraf Hossain decided to cancel the arrangement under which the appellant had to pay the money to the original mortgagee, and transferred to Abdul Haq his right to recover the money directly from the appellant, the payment to Azizan could not possibly be a valid discharge of the appellant's obligation. Notice was given to the appellant to return the money before the institution of the suit and the alleged payment to

(1) 9 C. 167; 11 C. L. R. 339.
(2) 3 Ind. Cas. 497; 6 A. L. J. 645; 31 A. 443.

Azizan was made long after the suit was instituted.

The only other point that has been pressed is that the plaintiffs are not entitled to the whole of the money. This, however, is not raised in the grounds of appeal, and the other defendants, who are prejudiced by this decision if it is wrong in this respect, do not appeal. The appellant is clearly bound to pay the sum, and it matters nothing to him how the plaintiffs and the other defendants divide it among themselves.

The appeal must be dismissed with costs.

RICHARDSON, J.—I agree.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

CIVIL REVISION PETITION No. 186 OF 1913.

June 24, 1914.

Present:—Justice Sir Henry Hartnoll and Mr. Justice Twomey.

A. J. ROBERTSON—APPLICANT

versus

KO CHEIK AND OTHERS—OPPOSITE PARTY.

Lien—Contract Act (IX of 1872), ss. 171, 217, 221—Barrister—Equitable lien—Money paid into Court—Protest, nature of.

In satisfaction of a decree a large sum was paid into Court, through a Barrister, under protest saying that owing to a mistake in the decree more money was deposited than was actually due under it. This sum was afterwards attached in execution of another decree against the judgment-debtor in the first decree. The Barrister claimed a lien over portion of the sum deposited:

Held, that the Barrister had no lien against the sum under sections 171, 217 and 221, of the Contract Act; [p. 870, col. 2.]

that the rule of Solicitor's equitable lien in England did not apply to the case, the Barrister having obtained no decree in favour of his client, and there being not fruits to obtain a lien on; [p. 870, col. 2.]

that as the Barrister had parted with the possession of the money without making any reference to his lien for fees, the amount of fees could not be regarded as having been paid in under protest. [p. 870, col. 2; p. 871, col. 1.]

JUDGMENT.

HARTNOLL, J.—A mortgage-decree was passed against Mr. Robertson's clients, Maung Kala and Ma Gauk, and in satisfaction thereof it is stated that Rs. 9,395-9-10 was paid into Court. Mr. Robertson states that this included a sum of Rs. 402 over and above what was due, owing to a mistake in the decree, and that it was paid in under protest. This sum has now been attached in execution of a decree obtained in another suit against Maung Kala and has been paid out in pursuance of that attachment; but Mr. Robertson claims a lien over Rs. 217 of it as being due to him on account of his fees.

Firstly, in support of his claim he urges that he has an equitable lien over it, and he relies on what is called the Solicitor's equitable lien in England. The nature of this lien is given at page 23 of Volume XIX of Halsbury's Laws of England, and is stated as follows: "A Solicitor is entitled not only to a common law lien for his charges upon documents in his possession belonging to his clients, but also to a lien of an equitable nature upon the fruits of judgments and orders obtained by him in favour of his clients in the suit in which he was employed for his costs in that suit."

Now apart from the fact that Mr. Robertson is a Barrister-at-Law and a general law agent both acting and pleading for his clients, the above rule cannot be held to apply to this case. He obtained no decree in favour of his clients and there were no fruits to obtain a lien on. The question, therefore, whether the rule should be applied to men like Mr. Robertson in this country need not be considered. He can quote no law nor rule giving such a lien in this country. His claim on the first ground put forward by him must fail.

His *next* ground is that he has a lien on the Rs. 217 by virtue of sections 171, 217 and 221 of the Contract Act; but he did not retain the Rs. 217 in his possession. He paid it into Court. He says that he paid it in under protest, but explains that his protest was not that he had such a lien as he claims on it but was merely a protest on behalf of his clients that they were paying in Rs. 402 more than was due by them. This protest on behalf of Mr. Robertson's clients was clearly no bar to the attachment of the extra money by the clients' creditors.

No protest was made as to Mr. Robertson's lien for fees, Rs. 217, included in the sum of Rs. 402. Seeing that he parted with possession of the money without making any reference to his lien for fees, I do not

think we can regard the amount of the fees as having been paid in under protest.

I would, therefore, dismiss this application.

TWOMEY, J.—I concur.

Application dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 216 OF 1913.

April 22, 1915.

Present:—Mr. Justice Walmsley.

JANAB ALI MIA AND OTHERS—DEFENDANTS —APPELLANTS

versus

NAZAMADDIN PRADHANIA AND OTHERS —PLAINTIFFS—RESPONDENTS.

Muhammadan Law—Fosterage—Natural son and foster daughter, marriage between, if legal—Relations of girl, if can question validity of marriage—Factum valet, *principle of, how far applicable.*

Under Muhammadan Law the prohibition regarding marriage attaching to a woman's natural son and foster-daughter is absolute, and not conditional upon the birth of the one and the suckling of the other occurring within any limited period. [p. 872, col. 1.]

It is not lawful for a female to marry any of the sons of the woman who has suckled her, because they are her brothers by fosterage. [p. 872, col. 1.]

Where the paternal relations of a girl brought a suit questioning the validity of the girl's marriage within four months of the marriage, and it appeared that the guardian of the girl had been abusing his position as guardian:

Held, that there was no error in granting the plaintiffs' prayer and allowing the plaintiffs to question the validity of the marriage. [p. 872, col. 1.]

The principle of *factum valet* does not render good in law a marriage which ought not in law to have been celebrated. [p. 872, col. 1.]

Sri Balusu Gurulingaswami v. *Sri Balusu Rumalakshmamma*, 21 A. 460; 26 I. A. 113; 3 C. W. N. 427; 22 M. 398; 9 M. L. J. 67, referred to.

Appeal against the decree of the Subordinate Judge, Tipperah, dated the 3rd of October 1912, affirming that of the Munsif, Additional Court, Chandpur, dated the 19th of August 1911.

Babu *Gobinda Chandra Dey Roy*, for the Appellants.

Dr. *Sarat Chandra Bysack* and Babu *Jatindra Mohan Ghosh*, for the Respondents.

JUDGMENT.—The principal question in appeal relates to the Muhammadan Law of fosterage. The necessary facts are as follows. The defendant No. 3, Newaz Ali, had a son born to him named Janab Ali, defendant No. 1. A few years later, Newaz Ali's wife, the mother of Janab Ali, took charge of Zohara Banu, defendant No. 2, and suckled her. Zohara Banu was then an infant in arms: the lower Courts have not found exactly what her age was when Newaz Ali's wife began to suckle her, but they have found that she had not been weaned and that she was suckled by the woman, which I regard as a finding that she was certainly less than two years and a half. Subsequently Newaz Ali, as certificated guardian of Zohara Banu, gave her in marriage to his son, Janab Ali. The lower Courts have held that such a marriage was unlawful, because by the law of fosterage the two children were prohibited from marrying.

The appellant, Newaz Ali, contends that the lower Appellate Court has misunderstood the authorities. The text-books on which both sides rely are Sir Roland Wilson's Digest of Anglo-Muhammadan Law, Article 37, Baillie's Digest of Muhammadan Law and Grady's Edition of Hamilton's Hedaya.

The difficulty arises from a clause in the explanation to Article 37 in Sir Roland Wilson's book *viz.*, the clause, "or the suckling of one and the birth of the other as the case may be."

Where the relation established by fosterage is between two children who are both strangers to the foster mother, it may be that the prohibition attaches only if the two foster children partake of the same supply of milk, that is, if they are suckled within the same period of two years from the date when the flow of milk began, and, but for the clause which I have quoted, the explanation would seem to refer to this class of relation by fosterage. The clause, however, suggests by the words "birth of one" that it refers to the relation between the woman's natural child and her foster child. If the words do mean that prohibition between the natural child and the foster child does not attach when there has been a certain interval between the birth of the natural child and the suckling of the foster child then, I think, with all respect to the learned author, he goes beyond the text-books which he quotes. In the Hedaya there is this passage: "Prohibition is attached

to the milk of the man (that is to say, to the milk of which he is the cause), if, for example, a woman nurse a female child, the latter is prohibited to her husband and to his father and son, because the husband through whom the woman's breasts have been filled with milk is as a father to the child." Again "it is not lawful for a female to marry any of the sons of the woman who has suckled her, because they are her brothers." Baillie is equally clear: "To the suckling, both his foster parents and their ascendants and descendants, either by natural descent or fosterage, are all prohibited, so that if his nurse should have already borne...a child to the same or to another man whether before the nursing or after it or should have nursed another infant...the whole would be brothers and sisters to the first suckling."

In view of these passages I must hold that the prohibition attaching to a woman's natural son and foster-daughter is absolute, and not conditional upon the birth of the one and the suckling of the other occurring within any limited period. That being so, there could not be a lawful marriage between Janab Ali and Zohara Banu.

It is also urged that the learned Subordinate Judge has erred in allowing the plaintiffs to question the validity of the marriage, because their motive is to escape from the liability to pay rent, and not to safeguard the welfare of Zohara Banu. It is found, however, that the plaintiffs are the girl's paternal relatives: they brought the suit within four months of the marriage; and the learned Munsif refers to various circumstances which suggest that Newaz Ali is abusing his position as guardian. Under these circumstances I cannot hold that there is any error in grantiug the plaintiffs' prayer.

The last suggestion is that as the marriage has been celebrated, and probably consummated, '*factum valet*', but that principle does not render good in law a marriage which ought not in law to have been celebrated. [See the case of *Sri Balusu Gurulingaswami* v. *Sri Ramalakshmamma* (1)].

The appeal fails and it is dismissed with costs.

Appeal dismissed.

(1) 22 M. 398; 21 A. 460; 26 I. A. 113; 3 C. W. N. 427; 9 M. L. J. 67.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL No. 76 OF 1913.

June 30, 1914.

Present:—Justice Sir Henry Hartnoll and Mr. Justice Ormond.

SIT YIN AND ANOTHER—APPELLANTS

versus

MA SHIN—RESPONDENT.

Lower Burma Towns and Village Lands Act (IV of 1898), s. 41—Jurisdiction of Civil or Revenue Court—Litigation between private persons—Eviction of a squatter by a squatter or of a sub-lessee by a lessee—Encroachment by lessee, whether can enure for benefit of lessor.

Where private persons litigate concerning claims to land not held under grant or lease from Government or under a license from the Revenue Officer, but which is at the disposal of Government, the jurisdiction of the Civil Court is not barred by section 41 (*a*) of the Lower Burma Towns and Village Lands Act. [p. 874, col. 1.]

Under the said Act the eviction of a squatter by another squatter, or of a sub-lessee by a lessee is not a matter that 'is to be determined by the Revenue Authority', and there is nothing in the Act to oust the jurisdiction of the Civil Courts in cases which do not involve the decision of any rights as against Government. [p. 875, col. 1.]

The benefit of an encroachment by a lessee on a neighbour's land enures for the benefit of the lessor. [p. 875, col. 1.]

Though section 108 *B* (*d*) of the Transfer of Property Act is not in force in Wakema, the principle embodied therein should be followed. [p. 874, col. 2.]

Secretary of State v. *J. Moment*, 18 Ind. Cas. 22; 13 M. L.T. 53; 17 C. W. N. 169; (1913) M. W. N. 45; 15 Bom. L. R. 27; 11 A. L. J. 49; 17 C. L. J. 194; 6 Bur. L. T. 1; 27 M. L. J. 459; 40 C. 931; 7 L. B. R. 10; 40 I. A. 48, distinguished.

Mr. *Wiltshire*, for the Appellants.

Mr. *J. N. Lentaigne*, for the Respondent.

JUDGMENT.

HARTNOLL, J.—The appellants bring a suit against respondent for ejectment from certain land. Their case is that they purchased certain house property from one Ma Hnit, the house property including the site on which the structures stand. They allege that at the time of the purchase Ma Shin was in possession of the property as tenant to Ma Hnit, and that Ma Shin refused to pay rent and set up antagonistic claims. Ma Shin's defence is that, as regards a portion of the property, at the time of appellant's purchase from Ma Hnit she had already purchased the same from Ma Hnit and that appellants had notice of the same—that appellants' purchase was, therefore, fraudulent and invalid; as regards the rest of the property she claimed that she owned

it and that the site on which the structures stood never belonged to Ma Hnit who had no disposing power over it. Before appellants brought their suit, she had sued Ma Hnit for specific performance of the alleged contract with her. She brought her suit on the 21st May 1910 and appellants brought theirs on the 14th June 1910. On the 16th March 1912 Ma Shin's suit for specific performance was dismissed and on the same day the appellants were given the decree of eviction against respondent that they prayed for. During the pendency of the civil proceedings on the 3rd March 1911 the Deputy Commissioner of Myaungmya cancelled the lease under which Ma Hnit held the property, exclusive of any extensions to it in her possession, for breach of conditions and said: "No action will be taken to evict the present occupants from possession provided that they apply for leases for the areas of which they are in occupation by April 15th." One of the breach of the conditions was the sale to appellants. On the 12th May 1911 the appellants applied for a lease of the portion that they were in possession of and it was granted on the 10th March 1913. Ma Hnit also applied on the 12th May 1911 for a lease of the portion of land remaining with her and was granted such on the 10th March 1913. In the meanwhile on the 21st December 1912 the Divisional Court dismissed the appeal of Ma Shin against the decree of the District Court refusing specific performance and the decree ordering her eviction on the ground that the jurisdiction of the Civil Court was barred by section 41 (*a*) of the Lower Burma Towns and Village Lands Act. This appeal is laid against the decree of the Divisional Court dismissing the appellants' suit asking for the eviction of Ma Shin. The *first* ground of appeal is that the Divisional Judge erred in holding that the Civil Courts had no jurisdiction to decide appellants' claim. The Divisional Court relied on the cases of *J. Moment* v. *Secretary of State* (1) and *Maung Law* v. *Suppaya Padayachi* (2). Section 41 is as follows:—"No Civil Court shall have jurisdiction to determine (*a*) any matter which, under this Act, is to be determined by the Revenue Officer;

(*b*) any claim to any right over land as against the Government." The last part of it has been held to be *ultra vires* according to the Privy Council decision. *Secretary of State* v. *J. Moment* (3).

Looking at the case of *J. Moment* v. *Secretary of State* (1) it will be seen that the suit was one by the Secretary of State against Moment for possession and it was dismissed as it was held that both clauses of section 41 of the Lower Burma Towns and Village Lands Act were a bar to the suit. That part of the decision which held that the suit was barred by section 41 (*b*) has been overruled. It remains to consider whether the remaining part of the decision which dealt with section 41 (*a*) is applicable in the present case. The case of *J. Moment* v. *Secretary of State* (1) was one in which the Secretary of State sued Moment for possession and was not one where the litigation was between two private persons, as in the present case. The point, therefore, whether section 41 (*a*) would be applicable in the case of two private persons litigating was not considered. In the case of *Maung Law* v. *Suppaya Padayachi* (2) the learned Judge did not apparently notice the distinction. As regards the words of the judgment in the case of *Secretary of State* v. *J. Moment* (3) I am not at all sure that the learned Judges meant them to apply in all cases. Adamson, C.J., said: "Section 18 prescribes the method of recovering possession of State land." It would appear that in this passage the learned Judge was contemplating litigation between Government and another person. In view of the foregoing considerations and especially in view of the fact that the case was one of the Secretary of State proceeding against a private person I am of opinion that we are not precluded by the decision from considering whether section 41 (*a*) bars the jurisdiction of the Civil Court where those litigating are on both sides private persons litigating about the right to occupy land which is at the disposal of Government. Section 41, clause (*a*), is "any matter, which, under this Act, is to be determined by the Revenue Officer." I can find no words in the Act laying down

(1) 3 L. B. R. 165.
(2) 3 L. B. R. 256.

(3) 18 Ind. Cas. 22; 7 L. B. R. 10; 13 M. L. T. 53; 17 C. W. N. 169; (1913) M. W. N. 45; 15 Bom. L. R. 27; 11 A. L. J. 49; 17 C. L. J. 194; 6 Bur. L. T. 1; 27 M. L. J. 459; 40 C. 391; 40 I. A. 48.

that all disputes over land at the disposal of Government are to be determined by a Revenue Officer. There are in the Lower Burma Towns and Village Lands Act no provisions corresponding to section 56 (*a*) read with section 55, first proviso, of the Burma Land and Revenue Act, 1876. In Chapter V of the Lower Burma Towns and Village Lands Act, I can find no provision that the only person who can evict from land at the disposal of Government is the Revenue Officer, and that no evictions can take place from such lands except by his order. Sections 18, 19 and 20 only lay down liability to eviction. I would, therefore, hold that where private persons litigate concerning claims to land not held under grant or lease from Government or under a license from the Revenue Officer, but which is land at the disposal of Government, the jurisdiction of the Civil Court is not barred by section 41 (*a*) of the Lower Burma Towns and Village Lands Act.

In accordance with this finding we have heard the appeal on its merits. Ma Shin does not deny that the appellants have brought the land in dispute from Ma Hnit, but she pleads that previous to the doing so Ma Hnit agreed to sell her two of the rooms for Rs. 3,100, earnest-money to the extent of Rs. 600 being paid and that, though appellants knew of this agreement to sell, they nevertheless ignored it and made their own purchase. She also pleads that, as regards the remaining two rooms, the northernmost ones, they never belonged to Ma Hnit and she had no right of disposal over them. As regards her first plea she brought a suit against Ma Hnit and the present appellants for specific performance of her alleged agreement with Ma Hnit. The suit was dismissed by the District Court on the merits. On appeal the Divisional Court dismissed it on the ground that the Civil Court has no jurisdiction. The Divisional Judge also expressed his own opinion on the merits. The evidence taken in that suit was by consent admitted as evidence in the present case. The *first* point for consideration is whether there was an agreement for sale entered into by Ma Hnit and Ma Shin as alleged by Ma Shin. Both the District and Divisional Courts found in the other suit that Ma Shin did not prove that there was. On studying the evidence I have come to the same conclusion. To find that there was I must come to the conclusion that Ma Hnit is wrongfully retaining the Rs. 600 which Ma Shin says she paid as earnest-money. Ma Hnit appears to be a respectable and aged lady; she also seems to be fairly well-to-do. I think it improbable that she would retain Ma Shin's Rs. 600. There were admittedly negotiations between Ma Hnit and Ma Shin with regard to Ma Hnit's selling the property; but the evidence as to their exact nature is conflicting. Maung Shwe Byaw, Ma Hnit's son, says that the Rs. 600 were taken and returned. There is evidence to show that the negotiations between Ma Hnit and Ma Shin fell through as Ma Hnit would not guarantee to bear any penalties the Government might impose on the owner of the property in respect of unauthorized erections on adjoining Government land. No apparent reason exists for disbelieving Po Twe in what he says in connection with this matter. No receipt was ever given for the Rs. 600. Again there is no good reason apparent for disbelieving Po Saing, who was admittedly the writer of the conveyance conveying the property in dispute to the appellants. His evidence does not corroborate that of Po Shwe when the latter says that he went and protested against the sale, but it does corroborate that of Po Ko who says that Po Shwe came to offer the Chinaman Rs. 1,500 in consideration of their not buying the house and of their allowing respondent to do so.

I am of opinion that Ma Shin has not proved her plea that there was an agreement for sale between her and Ma Hnit.

As regards the two northernmost rooms it appears that they were an extension made to the other two rooms and the *panatchut* by Ma Hnit's consent, the latter reducing the rent Rs. 10 in consequence. From the evidence it is not clear whether these extensions were made wholly, or partially, on Ma Hnit's land, or on land at the disposal of Government: but this does not seem to me to affect the matter. Though section 108 B (*d*) of the Transfer of Property Act is not in force in Wakema, it embodies a well-known principle of law that should be followed. If Ma Shin has encroached on Government land, such encroachment enures for the benefit of her lessor, Ma Hnit. She does not ask for compensation for the new erections, and

it is clear that she has had her rent reduced Rs. 10 a month for a considerable time.

I would, therefore, set aside the decree of the Divisional Court and restore that of the District Court with costs to the appellants in all Courts.

ORMOND, J.—We are not concerned with the dealings by Government, in connection with the land in dispute since the institution of the suit. The case must be decided according to the circumstances in existence at the time of the institution of the suit. At that time, Ma Hnit's lease had not been cancelled; though, in my opinion, it is immaterial whether she ever had a lease from Government or not. There is nothing in the Lower Burma Towns and Village Lands Act to oust the jurisdiction of the Civil Courts in this case. The eviction of a squatter by another squatter or of a sub-lessee by a lessee is not a matter that "is to be determined by the Revenue Authority"; and the case does not involve the decision of any rights as against Government. Ma Shin, the appellant, admits that she was the tenant, as to the southern portion of the premises in dispute, of Ma Hnit, the plaintiffs' vendor; but she says she had agreed to buy this portion from Ma Hnit and had paid her Rs. 600 as part of the purchase-money. Both the lower Courts have found that there was no such contract for sale and no such payment. My learned colleague has stated the facts and I concur in upholding such finding. As to the northern portion of the premises, it was an extension made by Ma Shin on Government land. She had no license or lease from Government; it was, therefore, an encroachment by a lessee on a neighbour's land and the benefit of such encroachment enures for the benefit of the lessor, Ma Hnit. The plaintiffs, who bough' the premises from Ma Hnit, are, therefore, entitled to evict the respondent, Ma Shin, from the whole premises. I concur in the order proposed by my learned colleague.

Decree set aside.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2218 OF 1912.

March 22, 1915.

Present.—Mr. Justice Holmwood and Mr. Justice Walmsley.

HANKAR RAI—DEFENDANT No. 1—APPELLANT

versus

KAMTA PROSHAD SAHU AND ANOTHER—PLAINTIFF & DEFENDANT—RESPONDENTS.

Mortgage—Subsequent mortgagee, made party to suit on prior mortgage—Failure to appear—Right to raise afterwards plea of payment of prior lien—Test.

A subsequent mortgagee who has been made party to a suit on a prior mortgage but who has failed to appear cannot afterwards raise the plea that he had paid off a prior lien and was, therefore, in the position of a prior mortgagee. [p. 876, col. 1.]

Mahomed Ibrahim Hossein Khan v. *Ambika Pershad Singh*, 14 Ind. Cas. 496; 11 M. L. T. 265; (1912) M. W. N. 367; 9 A. L. J. 332; 14 Bom. L. R. 280; 16 C. W. N. 505; 15 C. L. J. 411; 22 M. L. J. 468; 39 C. 527 (P. C.), followed.

The test in all such cases is, was the defendant impleaded as a puisne mortgagee and, therefore, a necessary party, if he was, he is bound to set up his prior mortgage as well as his subsequent mortgage. [p. 876, col. 1.]

Mohant Kishen Dyal Gir v. *Mahomed Amirul Hussein*, 26 Ind. Cas. 673; 19 C. W. N. 942, referred to.

Appeal against the decree of the Subordinate Judge, first Court, Shahabad, dated the 27th of June 1912, reversing that of the Munsif, first Court, at Arrah, dated the 30th of June 1911.

Babus *Chandra Sikhar Prosad Singh* and Moulvi *Khurshed Hossain*, for the Appellant.

Babu *Umakali Mukherji* and *Sudhasnshu Sikhar Mukherjee*, for the Respondents.

JUDGMENT.—The simple question which arises in this second apeal is the same as that which was decided in the Court of Appeal below, namely, whether defendant No. 1 not having set up his alleged prior lien in the suit brought by Gopal Sahu to which he was made a party, is precluded from raising the plea in the present suit. On the authorities cited by the learned Judge in the Court below in his judgment and on the further authority of the Judicial Committee in the case of *Mahomed Ibrahim Hossein Khan* v. *Ambika Pershad Singh* (1), we are clearly of opinion that the learned Judge in the Court below was right when he says that these decisions clearly lay down that

(1) 14 Ind. Cas. 496; 11 M. L. T. 265; (1912) M. W. N. 367; 9 A. L. J. 332; 14 Bom. L. R. 280; 16 C. W. N. 505; 15 C. L. J. 411; 39 C. 527 (P. C.); 22 M. L. J. 468.

a subsequent mortgagee, who has been made party to a suit on a prior mortgage but who has failed to appear, cannot afterwards raise the plea that he had paid off a prior lien and was, therefore, in the position of a prior mortgagee. The same question was recently discussed at length in *Mohant Kishen Dyal Gir* v. *Mahomed Amirul Hussein* (2), which was decided by one of us sitting with Mr. Justice Carnduff on the 16th December 1914, in which we said, the test in all cases we have had laid before us is, was the defendant impleaded as a puisne mortgagee and, therefore, a necessary party, if he was, he is bound to set up his prior mortgage as well as his subsequent mortgage. That being so, we can have no doubt that the decision of the lower Court is correct.

As regards any equitable relief which might have been given to the parties on the facts, we do not think that in second appeal we can deal with that question. The only question before us is whether the learned Judge in the Court below was right or wrong in the matter of the law as laid down by him.

The result is that the appeal is dismissed with costs.

Appeal dismissed.

(2) 26 Ind. Cas. 673; 19 C. W. N. 942.

LOWER BURMA CHIEF COURT.

CIVIL REVISION PETITION No. 17 OF 1914.

July 3, 1914.

Present:—Mr. Justice Twomey.

V. V. M. CHETTY FIRM—APPLICANT

versus

R. M. A. R. ARUNACHALLUM CHETTY—RESPONDENT.

Civil Procedure Code (*Act V of* 1908), *s.* 115—*Revision—Interlocutory order—Refusal to frame additional issue.*

Even if the High Court can deal in revision with an interlocutory order in a suit, the exercise of the power is in the discretion of the Court and the power should not be exercised unless it appears that substantial injury may be caused to the applicant if he is left to wait for the ultimate remedy in appeal from the decree. [p. 876, col. 2.]

There is no precedent for interference in revision with an order declining to frame an additional issue in a suit. [p. 876, col. 2.]

Mr. *B. P. Lentaigne*, for the Applicant.

Mr. *J. R. Das*, for the Respondent.

JUDGMENT.—There is the authority of the Calcutta High Court in support of the view that the High Court can deal in revision with an interlocutory order in a suit [*Dhapi* v. *Ram Pershad* (1)], but I note that several other High Courts are opposed to this view. At any rate the exercise of this power is in the discretion of the Court and I think it is obvious that the power should not be exercised, unless it appears that substantial injury may be caused to the applicant if he is left to wait for his ultimate remedy in appeal from the decree. There is no precedent, so far as I am aware, for interference in revision with such an order as that now under consideration, *viz.*, an order declining to frame an additional issue in a suit. It is manifestly inexpedient that the progress of a suit should be liable to interruption on such a ground as this, and the most cogent reasons would be necessary to justify it.

The applicants are some of the defendants in a suit brought by the respondent as plaintiff, and the additional issue which they wanted the Court to frame was an issue as to whether certain other persons should not be joined as parties to the suit. Apparently this would depend on whether the plaintiff-respondent sued in his individual capacity or as representing his firm, the other persons referred to being, as it is alleged, co-partners therein. The heading of the plaint is of an ambiguous character and it certainly reads at first sight as if the plaintiff was suing as an individual. But the lower Court has treated the suit as a suit by the plaintiff's firm, and in an order dated after the present application was filed, the learned Judge has decided that it is unnecessary to join the persons referred to. The reason given is that they are merely the legal representatives of deceased partners and are, therefore, not necessary parties under Order XXXIV, rule 4. It further appears from the record that when issues were framed the applicant's Counsel was present and made no application then for an additional issue as to these persons being necessary parties. It cannot be said that they did not then know that Ramaswami was a partner, for this fact was disclosed in the examination of the plaintiff's agent two days earlier (the applicant's Advocate being present).

(1) 14 C. 768.

On the question whether the suit has been rightly treated as a suit under Order XXX, I can express no opinion at this stage. But in the circumstances mentioned above I am of opinion that no sufficient ground has been made out for interference in revision with the District Judge's order of 15th December 1913.

The application is dismissed with costs. Advocate's fee three gold *mohurs*.

Application dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 77 OF 1914.

February 26, 1915.

Present:—Mr. Justice N. Chatterjea and Mr. Justice Greaves.

BADARENNESSA CHOWDHURANI—OPPOSITE PARTY—APPELLANT

versus

ALAM GAZI AND OTHERS—RESPONDENTS.

Occupancy holding, if can be sold—Co-sharer landlord decree-holder, position of—Holding not to be sold, if raiyat *objects—Transfer, involuntary, of whole or part of holding, how far valid.*

An occupancy holding which is not saleable by custom or usage cannot be sold in execution of a decree obtained by a co-sharer landlord for his share of the rent, and in this respect a co-sharer landlord is in the same position as an ordinary executing creditor. [p. 877, col. 1.]

Durga Charan Mandal v. *Kali Prasanna Sarkar*, 26 C. 727; 3 C. W. N. 586; *Jarip* v. *Ram Kumar De*, 3 C. W. N. 747 and *Dayamoyi* v. *Ananda Mohan Roy Chowdhury*, 27 Ind. Cas. 61; 20 C. L. J. 52; 42 C. 172; 18 C. W. N. 971 (F. B.), referred to.

A *raiyat* is entitled to have a sale of his holding in execution of a money-decree set aside after it takes place, and the holding cannot be sold in execution of such a decree where the *raiyat* objects to the sale before it takes place. [p. 878, col. 1.]

Dayamoyi v. *Ananda Mohan Roy Chowdhury*, 27 Ind. Cas. 61; 20 C. L. J. 52; 42 C. 172; 18 C. W. N. 971 (F. B.), followed.

A non-transferable occupancy holding is not a saleable property. [p. 878, col. 1.]

The principle deducible from the decision in *Dayamoyi* v. *Ananda Mohan Roy Chowdhury*, 27 Ind. Cas. 61; 20 C. L. J. 52; 42 C. 172; 18 C. W. N. 971 (F. B.), is applicable to an involuntary transfer of the whole as well as of a part of the holding. [p. 878, col. 1.]

Dwarkanath Pal v. *Tarini Sankar Ray*, 34 C. 199; 11 C. W. N. 513; 5 C. L. J. 294, distinguished.

Shukuruddin v. *Rani Hemangini Debi*, 13 Ind. Cas. 192; 16 C. W. N. 420, not followed.

A co-sharer landlord is not entitled to sell the whole or part of the occupancy-holding of the *raiyat* in execution of a decree obtained by him against the *raiyat*. [p. 878, col. 2.]

Appeal against the order of the District Judge, Tipperah, dated the 29th November 1913, affirming that of the Munsif, 5th Court, Comilla, dated the 23rd of August 1913.

Babu *Birendra Chandra Das*, for the Appellant.

Babu *Upendra Kumar Roy*, for the Respondents.

JUDGMENT.—This appeal arises out of an application for execution of a decree obtained by a co-sharer landlord for his share of the rent of an occupancy holding. The judgment-debtor, the *raiyat*, raised an objection that as the holding was not transferable by custom or local usage, it could not be sold in execution of the decree obtained by the co-sharer landlord.

The Courts below have given effect to the objection, and have disallowed the application for execution. The decree-holder has appealed to this Court.

Now it has been held in a number of cases that an occupancy holding which is not saleable by custom or usage, cannot be sold in execution of a decree obtained by a co-sharer landlord for his share of the rent, and that in this respect a co-sharer landlord is in the same position as an ordinary execution creditor. See *Durga Charan Mandal* v. *Kali Prasanna Sarkar* (1), *Sadagar Sirkar* v. *Krishna Chandra Nath* (2), *Jarip* v. *Ram Kumar De* (3). And the recent Full Bench in the case of *Dayamoyi* v. *Ananda Mohan Roy Chowdhury* (4) have laid down that an involuntary transfer, *i. e.*, a sale in execution of a money-decree of the whole or part of an occupancy holding, apart from custom or local usage, is operative against the *raiyat*, where the *raiyat* with knowledge fails or omits to have the sale set aside. It is true the questions whether a *raiyat* is entitled to have the sale set aside, or has the right to object to the sale before it takes place, were not in terms decided by the Full Bench. But

(1) 26 C. 727; 3 C. W. N. 586.
(2) 26 C. 937; 3 C. W. N. 742.
(3) 3 C. W. N. 747.
(4) 27 Ind. Cas. 61; 20 C. L. J. 52; 42 C. 172; 18 C. W. N. 971 (F. B.).

if the *raiyat* has no right to object to the sale of an occupancy holding in execution of a money-decree before it takes place or has no right to have the sale (after it takes place) set aside, in other words, where the sale is valid, the sale would be operative against him, and it would be immaterial whether he had knowledge of the sale or omitted or failed to have it set aside. The sale however, though invalid, may be operative against the *raiyat* if he with knowledge thereof omits or fails to have it set aside. The question, therefore, of the omission or failure to set aside the sale with knowledge thereof becomes material only where the sale is invalid, and the *raiyat* has a right to object to it. We are accordingly of opinion that the Full Bench decision by implication holds that the *raiyat* is entitled to have a sale of the holding in execution of a money-decree set aside after it takes place, and that the holding cannot be sold in execution of such a decree where the *raiyat* objects to the sale before it takes place. This view is in accordance with that taken in the cases cited above, and it is to be observed that the Full Bench laid down what had been established by the weight of modern authority.

No doubt, under section 60 of the Civil Proceedure Code, all saleable property belonging to the judgment-debtor, or over which he has a disposing power which he may exercise for his own benefit, is liable to sale in execution of a decree. But a non-transferable occupancy holding is not saleable property, and the Full Bench decision does not hold that the *raiyat* has a disposing power over the holding. All that it holds is that a voluntary transfer is operative against him.

It is next contended that the decree-holder being a co-sharer landlord to the extent of a 10-annas share is entitled to sell a 10-annas share of the holding. But apart from other considerations, the principle deducible from the Full Bench decision is applicable to an involuntary transfer of the whole as well as of a *part* of the holding.

There are certain observations in the case of *Dwarkanath Pal* v. *Tarini Sankar Ray* (5) to the effect that it is not necessary that the consent of the landlord should be obtained prior to the sale, and that the sale is valid, if the landlord subsequently to the sale recognises the purchaser and receives rent from him. But in that case, the defendants with full knowledge of the execution proceedings and the sale had failed to raise the objection at the time of the sale that the holding was not transferable, and the question was raised after the sale had been confirmed, and after the purchase had been recognised by the landlord.

In the case of *Shukuruddin* v. *Rani Hemangini Debi* (6), referred to in the judgment of the Court below, it appears that this Court maintained an order passed by the Court below granting the decree-holder's application for sale of an occupancy holding to the extent of a $15\frac{1}{4}$-annas share, the co-sharer landlords to that extent having consented to the sale. In doing so, however, the learned Judges said that "the non-consenting landlords may give their consent after the sale. In any case the decree-holder takes the risk, and in the present state of the law the purchaser will purchase at his peril. We do not think it necessary to interfere." The decision can no longer be followed having regard to the view taken by the Full Bench.

We are accordingly of opinion that the appellant is not entitled to sell the whole or part of the occupancy holding in execution of the decree obtained by him.

The appeal is dismissed, but we make no order as to costs.

Appeal dismissed.

(5) 34 C. 199; 11 C. W. N. 513; 5 C. L. J. 294.

(6) 13 Ind. Cas. 192; 16 C. W. N. 420.

MADRAS HIGH COURT.
FULL BENCH.

CIVIL MISCELLANEOUS PETITION No. 2602 OF 1914.

April 16, 1915.

Present:—Sir John Wallis, KT., Chief Justice, Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

A VAKIL OF THE HIGH COURT—PETITIONER

versus

THE PRESIDENT OF THE VAKILS' ASSOCIATION, HIGH COURT, MADRAS—RESPONDENT.

Letters Patent (Mad.), cls. 10, 39—Orders in exercise of disciplinary jurisdiction—Leave to appeal to Privy Council, whether to be granted.

Orders passed in proceedings in exercise of the disciplinary jurisdiction of the High Court under section 10 of the Letters Patent are not appealable under clause 39 of the Letters Patent and no special leave to appeal to the Privy Council can be granted.

Hume, Public Prosecutor of Calcutta v. *Poresh Chandra Ghosh*, 22 Ind. Cas. 324; 41 C. 734; 15 Cr. L. J. 52; 19 C. W. N. 593; *Ganesh S. Dandvate* v. *Government Pleader*, 32 B. 106; 10 Bom. L. R. 21; 3 M. L. T. 131; *Tetley* v. *Jai Shankar*, 1 A. 726, followed.

In the matter of Sashi Bhushan Sarbadicary, 34 I. A. 41; 11 C. W. N. 273; 29 A. 95 (P. C.); 4 A. L. J. 34; 9 Bom. L. R. 9; 17 M. L. J. 74; 5 C. L. J. 130; 2 M. L. T. 1, distinguished.

Petition praying that in the circumstances therein the High Court will be pleased to grant the petitioner a certificate to enable him to appeal to His Majesty in Council from the order, dated the 20th March 1914, of this Court in Civil Miscellaneous Petition No. 585 of 1914 and to exempt the petitioner from furnishing security for costs.

FACTS.—A Vakil was suspended by the High Court from practising for a period of two months in a proceeding taken under section 10 of the Charter Act for misconduct. He applied for leave to appeal to the Privy Council under sections 109 and 110 of the Code of Civil Procedure.

Mr. *G. S. Ramachandra Aiyar*, for the Petitioner.

ORDER.—The petitioner relies upon the fact that leave to appeal was granted by this Court in a similar case, Civil Miscellaneous Petitions Nos. 595 and 596 of 1912, but on a further consideration of the question we agree with the recent decision *Hume, Public Prosecutor of Calcutta* v. *Poresh Chandra Ghosh* (1) that disciplinary proceedings under clause 10 of the Letters Patent are not appealable under clause 39, and that we have no power to give leave to appeal to the Privy Council from an order passed in the exercise of such jurisdiction. This is also the view taken in *Ganesh S. Dandvate* v. *Government Pleader* (2). In *Tetley* v. *Jai Shankar* (3) also it was held that no such leave could be granted and though in the subsequent case from Allahabad, *In the matter of Sashi Bhushan Sarbadhicary* (4), it appears that leave was granted by the Allahabad High Court, the reports show that special leave to appeal was obtained from their Lordships before the appeal was heard.

The application is dismissed.

Application dismissed.

(1) 22 Ind. Cas. 324; 41 C. 734; 15 Cr. L. J. 52; 19 C. W. N. 593.

(2) 32 B. 106; 10 Bom. L. R. 21; 3 M. L. T. 131.

(3) 1 A. 726.

(4) 34 I. A. 41; 11 C. W. N. 273; 29 A. 95 (P. C.); 4 A. L. J. 34; 9 Bom. L. R. 9; 17 M. L. J. 74; 5 C. L. J. 130; 2 M. L. T. 1.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1184 OF 1912.

August 6, 1914.

Present:—Mr. Justice Woodroffe and Mr. Justice Coxe.

MOHIM CHANDRA DEY—PLAINTIFF—APPELLANT

versus

BAIDYA NATH KAPALI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885) ss. 49 (b), 85 (2)—Lease, perpetual, validity of—Under-raiyat—Rent, acceptance of, if ratification.

Where a *raiyat* grants a lease allowing the lessee to hold the land from generation to generation, and gets rent therefrom, the lease is a nullity, and the acceptance of rent from the lessee cannot effect a ratification of the lease, which is initially void. [p. 880, col. 1.]

Jarip Khan v. *Durfa Bewa*, 15 Ind. Cas. 476; 16 C. L. J. 144; 17 C. W. N. 59 and *Telam Pramanik* v. *Adu Sheik*, 18 Ind. Cas. 791; 17 C. W. N. 468, followed.

Appeal against the decree of the Officiating Additional Subordinate Judge, Mymensingh, dated the 19th of February 1912, reversing that of the Munsif, first Court, Mymensingh, dated the 19th July 1911.

Babus *Jogesh Chandra Roy* and *Sasanka Jiban Roy*, for the Appellant.

Babu *Govinda Chandra Dey Roy*, for the Respondents.

RAM DEO SINGH *v.* MOHESWAR PROSAD.

JUDGMENT.—There have been drawn to our notice two decisions, *Jarip Khan* v. *Durfa Bewa* (1) and *Telam Pramanik* v. *Adu Sheik* (2), which were decided after the date of the judgment under appeal and which, therefore, have not been referred to by the Subordinate Judge. Those cases appear to establish that the lease in this case should not have been admitted for registration under section 85, clause 2, of the Bengal Tenancy Act, and that the lease is a nullity. That being so, although, as the first Court has held, the plaintiff after the death of his guardian accepted rent from the defendants, he could not thereby effect a ratification of the lease which was initially void.

The appellant has undertaken, however, to refund to the defendants the sum of Rs. 85 received by him as a bonus for the lease and to refund that amount before taking possession of the property. This undertaking is recorded and must be given effect to.

The appeal must, therefore, be decreed and the decree of the Munsif restored, subject to the undertaking by the appellant that he will not attempt to get *khas* possession until he has refunded the money which he has taken from the defendants.

As the appeal is decided upon a question which is one of doubt and upon decisions which have been reported since the date of the judgment under appeal, the order which I think we should make as to costs in this Court and in the lower Appellate Court is that the parties will bear their own costs. The order as to costs of the first Court will stand.

Appeal allowed.

(1) 15 Ind. Cas. 476; 16 C. L. J. 144; 17 C. W. N. 59.

(2) 18 Ind. Cas. 791; 17 C. W. N. 468.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2936 OF 1914.

February 22, 1915.

Present:—Mr. Justice Sharfuddin and Mr. Justice Coxe.

RAM DEO SINGH—DEFENDANT—APPELLANT

versus

Babu MOHESWAR PROSAD—PLAINTIFF—RESPONDENT.

Bengal Tenancy (Amendment) Act (I of 1907), s. 31(a), scope of—Rent, enhancement of—"Prevailing rate," meaning of.

Per *Sharfuddin, J.*—The 'prevailing rate' is not the average rate of rent of neighbouring villages. [p. 881, col. 1.]

Where it is found that there is no prevailing rate in the neighbouring villages, no decree for enhancement can be given. [p. 881, col. 1.]

Where the provisions of section 31 (*a*) of the Bengal Tenancy Act are not extended, the principles of the prevailing rate cannot be applied. [p. 881, col. 1.]

Per *Coxe, J.*—Where the great majority of the *raiyats* are found to pay at the rate of Rs. 4 and over in the neighbouring villages:

Held, that Rs. 4 and over is not a rate at all, much less a prevailing rate, unless the artificial construction contained in section 31 (*a*) is placed on that expression. [p. 881, col. 1.]

It is not the intention of the Legislature that section 31 (*a*) should apply in a district to which it is not formally extended, however reasonable the provisions of that section are. [p. 881, col. 1.]

Appeal against the decision of the District Judge of Muzufferpur, dated the 17th June 1911, modifying that of the Officiating Munsif Hajipur, dated the 11th July 1910.

Babus *Satis Chandra Ghose* and *Anilendra Nath Ray Chowdhury*, for the Appellant.

Babus *Jogesh Chandra Roy* and *Akhoy Kumar Banerjee*, for the Respondent.

JUDGMENT.

SHARFUDDIN, J.—This is an appeal from the judgment of the District Judge of Muzufferpur dated the 17th June 1911. The plaintiff is the landlord and as such he sued the defendant, who is an occupancy *raiyat* of *Mouza* Bishunpur, Chandpur *Lakhiraj*, for enhancement of rent, on the ground that the rate at which the defendant paid rent was below the prevailing rate paid by *raiyats* for similar lands in neighbouring villages and also on the ground of a rise of price of staple crops. The Munsif gave a decree at the rate of Rs. 5 per *bigha* for the years in suit and declared Rs. 5 per *bigha* for future years as the prevailing rate. On appeal, the learned District Judge held that the rent could not be doubly enhanced, both on the ground of the prevailing rate and also on the ground of a rise of prices, and that the prevailing rate should be fixed at Rs. 4 per *bigha*. He gave a decree for the years in suit at the then existing rate. The defendant appeals to this Court and we are now asked to decide the correctness of the judgment of the District Judge.

The points taken are that the lower Appellate Court was in error in thinking that the average rate of the neigbouring villages is the

prevailing rate and that as no one prevailing rate was found, the suit should have been dismissed.

The finding of the lower Appellate Court is that there is really no prevaling rate in the neighbouring villages. It appears that in one village the rate varies from Re. 1 to Rs. 116 per *bigha*. It is further found that there are 511 tenants in three neighbouring villages, and of these 437 pay rent at the rate of Rs. 4 per *bigha* and over. This cannot be held to be the prevailing rate. The learned District Judge admits that the provisions of section 31 (*a*) of the Bengal Tenancy Act have not been extended to Mozafferpore. At the same time he was led, in order to do justice, practically to apply the same principles to the present case. We have to administer the law and we cannot in the circumstances of the present case hold that any one prevailing rate has been ascertained and found and, therefore, no decree for enhancement can be given in this case.

The appeal is decreed and costs to abide the result. The lower Appellate Court having come to no decision on the question of enhancement on the ground of rise in prices of staple crops, the case is remanded for disposal after an inquiry whether the landlord is entitled to enhancement on this ground.

This judgment governs the other appeal No. 3348 of 1911.

COXE, J.—I agree. The finding of the District Judge is that the great majority of the *raiyats* pay at the rate of Rs. 4 and over and, therefore, the prevailing rate of these villages cannot be said to be less than Rs. 4. In my opinion Rs. 4 and over is not a rate at all, much less a prevailing rate, unless the artificial construction contained in section 31 (*a*) is placed on that expression.

The fact seems to be that the provisions of that section are so reasonable that the learned District Judge was naturally inclined to apply it in his district, even although it was not formally extended; but as it has not been extended, we must assume that it is not the intention of the Legislature that the section should apply. The question, however, of extending it to the district might very well be considered.

Appeals allowed.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 4 OF 1913.

October 20, 1914.

Present:—Sir Charles Fox, KT., Chief Judge, and Mr. Justice Hartnoll.

MA TIN ME—PLAINTIFF—APPELLANT

versus

MAUNG MAUNG AND OTHERS—DEFENDANTS—RESPONDENTS.

Buddhist Law—Husband and wife—Wife's interest in joint property affected by mortgage executed by husband alone—Wife's conduct and acquiescence—Estoppel.

Where a Buddhist couple jointly owned properties but the business was carried on by the husband in his name only and he alone mortgaged the joint properties but the wife knew of the mortgages created by him and acquiesced in them from the beginning:

Held, that the husband had power to bind and did bind the wife's interest in the mortgaged properties. [p. 882, col. 1.]

Where the leases of the sites of certain mills were in the name of the husband alone and where in his business transactions he alone appeared as the rice mill owner and the wife did not say that she was half owner of the mortgaged properties, although she took part in the negotiation of a mortgage:

Held, that the wife was estopped from pleading that the mortgage decree passed against her husband alone did not affect her interest in the mortgaged property as she was not a party to the suit. [p. 882, col. 2.]

Appeal against the judgment and decree of the District Judge of Pegu, dated 16th December 1912, in Civil Regular No. 28 of 1912.

Mr. *Dantra*, for the Appellant.

Mr. *B. Lentaigne*, for the 2nd Respondent.

JUDGMENT.—Messrs. Wightman and Co. admittedly advanced to Maung Maung, the husband of Ma Tin Me the appellant, the sums of Rs. 35,000 and Rs. 25,000. As security for the first loan the mill premises and other properties mentioned in paragraph 2 (A), (B) and (C) of the plaint were mortgaged and as security for the second loan the mill premises and properties mentioned in paragraph 2 (D) of the plaint were mortgaged. The respondents, Messrs. Wightman and Co., subsequently sued Maung Maung to recover the amount due on the two mortgages and obtained the usual mortgage-decree. They subsequently became the auction-purchasers of the mortgaged properties.

Now Ma Tin Me brings this suit to obtain a decree declaring that she is the joint owner of the mortgaged properties, that her share in them is one half, that the mortgage created by Maung Maung does not bind her interest and that the

mortgage-decree passed against Maung Maung in favour of respondents does not affect her or her interest in the property. Her suit has been dismissed by the District Judge and she appeals.

The *first* point for consideration is whether she and Maung Maung jointly own the properties mortgaged by Maung Maung and on a consideration of the evidence it must be held that they do. They are a Burmese Buddhist couple, and the premises mortgaged were acquired after their marriage, the mills being erected after their acquisition. As the Exhibits show, appellant and Maung Maung borrowed heavily from a Chetty firm. It is reasonable to assume that such borrowed moneys had their part in the erection of the first mill. The second mill appears to have been paid for, in great part, with the money advanced by respondents on the second mortgage. Ma Tin Me took a considerable part in the raising of this loan.

The *next* point for decision is whether Maung Maung in creating the mortgages bound Ma Tin Me's interest in the properties mortgaged. The leading case on the subject is that of *Ma Thu* v. *Ma Bu* (1), which has never been dissented from. It is clear from the evidence that Maung Maung has been conducting the paddy and the milling business and that Ma Tin Me's name has not appeared in connection therewith.

The letter, Exhibit I, shows that the business was carried on solely in Maung Maung's name—the business stamp being "Maung Maung, Deiku Rice Mill Owner." The contracts Exhibits 3 and 4 are in the name of Maung Maung only. The evidence clearly shows that Ma Tin Me knew of the mortgages and acquiesced in them from the beginning, for I can see no reason to disbelieve the defence witnesses. In the circumstances it must be held that Maung Maung in executing the mortgages had power to bind and did bind Ma Tin Me's interest in the mortgaged properties.

The *last* point for decision is whether the mortgage-decree passed against Maung Maung affects Ma Tin Me and her interest in the mortgaged property, in that she was not a party to the suit and the decree was not passed against her. Order XXXIV, rule 1, of the Code of Civil Procedure is relied on. There is no doubt that Ma Tin Me should have been made a party to the mortgage suit; but the question is whether she is not estopped from pleading now that she is not affected by the mortgage-decree. It goes without saying that if the respondents had understood, she was half owner of the mortgaged properties, they would have joined her as a defendant in the mortgage suit and so have avoided future complications. Have they been negligent in not joining her? They are a European firm and would not be likely to know the law of joint ownership of property acquired during the marriage of a Burmese Buddhist man and wife. They dealt with Maung Maung as he ostensibly held himself out as the owner of the sites and mills. Admittedly the leases of the sites were in his name only. In his business dealings he alone appears as the rice mill owner. Ma Tin Me allowed this. Further when Abdul Aziz was conducting the negotiations leading to the first mortgage, Ma Tin Me not only did not object but actively acquiesced. She did not then say that she was half owner of the properties. Abdul Aziz is a native of India other than Burma and may not have known Buddist Law and customs. At the time of the negotiations for the second mortgage Ma Tin Me went personally to Mr. Paton and begged for the loan. She did not then say that she was half owner, but she allowed the mortgage to be in Maung Maung's name only as if he were the only owner. Such conduct could not but fail to mislead the respondents and cause them to think that Maung Maung was the owner and had power to deal with the property. Under such circumstances, can they be said to have been negligent in not joining Ma Tin Me as a defendant when the time came to bring a suit to recover their money? The disclosed conduct of Ma Tin Me is such that it is not open to her now to plead that she is not bound by the decree obtained by respondents against Maung Maung.

The appeal is dismissed with costs.

Appeal dismissed.

(1) L. B. R. (1872-1892), 578.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3098 OF 1911.

February 25, 1915.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Richardson.

AMBICA CHARAN BEPARI—PLAINTIFF—APPELLANT

versus

ASWINI KUMAR BANERJEE AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 149 (3), scope of—Arrears of rent, suit for—'Money,' meaning of—Apportionment, question of.

In a suit for arrears of rent against a tenant, the money mentioned in sub-section (3) of section 149 of the Bengal Tenancy Act is the entire sum deposited into Court under sub-section (1) and no question of apportionment between rival claimants to proprietorship of the tenancy is intended to be raised or decided under the section.

Where it is admitted by the tenant defendant that part at any rate of the sum deposited is due to the defendant-landlord but the precise part so due is not determined:

Held, that section 149 of the Bengal Tenancy Act has no application, the question of apportionment being not within the scope of the suit.

Appeal against the decree of the Subordinate Judge of Backergunj, dated the 18th July 1911, reversing that of the Munsif of Barisal, dated the 1st October 1910.

Babu *Surendra Nath Das Gupta*, for the Appellant.

Babus *Satis Chunder Ghose* and *Biraj Mohan Majumdar*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff in a suit instituted under section 149 (3) of the Bengal Tenency Act. The plaintiff was successful in the Court of first instance but his claim has been dismissed on appeal by the Subordinate Judge. The landlord-defendant instituted a suit for arrears of rent against the tenant-defendant in respect of the eleven parcels of land. The tenant pleaded in substance that he was liable to pay rent in respect of nine plots, but that in respect of the other two plots he was not liable to pay rent, as rent had already been recovered from him by the present plaintiff on the allegation that those two parcels were included in a property owned by him. The tenant thereupon paid into Court the entire sum claimed in the suit. Notice was thereafter issued to the present plaintiff, who forthwith instituted this suit under section 149 (3), Bengal Tenancy Act. The question for decision is, whether section 149 is applicable to the circumstances of this case.

Sub-section (1) of section 149 is in these terms: "When a defendant admits that money is due from him on account of rent but pleads that it is due not to the plaintiff but to a third person, the Court shall refuse to take cognizance of the plea, unless the defendant pays into Court the amount so admitted to be due." Sub-section (2) then provides that where such a payment is made, the Court shall forthwith cause notice of the payment to be served on the third person. Sub-section (3) lays down that unless the third person, within three months from the receipt of notice, institutes a suit against the plaintiff and therein obtains an order restraining payment out of the money, it shall be paid out to the plaintiff on his application.

It is plain that the money mentioned in sub-section (3) is the entire sum deposited under sub-section (1) and no question of apportionment is intended to be raised or decided under the section. In the present case, however, it is admitted by the tenant-defendant that part at any rate of that sum is due to the defendant-landlord; what precise part is so due has not been determined, because it involves a question of apportionment not within the scope of the suit. In a case of this description, we are of opinion that section 149 has no application.

The result is that the decree of the Subordinate Judge is affirmed on the ground that the suit is not maintainable under section 149 and the appeal is dismissed with costs.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 37 OF 1905.

April 23, 1907.

Present:—Sir Charles Fox, KT., Chief Judge, and Mr. Justice Hartnoll.

PADASHIN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MAUNG LUN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Malicious prosecution—Damages, suit for—Proof—Conviction of plaintiff in lower Court, effect of.

In a suit for damages for malicious prosecution the plaintiff must prove the following four things:—

(1) that he was innocent of the crime alleged against him;

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(2) that his innocence has been pronounced by a competent tribunal;

(3) that there was a want of reasonable and probable cause for the prosecution; and

(4) that the proceedings against him had been initiated in a malicious spirit.

A conviction in the lower Court of the plaintiff to a suit for damages for malicious prosecution although reversed on appeal is fatal to his suit for malicious prosecution save in very exceptional circumstances.

Mr. *Palit*, for the Appellants.

Mr. *Dantra*, for the Respondents.

JUDGMENT.

Fox, C. J.—The plaintiffs had been convicted by the first class Magistrate of Kungyangon of obtaining the defendants' property by cheating. Upon appeal to the Sessions Court they were acquitted. They then brought the suit out of which this appeal arises for damages for malicious prosecution.

They had to prove *first*, that they were innocent of the crime alleged against them, *secondly*, that their innocence had been pronounced by a competent tribunal, *thirdly*, that there was a want of reasonable and probable cause for the prosecution, or that the circumstances of the case were such as to be in the eyes of the Court inconsistent with the existence of reasonable and probable cause, and *fourthly*, that the proceedings against them had been initiated in a malicious spirit, that is, from an indirect motive and not in furtherance of justice. If they failed to prove any one of these matters, their case failed [see *Abrath* v. *The North Eastern Railway Company* (1).] The plaintiffs proved to my mind only the second of these matters conclusively. Possibly it may also be said that they also proved the first, for even if they had done all that the complainant said they had done, they were not liable to be convicted of cheating and of obtaining property by cheating. They, however, in my opinion, entirely failed to prove the other two requisites for succeeding in their suit. The whole matter turns upon whether the allegation which the 1st defendant had made against them, that he had paid them Rs. 4,800 as an advance in part payment of paddy which they had sold to him, was utterly without foundation and false. The Magistrate believed that he had paid them the money, and convicted them. Upon the ruling in *Soobramony Pillay Chetty* v. *Maung Po Lu* (2), this conviction would be fatal to the plaintiffs' case. Without going as far as adopting the ruling in that case, which I think goes too far, and adopting the rule as stated by Mr. Pollock in section 42 of his draft of a Civil Wrongs Bill *viz.*, "that an action will lie if the plaintiff was ultimately acquitted on appeal by reason of the original conviction having proceeded on evidence known by the complainant to be false or on the wilful suppression by him of material information," the plaintiffs have, in my judgment, failed to establish that the first defendant's prosecution of them was without reasonable and probable cause, and that it was malicious.

The District Judge has dealt with the facts and evidence very fully and carefully. It is unnecessary to repeat them.

There is, first of all, the great improbability of a man in the 1st defendant's position making the allegations he did without any foundation for them, and knowing, as he must have known, that he had not the strongest proof in the shape of a signed receipt that he had paid the Rs. 4,800.

The weakness of the evidence for the plaintiffs strengthens the belief that the 1st defendant did pay them the money.

It is a case in which two Judges who saw and heard the witnesses believed the first defendant and his witnesses. There is, in my opinion, no ground for holding that the District Judge's view was wrong. As against the 2nd defendant there was no substantial case, and the Judge was, I think, right in awarding separate costs. I would dismiss the appeal with costs.

HARTNOLL, J.—I concur.

Appeal dismissed.

(2) 2 L. B. R. 111.

(1) (1886) 11 App. Cas. 247; 55 L. J. Q. B. 457; 55 L. T. 63; 50 J. P. 659.

BROJENDRO KISHORE RAI *v.* KHALIL NAGARCHI.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL NO. 1945 OF 1912.
December 3, 1914.
Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Chapman.
BROJENDRO KISHORE RAI CHAUDHURI—PLAINTIFF—APPELLANT
versus
KHALIL NAGARCHI AND OTHERS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 30, 101, 111, scope of—Rent, enhancement of, alteration of, suit for—Local area, meaning of.

A suit for enhancement of rent under section 30 of the Bengal Tenancy Act and a suit of the nature described in section 52, are included in the expression 'suit for alteration of rent' in section 111. [p. 885, col. 2.]

Under section 101 of the Bengal Tenancy Act, an entire district is included in the meaning of the term 'local area', although an area smaller than an entire estate or country as a whole is usually meant by the term 'local'. [p. 886, col. 1.]

Appeal against the decree of the Subordinate Judge, Mymensingh, dated the 25th April 1912, reversing that of the Munsif, Iswargunge, dated the 12th May 1911.

Babus *Dwarka Nath Chakrabutty* and *Ramani Mohan Chatterjee*, for the Appellant.

JUDGMENT.—This is an appeal by the plaintiff in a suit for enhancement of rent, instituted under section 30 of the Bengal Tenancy Act. The question in controversy is, whether the suit is barred by the provisions of section 111.

Section 111, we quote only so much thereof as is relevant to the question now before us, is in these terms: "Where an order has been made under section 101 directing the preparation of a Record of Rights, then, subject to the provisions of section 104H, a Civil Court shall not, until three months after the final publication of the Record of Rights, entertain any suit for the alteration of the rent of any tenant in the area to which the Record of Rights applies." It is not disputed that on the 8th December 1908 an order was made by the then Local Government, that is, the Government of Eastern Bengal and Assam, under the provisions of clause (1) of section 101. That notification was in these terms: "In the exercise of the powers conferred on him by section 101 (1) of the Bengal Tenancy Act as amended to date, and with the previous sanction of the Governor-General in Council, the Lieutenant-Governor of Eastern Bengal and Assam is pleased to direct that a survey shall be made and Records of Rights prepared in respect of all lands which are comprised within the administrative boundaries of the District of Mymensingh as well as those revenue survey *mouzahs* which are comprised within the administrative boundaries of the Districts of Rangpore, Pubna, Bogra or Tipperah, but which fall wholly or partly within five miles from the main stream of any river which forms the administrative boundary of the District of Mymensingh." The land in respect of which enhanced rent is claimed is situated within the District of Mymensingh, and it was accordingly argued by the tenant defendants before the Subordinate Judge that the suit was barred under section 111 of the Bengal Tenancy Act. In answer, it was contended on behalf of the plaintiff landlord that the suit was not for the "alteration of the rent of the tenant" within the meaning of section 111. The argument in substance was that a suit for the alteration of rent is a suit of the description contemplated by section 52, which entitles the landlord to claim additional rent for additional land. This contention was very properly overruled by the Subordinate Judge. In our opinion, the expression "suit for alteration of rent" includes not merely a suit of the nature described in section 52, but also a suit for enhancement of rent under section 30. Indeed in this Court no serious endeavour has been made to controvert the view of the Subordinate Judge in this respect.

But it has been argued here that the notification of the 8th December 1908 does not contain an order under section 101 as contemplated by section 111. The argument is that the expression "local area" indicates a smaller area than an entire district. To support this contention reference has been made to the words 'estates, or tenure or part thereof' which were introduced into section 101 by Act VIII of 1898 B. C. In our opinion, these words do not tend to restrict the meaning of the expression 'local area.' The term 'local area' is not defined in the Bengal Tenancy Act, and is obviously comprehensive enough to

include an entire district. The term 'local' is frequently applied to an area smaller than an entire estate or country as a whole. We are not called upon to determine in this case, whether the expression 'local area' may include the entire province to which the Bengal Tenancy Act applies. What we have to decide is, whether the expression includes a district, and we feel no doubt that this question must be answered in the affirmative. It has been pressed upon us that in this view, an order of this description is likely to operate to the prejudice of landlords. It has been pointed out that many years may elapse before the operation of survey and settlement may be carried out pursuant to the orders of the Local Government and that during all these years the jurisdiction of the Civil Court to entertain suits for enhancement of rent would remain suspended by operation of section 111. It may be conceded that this may be the possible result of a comprehensive order of the description now before us. But if there is any real hardship to landlords, it may be remedied in one of two ways. In the *first* place, the hardship may be avoided, if an order under section 111 is made applicable to a smaller tract of land than an entire district. That, however, is a matter for the Local Government to consider if a representation is submitted to them. In the *second* place, the hardship may be avoided, if section 111 were so modified as to be applicable only in cases where survey and settlement operations have actually been commenced in respect of a particular tract pursuant to an order under section 101. That, however, is a matter for the Legislature to consider. But, so long as section 111 stands as it now does, it is clearly open to the Local Government to issue a notification in terms of the notification of the 8th December 1908; and the effect of that notification is, under section 111, to prevent the trial of the present suit by a Civil Court.

The result is that the decree of the Subordinate Judge is confirmed and this appeal dismissed.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL No. 146 OF 1913.

November 4, 1914.

Present:—Mr. Justice Ormond.

MAUNG YEIK AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MAUNG PE TO AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Mortgage or sale—Transfer of Property Act (IV of 1882), ss. 54, 59 55 (6) (b)—Transaction without registered document when transaction compulsorily registrable, effect of.

Where the defendants were put into possession of two plots of plaintiffs' land, five or six years before the suit, without any registered document on payment of Rs. 100 in respect of each plot and where the transaction was either an abortive mortgage (according to the plaintiffs) or an abortive sale (according to the defendants):

Held, that in either case the plaintiffs were entitled to possession upon payment of Rs. 200 as under the provisions of sections 54 and 59 of the Transfer of Property Act an oral transfer could effect neither a mortgage nor a sale and the defendants were entitled only to a charge on the land under section 55 (6) (*b*) for the purchase-money paid by them. [p. 887, col. 1.]

Appeal against the judgment and decree of the District Judge of Bassein, in Civil Appeal No. 118 of 1912, reversing that of the Township Judge of Bassein, in Civil Reg. No. 442 of 1912.

Mr. *Wiltshire*, for the Appellants.

Mr. *Israilkhan*, for the Respondents.

JUDGMENT.—The plaintiffs sue to redeem as mortgagors two plots of land at Rs. 100 each of which the defendants are in possession. No registered document or any document was effected. The defendants allege that the transaction was a sale. The Township Court dismissed the suit on the ground that the plaintiffs had not proved their mortgage. The District Court on appeal gave a decree to the plaintiffs for possession on payment of Rs. 200, upon the ground that the defendants had not proved their purchase. It is, no doubt, for the plaintiffs to prove their case; they must show a better title than the defendants; and the defendants being in possession, we start with a presumption in their favour—that they are the owners. The facts are that the defendants were put into possession of the plaintiffs' land, five or six years before the suit, by or with the permission of the plaintiffs; that there was no registered document and that Rs. 100

was paid in respect of each plot of land. Under the provisions of sections 54 and 59 of the Transfer of Property Act an oral transaction could effect neither a mortgage nor a sale. The defendants, by being put into possession by the plaintiffs, either under a contract for a mortgage or under a contract for sale, acquired no interest in the land; their only right being, if their case is true, to a charge on the land under section 55 (6) (*b*) of the Transfer of Property Act for the purchase-money paid by them.

The cases cited by Mr. Israilkhan for the plaintiff-respondents, namely, *Lalchand Motiram* v. *Lakshman Sahadu* (1) and *Kurri Veerareddi* v. *Kurri Bapireddi* (2) are authorities for this view.

The plaintiffs were the owners at the time of the transaction; the defendants acquired no title to possession under the transaction, and they have not acquired a title since. It is then contended by Mr. Wiltshire for the defendant-appellants that the suit being one for redemption based on a mortgage, the plaintiffs cannot be awarded possession except on a mortgage. The plaintiffs in their suit for redemption claim possession upon payment of Rs. 200. The facts proved or admitted show that the transaction was either an abortive mortgage (according to the plaintiffs) or an abortive sale (according to the defendants); in either case the plaintiffs are entitled to possession upon payment of Rs. 200. The facts necessarily adduced by the plaintiffs to prove their mortgage, though not sufficient to prove a mortgage, are sufficient to show that the plaintiffs are entitled to the relief claimed; and the case of the defendants shows the same. I think that the Court should, therefore, give the plaintiffs relief in the present suit.

The appeal is dismissed with costs in all Courts, and there will be a decree for possession of these plots of land after the paddy crops have been reaped and upon payment of Rs. 200.

Appeal dismissed.

(1) 28 B. 466; 6 Bom. L. R. 510.

(2) 29 M. 336; 1 M. L. T. 153 (F. B.); 16 M. L. J. 395.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 763 OF 1914.

February 10, 1915.

Present:—Justice Sir Donald Johnstone, KT.

KISHEN SARUP AND ANOTHER—DEFENDANTS—PETITIONERS

versus

Chaudhri TARA CHAND AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Promissory note, sale of—Purchaser bound to make enquiries of executant—Caveat emptor.

A person buying a promissory note must know that he is buying a mere claim and must make enquiries before buying.

Petition, under section 70 of Act IX of 1887, against the decree of the Judge, Cantonment Small Cause Court, Jullundur, dated the 23rd March 1914, decreeing the claim against the petitioners.

Mr. *N. C. Mehra*, for the Appellant.

Messrs. *Raghunath Rai* and *T. D. Khanna*, for the Respondent.

JUDGMENT.—I cannot see that minor sons of the late Bhagirath can possibly be held liable in this case. Deceased held this pro-note for Rs. 50. He died. His widow sold it to plaintiff, very likely in good faith, not knowing it had been paid off (if it was so). The purchaser should have enquired of the executant, Gappu, before buying. He must have known he was buying a mere *claim*, and in these circumstances he should have made enquiries; it is a case of *caveat emptor*.

I do not think, indeed, that he has any case against any defendant. Gappu has proved fairly well that he has paid Bhagirath.

Revision allowed and suit dismissed with costs.

Revision allowed.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 49 OF 1913.

November 5, 1914.

Present:—Mr. Justice Ormond.

MAUNG PO YIN—DEFENDANT—APPELLANT

versus

MG. NI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Gift made in contemplation of death—Possession not delivered, effect of—Better title to be shown by person not in possession.

A gift made in contemplation of death and intended to operate only after the donor's death is inoperative and void.

A person not in possession ought to show a better title to the property from which he seeks to eject the person in possession.

Appeal against the judgment and decree of the District Court, Myaungmya, confirming the judgment and decree of the Township Court, Wakema.

Mr. *Dawson*, for the Appellant.

Mr. *Po Thit*, for the Respondents.

JUDGMENT.—The plaintiff sued for possession of a house which formerly belonged to Ma Hla U, who died eight or nine years before suit. The suit was instituted in 1912.

The plaintiff, who is the nephew of Ma Hla U, says that Ma Hla U when she was very old and in bad health, two months before her death, gave the house to him with this condition that Ma Mein (her sister-in-law who had been living with her) should remain in the house as long as she was happy there. One of the plaintiff's witnesses states that the gift was made in the following terms:—"Let Ma Mein take after my death and you (plaintiff) take it outright after Ma Mein's death." The plaintiff apparently lived in the house with Ma Hla U and Ma Mein; and after Ma Hla U's death he went to live in his own fields. Ma Mein lived in the house until her death which was two months before the suit; and after Ma Mein's death the defendant, who claims to be a relation of Ma Mein, took possession of the house.

The defendant's case is that he and Ma Mein jointly bought this house from Ma Hla U a day or two before Ma Hla U's death; that purchase has been disbelieved by both Courts. U San Pye, a son of Ma Hla U's husband by a former marriage, is the heir to the house; and he supports the plaintiff's case. His father predeceased Ma Hla U by about three years. The Township

Judge found that the plaintiff's case of a gift was true. The District Court also found that the gift was true and adds that the plaintiff has other rights of inheritance to the house and his possession thereof, if disputed, could only be disputed by Maung San Pye, step-son of Ma Hla U and son of U Kywet Ni (her husband who had predeceased her). But the plaintiff was not in possession and in order to reject the defendant he must show a better title.

From the evidence I think it clear that the gift by Ma Hla U was made in contemplation of death and was intended to operate only after her death; it was, therefore, inoperative and void and although the rightful heir, U San Pye, may be disposed to support the plaintiff's claim, he has not divested himself of his rights to the house in favour of the plaintiff. The plaintiff, therefore, has not shown any title. The appeal is allowed with costs and the suit is dismissed with costs to the defendant in both the lower Courts.

Appeal allowed.

PUNJAB CHIEF COURT.

MISCELLANEOUS CIVIL APPEAL No 2204 OF 1914.

May 5, 1915.

Present:—Sir Donald Johnstone, KT., Chief Judge.

JAM KHAN—INSOLVENT—APPELLANT

versus

DEVI DITTA AND OTHERS—CREDITORS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 42—Annulment of adjudication, when and when not allowed.

An adjudication can be annulled only under section 42 of the Provincial Insolvency Act when the conditions mentioned therein are fulfilled. [p. 889, col. 1.]

A Court while annulling an adjudication must find that the adjudication could not legally or properly have been made on the facts as existing at the time of the adjudication. Subsequent misconduct on the part of a petitioner should not lead to annulment of the adjudication. [p. 889, col. 1.]

An adjudication cannot be annulled because:

(*i*) the petitioner could subsequently pay his debts in full out of his assets;

(*ii*) a part of his property is subject to the Alienation of Land Act;

(*iii*) the debtor since his adjudication has not been giving any produce of his lands to the Receiver, or

(*iv*) he has not made over all his assets to the Receiver. [p. 889, cols. 1 & 2.]

Miscellaneous appeal from the order of the District Judge, Jhang, dated the 27th July 1914, annulling the adjudication of the appellant as an insolvent.

Mr. *Nand Lal*, for the Appellant.

Mr. *Brij Lal*, for the Respondents.

JUDGMENT.—This is a miscellaneous appeal from the order of the District Judge of Jhang, dated 27th July 1914, annulling the bankruptcy of one Jam Khan. It appears that the application of Jam Khan was put in on 29th June 1912, and not on 12th July 1913, as the lower Court states. He was adjudicated an insolvent on 6th June 1913, and a Receiver was appointed the same time. Now on 27th July 1914, the learned District Judge has come to the conclusion that the adjudication should be annulled. An adjudication can be annulled only under section 42 of the Act. There are three conditions which must be fulfilled before an adjudication can be annulled: (1) That the Court must come to the conclusion that the debtor ought not to have been adjudged an insolvent. (2) Where it is proved to the satisfaction of the Court that the debts of the insolvent have been paid in full. (3) Where a composition or scheme has been approved by the Court under section 27. In the present case clearly and admittedly the 2nd and 3rd of these conditions are not fulfilled and I cannot help thinking that the Court below has overlooked the wording of the 1st condition. It seems to me that the natural meaning of the words in the 1st condition is that on the facts as existing at the time of the adjudication an adjudication could not legally or properly have been made. The section does not indicate that subsequent misconduct on the part of a petitioner should lead to annulment of the adjudication. Now, looked at in this way, the seven reasons given by the lower Court for annulling this adjudication appear to be open to a good deal of criticism. The first reason given is that inasmuch as apparently the accused could pay his debts in full out of his assets he should not have been adjudicated an insolvent, and the Madras ruling, *Koppuravvuri Subbarayudu* v. *Guntur Cotton Jute and Paper Mills Co., Ltd.* (1), is quoted as an authority. For myself I cannot find in the Act any authority for such a proposition. One may think that it would have been a very useful provision in such a statute as this, but I cannot find any provision of the kind. The second reason given is wholly unintelligible. It runs thus:—"The lands are inalienable and can be sold to any agriculturist of the district." I suppose this involves an allusion to the Punjab Alienation of Land Act, but again I can find nothing in the Insolvency Act to warrant the idea that a man should not be declared an insolvent because part of his property is subject to the Alienation of Land Act. The third reason given is something like the first and need not be discussed any further. The fourth reason is stated to be that the District Judge's predecessor-in-office has held the petitioner guilty of an offence under section 43 of the Insolvency Act. The petitioner's Counsel before me absolutely denies this. The respondent's Counsel is unable to point to any proof of it, and I can find no proof on the record. The fifth reason is that the debtor since his adjudication has not been giving any produce of his lands to the Receiver. No doubt, he ought to have been doing that, but can it be said that the Judge, sitting in his Court on 6th June 1913, could have foreseen that the debtor intended to withhold the produce of his lands? The sixth reason is stated to be that the debtor has not made over all his assets to the Receiver. The Receiver, no doubt, says this, but the assertion is flatly denied before me and I can find no proof on the record of the assertion. After the Receiver's report had been considered, the debtor was examined by the Court but was asked no question on this subject. In these circumstances it can hardly be said that the sixth reason is a good one. The seventh reason is also connected with the conduct of the debtor after the adjudication, and, as already seen, that does not appear to be a ground for proceeding under section 42 of the Act.

At the same time there is only too good reason to believe that this man should not have the benefit of the Insolvency Law and I

(1) 22 Ind. Cas. 276; 14 M. L. T. 587; (1914) M. W. N. 153.

am very unwilling that he should have it. The only course possible seems to me to be this that the file should now be returned to the District Judge who should make a proper enquiry with reference to the above remarks. He should consider carefully the wording of section 42 and after inquiry come to the conclusion as to whether the debtor should have been declared an insolvent or not on 6th June 1913, on the real facts existing at that date. The order annulling adjudication is set aside and the case is remanded for re-trial.

Case remanded.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 161 OF 1914.

November 13, 1914.

Present:—Mr. Justice Parlett.

MA THEIN ME—PLAINTIFF—APPELLANT

versus

MAUNG PO GYWE—DEFENDANT—RESPONDENT.

Buddhist Law—Husband and wife living separate—Custody of their girl aged seven years—Natural guardian—Guardians and Wards Act (VIII of 1890), *ss.* 9, 17 (1), 19 (b)—*Law applicable.*

In a suit by the mother of a Burmese Buddhist girl of seven years to recover her from the custody of her father, the plaintiff's husband, who was living separate:

Held, that the provisions contained in sections 254 to 257 of Kinwun Mingyi's Digest, Volume II, providing for the custody of children upon divorce of the parents, did not apply where, though the husband and wife lived separate, the marriage status continued and that as guardianship was not one of the matters mentioned in section 13 of the Burma Laws Act, the personal law of Buddhists was not applicable. [p. 890, col. 2.]

Held, also, that according to section 19 (*b*) of the Guardians and Wards Act, the father was the natural guardian of the minor child under the circumstances of the case. [p. 891, col. 1.]

Appeal from the decree of the Divisional Court of Tennasserim, confirming the decree of the District Court of Amherst.

Mr. *May Oung*, for the Appellant.

Mr. *Ginwalla*, for the Respondent.

JUDGMENT.—The parties to this suit are husband and wife living apart and the husband's suit for restitution of conjugal rights was dismissed. This suit has been brought by the wife to recover the custody of their child, a girl now over seven years of age whom the father retained at the separation and refused to give up. The plaintiff claimed to have the natural right to the custody of the child and the Court of first instance held that she had, but dismissed the suit on the ground that the child was as comfortable with the father as she would be with the mother and desired to remain with the former. On appeal the further ground was taken that the father was utterly unfit to bring up his daughter decently. The lower Appellate Court found against the appellant on that point but held that the father, not the mother, was the natural guardian of the daughter.

In this appeal it is urged that the mother and not the father is by law entitled to the custody of the minor daughter, that in this case the father is morally unfit to be in charge of a young girl and that it would be in the girl's interest to be with her mother. It is argued that as section 17 (1) of the Guardians and Wards Act directs a Court in appointing a guardian to act consistently with the law to which the minor is subject, the law to be applied in this case is the personal Burmese Buddhist Law, and that the analogy of the principle contained in sections 254 to 257 of the Kinwun Mingyi's Digest, Volume 2, should be acted on and the mother held to have the right to custody of minor daughters. These sections provide for the custody of children upon divorce of the parents and cannot be held to directly apply, whereas in the present case the marriage status continues.

Section 19 (*b*) of the Guardians and Wards Act shows that the father of a minor, who is not a European British subject, is, *prima facie*, the guardian. No doubt both sections 9 and 17 (1) make applicable to such a minor "the law to which the minor is subject." Section 13 of the Burma Laws Act (XIII of 1908), however, does not mention guardianship as one of the matters in which the personal law is expressly required to be administered as among Buddhists and accordingly Burmese Buddhist Law is not applicable to cases under the Guardians and Wards Act. It is true that in the case of *Maung Pan Bu* v. *Ma Nyun* (1) it was said that the proper person to have the custody of a

(1) 9 Bur. L. R. 183.

daughter is the mother, but that remark must be taken as applicable to the particular facts of that case, and no reasons are given for holding it to be a general rule of law. On the other hand both in *Ma Chok* v. *Maung Po Sin* (2) and in *Maung Ba Thein* v. *Ma Me* (3), it was held that the father is *prima facie* guardians of his children according to Burmese Law. I think there can be no doubt of this, since the law applicable is that contained in section 19 (*b*) of the Guardians and Wards Act. I consider, therefore, that the Divisional Court's decision on this point was correct. I also agree with that Court that the father had not been shown to have lost his right by misconduct or unfitness. "Before the Court can interfere there must be a distinct danger of the child being injured, or contaminated by remaining in the custody of the father" (Trevelyan on Minors, 4th Edition, page 69 . Lastly, the girl is clearly not of such tender years that she cannot be separated from her mother, nor is it shown that on other grounds it would be distinctly in her interest to be handed over to her.

The appeal is dismissed with costs, Advocate's fees two gold *mohurs*.

Appeal dismissed.

(2) U. B. R. (1892-96) II, 645.
(3) 4 Bur. L. R. 242.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 642 OF 1913.

March 31, 1915.

Present:—Mr. Justice Shadi Lal and Mr. Justice LeRossignol.

RAM LABHAYA—PLAINTIFF—APPELLANT

versus

GOPAL DAS—DEFENDANT—RESPONDENT.

Alienation—Necessity Sale of ancestral property—Objection on ground of immorality of purpose—Onus *—Obligation of vendee.*

Where a Hindu father sold his ancestral house to a third person and after his death his son sued for recovery of possession, alleging that the sale consideration money was taken for an immoral purpose:

Held, (1) that it lay on the plaintiff to prove the immorality of the transaction if he wanted to free himself from his liability to pay his father's debt; [p. 891, col. 2.]

(2) that the sale could not be maintained as a sale unless the vendee proved necessity; [p. 891, col. 2.]

(3) that as the sale had taken place some 20 years before suit, circumstantial evidence should be considered sufficient to establish necessity. [p. 892, col. 1.]

Second appeal from the decree of the Divisional Judge, Attock Division, at Campbellpur, dated the 20th January 1913, reversing that of the District Judge, Attock District, at Campbellpur, dated the 4th April 1912, decreeing the claim.

Bhagat *Gobind Das*, for the Appellant.

Mr. *Nand Lal*, for the Respondent.

JUDGMENT.—This is a suit brought by a son aged about 20 for recovery of a house sold by his late father, Domoder Das, for Rs. 575 in January 1893.

The plaintiff alleges that the property was ancestral, that his father was addicted to drugs and wine and that the sale consideration money was taken for an immoral purpose *i.e.*, the purchase of drugs and liquor.

It is not now denied that the house was ancestral. The first Court held that the vendor was addicted to drink and drugs and the sale was for immoral purpose; the Divisional Court differed and held that plaintiff has not established the immoral purpose of the sale.

In second appeal it was contended that the Divisional Judge has incorrectly appreciated the first Court's attitude to some of the plaintiff's evidence and that the *onus* should have been placed on defendant to prove that the sale was for necessity.

We have been referred to *Shahabul* v. *Ganesh Das* (1) and *Chandra Deo Singh* v. *Mata Prasad* (2) and have no doubt that it lies on plaintiff to prove the immorality of the transaction, if he is to succeed in freeing himself from his liability to pay his father's debts, but that the sale cannot be maintained as a sale unless the vendee proves necessity.

Now in this case only Rs. 52 and 26 or 78 in all were antecedent debts and the balance of the sale price passed in cash.

We have considered the oral evidence on both sides and are of the opinion that though vendor was a person of jovial humour and indulged in liquor and *bhang*, the plaintiff's evidence in this matter is grossly exaggerated.

The vendor was the son of an army pen-

(1) 53 P. R. 1901; 62 P. L. R. 1901.
(2) 1 Ind. Cas. 479; 31 A. 176 (F.B.); 6 A. L. J. 263.

sioner who himself in 1886 sold a house for Rs. 400 of which Rs. 310 passed in cash.

Vendor first mortgaged this land in 1890 for Rs. 49 and sold it in 1893. He had no source of income but this property and his precarious earnings as an officiating process-server, a post which he secured and held spasmodically. His family consisted of himself, his wife, a daughter and two sons.

We note that some ¾ths of the family property still remains, so that he did not waste the whole of it and had he been a confirmed debauchee, he would not have been retained as a process-server.

Unfortunately defendant was not called upon to prove necessity, and it would be unfair to expect precise evidence on the point, some twenty years after the transaction.

After careful consideration of the case, we agree with the Divisional Judge that all the known circumstances suggest that the vendor was a poor man and that he like his father sold a portion of his immoveable property when forced to do so in order to maintain his family.

We also find that plaintiff's evidence as to his father's debauchery is all of a general type and mentions no specific facts and that the immorality of the transaction is not established, on the contrary we hold it was a *bona fide* sale to meet the family expenses.

For these reasons we do not interfere and dismiss the appeal, with costs.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL NO. 11 OF 1914.

May 17, 1915.

Present:—Sir Charles Fox, KT., Chief Judge.

MA TUN —APPELLANT

versus

MA WAING THA AND OTHERS—RESPONDENTS.

Mortgage—Benamidar *mortgagee, right of, to sue* — *Mortgagor, whether can object to mortgagee's right* —*Civil Procedure Code (Act V of 1908), s. 100*—*Evidence Act (I of 1872), s. 92.*

A *benamidar* has a right of suit on a mortgage of immoveable property in his favour and it is not open to the mortgagor to raise any question as to the right of the *benamidar* to recover the mortgage debt. [p. 893, cols. 1 & 2.]

Ram Bhurosee Singh v. *Bissesser Narain Mahata*, 18 W. R. 454, followed.

Mr. *Chari*, for the Appellant.

Mr. *Villa*, for the Respondents.

JUDGMENT.—The plaintiff is the widow of Shwe Gan who was son of San Bwin and Ma Aung.

Admittedly the original defendant, Moung Pe, whose legal representatives are the respondents in this appeal executed a mortgage bond in favour of Shwe Gan for money lent. Shwe Gan died and the plaintiff obtained a certificate to collect debts due to him. She sued Moung Pe to recover the amount due on the mortgage-bond. He pleaded that the money had been lent to him by San Bwin and Ma Aung and that he had re-paid the amount due to Ma Aung. The latter admitted receipt. Both Courts have held that Shwe Gan was merely a *benamidar* of his parents and that the plaintiff could not recover in the suit. In an appeal under section 100 of the Code of Civil Procedure, this Court is bound by the Divisional Court's decision on the facts. The question of law involved in this case is whether it was open to the defendant to plead that the real mortgagees were San Bwin and Ma Aung although the documents of mortgage stated that Shwe Gan was the mortgagee and made the amount payable to him. On the finding of the Divisional Court it must be taken that Shwe Gan was merely a *benamidar* and the case of *Munshi Basir-ud-din Ahmed* v. *Mahomed Jalish Patwari* (1) has been cited in support of the proposition that a *benamidar* cannot sue for recovery of a mortgage-debt.

This decision purported to be based upon practically uniform decisions of the Calcutta High Court. There had, however, been decisions of that Court to a contrary effect, see *Bhola Pershad* v. *Ram Lal* (2) and *Sachitananda Mohapatra* v. *Baloram Gorain* (3). The Allahabad High Court had in *Yad Ram* v. *Umrao Singh* (4) expressly ruled to the contrary. It appears to me that this deci-

(1) 12 C. W. N. 409.
(2) 24 C. 34.
(3) 24 C. 644.
(4) 21 A. 380; A. W. N. (1899) 130.

sion is of greater weight than those of the Calcutta High Court which held that a *benamidar* had no right of suit. In *Nand Kishore Lal* v. *Ahmed Ata* (5), Burkitt, J, pointed out an error in the reading of a quotation in the judgment of the Privy Council in *Gopeekrist Gosain* v. *Gungapersaud Gosain* (6) made in one of the Calcutta High Court cases, and in *Mohendra Nath Mukerjee* v. *Kali Proshad Johuri* (7), Banerjee, J., admitted the error, but adhered to the view that a *benamidar* had no right of suit for recovery of immoveable property. The Allahabad cases appear to me to show that there is no strong foundation for this rule of law and there is certainly no such foundation for the rule that a *benamidar* has no right of suit on a mortgage in his favour.

If, as I hold, the plaintiff in this case, although she may be legal representative of a mere *benamidar*, had a right to sue on the mortgage, the further question arises, whether it was open to the defendant to raise and have tried in the suit the question whether the mortgagee was a mere *benamidar*. In my opinion it was not. It was not open to him to repudiate his own deed in writing, and to contest that although by the document he promised to re-pay the money to Shwe Gan, he in fact promised o re-pay it to Shwe Gan's parents, San Bwin and Ma Aung. To allow him to do so would be an infringement of the principle, if not of the actual letter, of section 92 of the Evidence Act The dispute between the plaintiff and her mother-in-law, as to who had the right to the mortgage-money, was no concern of the defendant's. He paid the money to Ma Aung's agent knowing full well that the plaintiff claimed it. He did so at his own risk and he has only himself to blame if he has to pay over again to the plaintiff.

To allow a mortgagor, when sued on a mortgage by the mortgagee, to raise questions as to whom the money lent came from, and as to some one other than the mortgagee named in the document being entitled to recover, it would be to allow a course which might throw an intolerable burden on mortgagee-plaintiffs and encourage harassment of creditors by fraudulent debtors.

Following the course taken in *Ram Bhurosee Singh* v. *Bissesser Narain Mahata* (8), I hold that it was not open to the defendant to raise any question as to the right of the plaintiff to recover on the mortgage.

The appeal is allowed. The decrees of the lower Courts are set aside.

There will be a mortgage-decree in the plaintiff's favour for Rs. 950, principal, and Rs. 228, interest up to the 13th February at the rate of Rs. 2 per mensem from that date until the 13th day of February 1916, which is the date fixed for payment into Court, together with costs of the plaintiff in all the Courts—in default of payment the property in the mortgage to be sold and the usual consequent orders to be entered in the decree.

Appeal allowed.

(5) 18 A. 69; A. W. N. (1895) 160.

(6) 6 M. I. A. 53; 4 W. R. 46 (P. C.); 1 Sar. P. C. J. 493; 19 E. R. 20.

(7) 30 C. 265; 7 C. W. N. 229.

(8) 18 W. R. 454.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1632 OF 1914.

January 26, 1915.

Present:—Mr. Justice Shadi Lal.

MILKHI MAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

GULAB SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Settlement Records and jamabandis—*Presumption of correctness—Gift of produce for charitable purposes—Impropriety of inventing technical names*—Malguzar.

In the absence of satisfactory evidence to the contrary entries in the Settlement Records and the annual *jamabandis* must be accepted as correct. [p. 894, col. 1.]

Where, therefore, the ancestors of the plaintiffs who were originally the absolute owners of the land in dispute made a gift of half the produce of the land to the aecestors of the defendants with the object of charitably supplying them with means of livelihood:

Held, that the plaintiffs having been in physical possession for a very long time and there being no intention of transferring ownership or possession to the defendants, the latter had no right to possession of the land. [p. 894, col. 2.]

Where the rights and liabilities of the parties are perfectly well defined and both the parties have acted in accordance therewith for a long time, it is unnecessary for the Court to invent a legal expression

by which the relationship existing between the parties should be described. [p. 894, col. 2.]

Second appeal from the decree of the Divisional Judge, Jullundur Division, dated the 21st day of May 1914, affirming that of the Munsif, first class, Jullundur, dated the 30th January 1914, decreeing plaintiffs' claim.

Rai Bahadur Pandit *Shoe Narain*, for the Appellants.

Lala *Ganga Bishen*, for the Respondents.

JUDGMENT.—The Courts below have concurred in holding that the ancestors of the plaintiffs-respondents were originally the absolute owners of the land in dispute and that they, on some date prior to 1851, gifted to the ancestors of the defendants, Ishar Das and Lachman Das, some of their rights, by which the latter were allowed to take half the produce from the donors, who were to remain in possession of the property. The donees were in the beginning also the *muafidars* of the land, but in process of time the Government resumed the *muafi*, and from that time onwards, the ex-*muafidars* were responsible for the payment of the land revenue. These findings of the lower Courts are based upon the entries in the Settlement Records and the annual *jamabandis* which, in the absence of satisfactory evidence to the contrary, must be accepted as correct. The Advocate for the defendants-appellants did not attempt to show why the entries in the Revenue Records should not be acted upon but simply stated a few facts in connection with the *muafi* and cited some rulings, and then left the Court to argue another case elsewhere. There was, therefore, no reply to the arguments advanced by the respondents' Pleader in support of the decree of the lower Appellate Court. It was contended on behalf of the respondents, and the contention seems to be fully justified, that some of the facts stated on behalf of the appellants were incorrect and that the authorities cited, being based on different sets of facts, had no bearing upon the case before me. In these circumstances I have, after giving my careful consideration to the case, come to the conclusion that the Courts below have taken the correct view and that nothing has been shown which would justify me in upsetting the concurrent findings against the appellants.

Upon the materials before me, it is quite clear that the plaintiffs had, from the earliest times of which we have got any record, been in physical possession of the land until they were dispossessed in 1912 and that the defendants have absolutely no right to the possession thereof. It appears that the gift of half the produce, which was, it is to be noted, made in favour of *udasi faqirs*, was prompted by charitable feelings and that there was never any intention of transferring to them the ownership or possession of the land. The object of the grant was merely to help the *faqirs* by supplying them with the means of their livelihood.

The rights and liabilities *inter se* are perfectly well defined and the plaintiffs have correctly stated them in the plaint. For more than 60 years, both the parties had acted in accordance therewith and it was only in 1912 that the *status quo* was disturbed. That being so, it is unnecessary for the Court to find out the exact meaning of the term *malguzars* which has been applied to the defendants Nos. 1 and 2, or to invent a legal expression by which the relationship existing between the parties should be described. As pointed out in *Gujjar Singh* v. *Bawa Uddham Singh* (1), the Court has to "look at the thing itself and its incidents without attaching to it a technical nickname of a kind calculated to mislead."

As regards the incidents, I entertain not the slightest doubt. The plaintiffs have, as stated above, given them in their plaint and the defendants have failed to establish anything to the contrary.

I accordingly affirm the decree of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

(1) 4 Ind. Cas. 626; 86 P. W. R. 1909.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 145 OF 1914.

April 29, 1915.

Present:—Sir Charles Fox, KT., Chief Judge.

MOUNG TE AND OTHERS—APPELLANTS

versus

MOUNG OH—RESPONDENT.

Possession, suit for, by person purchasing from one who had no right to sell—Judgment-debtor, right of, to remain in possession until legally evicted.

DYAL *v.* HIRDE RAM.

A person in possession of land is entitled to retain possession of it until some one who can show that he has a good title sues him and gets a decree.

A judgment-debtor whose land has been sold in execution can continue in possession of it until removed by due process of law in execution of the decree.

Mr. *Harvey*, for the Appellants.

Mr. *Halkar*, for the Respondent.

JUDGMENT.

FOX, C. J.—The appellants, although they are judgment-debtors whose land was sold in execution of a decree against them, are entitled to remain in possession of it until removed by due process of law in execution of the decree, or until some one who can show that he has a good title sues them and gets a decree. The plaintiff claimed title by reason of a purchase from L. A. R. Subramaniam Chetty. In execution of the decree against the appellants the land was sold to Kali Mutu. There is nothing to show that Kali Mutu transferred the land to L. A. R. Subramaniam Chetty. The plaintiff bought from a person who had not a title and consequently he acquired no right to the land by his purchase and no right to have the defendant ejected from the land. The appeal is allowed, the decrees of both the lower Courts are set aside, and the suit is dismissed with costs. The plaintiff must pay the defendant's costs in the District Court and in this Court.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1493 OF 1914.

February 22, 1915.

Present:—Mr. Justice Shadi Lal.

DYAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HIRDE RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal, second—Point not taken in lower Courts cannot be raised—Parties bound by case arising on pleadings.

A point not taken in the lower Courts cannot be raised for the first time in second appeal. [p. 895, col. 2; p. 896, col. 1.]

The parties are bound by the case which arises on their pleadings and which has been enquired into by the Court of first instance, and they cannot rely upon a point which has not been raised in that Court and which depends upon facts for its determination. [p. 896, col. 1.]

Second appeal from the decree of the Divisional Judge of Kulu, dated 23rd March 1914, affirming that of the District Judge, Kulu, dated the 25th of July 1913, dismissing the suit.

Bakshi *Tek Chand*, for the Appellants.

Rai Bahadur Pandit *Sheo Narain*, for the Respondents.

JUDGMENT.—The facts of this case are set out *in extenso* in the judgments of the lower Courts and need not be repeated here. The plaintiffs are the daughter's sons of one Jawahar, who died on the 15th March 1895. Upon his death, his property came into the possession of his second wife, Dasi. The lower Courts have held that the marriage between Jawahar and *Musammat* Dasi was valid according to custom and this finding cannot, in the absence of a certificate, be questioned in second appeal. *Musammat* Dasi who died in October 1912 had by her former husband a daughter, *Musammat* Kali, whose husband, Hirde Ram, is now in possession of the property which *Musammat* Dasi received from Jawahar, and the question for determination is whether the plaintiffs are entitled to recover possession from Hirde Ram. The Courts below have dismissed the suit and the plaintiffs have preferred a second appeal to this Court from the decree passed against them.

A preliminary objection has been taken by the Advocate for the respondents that the power-of-attorney in favour of the plaintiffs' agent Nandu does not authorise him to institute an appeal in the Chief Court. I have read the power-of-attorney carefully and I am of opinion that, though it does not expressly mention the institution of the appeal in the Chief Court, there is no doubt that the plaintiffs authorised him to prosecute all the litigation arising out of the suit and thus impliedly conferred upon him the power to lodge and prosecute an appeal in this Court. I accordingly overrule the preliminary objection.

Upon the merits, it is clear that the plaintiffs as daughter's sons have got the right of inheritance to the estate of their maternal grandfather: and the point raised for the first time in this Court that they are not entitled to immediate possession of the pro-

perty in the presence of their mother, was not taken in the lower Courts and cannot, therefore, be entertained by a Court of second appeal. Moreover the daughter of Jawahar, the mother of the plaintiffs, is a defendant in this case and she has supported the claim of her sons.

The sole ground upon which the learned Divisional Judge has dismissed the suit is that Jawahar settled his self-acquired property absolutely on *Musammat* Dasi. Now it is clear that the case remained pending in the lower Courts for some time, that the defendant filed two written statements on two different occasions and that there was a remand by the Divisional Judge for further enquiry. During all this time, the defendant Hirde Ram, never asserted that Jawahar had gifted the property to *Musammat* Dasi and made her absolute owner thereof. I have read the written statements and find that the defendant did not resist the claim of the plaintiffs on the above ground and it is manifest that no issue was framed thereon. The plea that Jawahar acquired the property in Kothi Nagar for the maintenance of *Musammat* Dasi, cannot obviously be construed as amounting to an allegation of a gift by Jawahar to her of all his property in full ownership: I have no doubt whatever that the plaintiffs had no opportunity to meet the case set up on behalf of the defendant for the first time in the lower Appellate Court and the law is clear that a procedure of that kind is entirely unwarranted. The parties are bound by the case which arises on their pleadings and which has been enquired into by the Court of first instance and they cannot rely upon a point which has not been raised in that Court and which depends upon facts for its determination. Further, it is worthy of note that the vague statements of the three witnesses relied upon by the lower Appellate Court in this connection do not bear out the contention that there was a gift *inter vivos* of an absolute estate in favour of the woman. There is no document in support of the alleged gift and the evidence as to what took place at the time of her marriage is of the vaguest possible description and does not establish the theory of absolute ownership. I am, therefore, constrained to hold that the defendant has no title to the immoveable property. I allow the appeal, set aside the decrees of the lower Courts, and pass in lieu thereof a decree in favour of the plaintiffs for possession of the immoveable property specified in the plaint. The claim as to moveable property is dismissed and the parties are directed to pay their own costs in all the Courts.

Appeal accepted.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2213 OF 1912.

February 18, 1915.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Richardson.

KALI KRISHNA BAISWAS AND OTHERS—APPELLANTS

versus

RAM CHANDRA BAIDYA AND OTHERS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 40, 153, scope of—Appeal, second—Commutation—Occupancy raiyat, advantage of—Revenue Court, decision of, how far affects Civil Court.

The question of *Bhowli* or *Nagdi* rent is one the decision whereon may be challenged by way of appeal under section 153 of the Bengal Tenancy Act. [p. 897, col. 1.]

Apurba Krishna Roy v. *Ashutosh Dutt*, 9 C. W. N. 122, referred to.

The propriety of commutation of rent of a holding or of the amount fixed cannot be called in question in a Civil Court. [p. 897, col. 2.]

A proceeding under section 40 of the Bengal Tenancy Act is founded on the assumption that the tenant whose rent is sought to be commuted is an occupancy *raiyat*. [p. 897, col. 2.]

A decision in a dispute as to the status of the tenant decided by the Revenue Authorities in a commutation proceeding under section 40 is not final and conclusive between the parties, the Civil Court has jurisdiction to go over it. [p. 897, col 2.]

Lalla Saligram Singh v. *Mohunt Ramgir*, 3 C. W. N. 311, distinguished.

Appeal against the decree of the District Judge of Backergunj, dated the 18th May 1912, reversing that of the Munsif, Barisal, dated the 27th November 1911.

Babu *Surendra Nath Guha*, for the Appellants.

Babu *Gunada Charan Sen*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for recovery of arrears of

rent. According to the plaintiffs, the defendants hold as under-*raiyats* under a *kabulyat* executed on the 1st November 1903. The plaintiffs claim rent at the annual rate of Rs. 30, which is stated in the contract as the price of the paddy payable by the tenant to his landlord. The defendants contend that they are occupancy *raiyats* and that by a commutation order made under section 40 of the Bengal Tenancy Act, they are liable to pay rent only at the rate of Rs. 13-6-6 a year. The Court of first instance decreed the claim in full. On appeal the contention of the defendants has been allowed to prevail. The plaintiffs have now appealed to this Court.

A preliminary objection has been taken on behalf of the respondents that the appeal is incompetent under section 153 of the Bengal Tenancy Act as the amount claimed in the suit is less than Rs. 100. In our opinion, there is no foundation for this contention. The decree under appeal has decided the question of the amount of rent annually payable, namely, is it Rs. 30 a year as claimed by the plaintiffs or Rs. 13-6-6 a year as alleged by the defendants. This clearly is a question the decision whereon may be challenged by way of appeal under section 153, Bengal Tenancy Act. The view we take is supported by the case of *Apurba Krishna Roy* v. *Ashutosh Dutt* (1).

As regards the merits, it is plain that the view taken by the Court of first instance must be upheld. It has not been seriously contested that the defendants are under-*raiyats* according to the terms of the *kabulyat* by which the tenancy was created. But it has been argued that the order under section 40 is conclusive between the parties and debars the plaintiffs from asserting that the defendants are not occupancy *raiyats*. In support of this view, reliance has been placed upon the case of *Lalla Saligram Singh* v. *Mohunt Ramgir* (2). That case is clearly distinguishable. There an application for commutation of rent had been dismissed by the Revenue Authorities concerned. The applicant then instituted a suit in the Civil Court for declaration of his status and also for an order to compel the Revenue Authorities to make an order for commutation under section 40. It was ruled that a suit could not be maintained for this purpose. The Court pointed out that the Legislature had given a judicial discretion in this matter to the Revenue Court and to the Revenue Court alone, and did not allow its decision to be hampered either in advance or afterwards by any decision come to by the Civil Court. This view is clearly in accord with the provisions of clause (6) of section 40 of the Bengal Tenancy Act. It may be conceded that the propriety of commutation or of the amount fixed cannot be called in question in a Civil Court. But it is plain that a proceeding under section 40 is founded on the assumption that the tenant whose rent is sought to be commuted is an occupancy *raiyat*. The Legislature could never have intended that a dispute as to the status of the tenant should be finally decided by the Revenue Authorities in a commutation proceeding under section 40 and should thereafter be conclusive between the parties in the Civil Court. In the case before us, as it has been established that the defendants are under *raiyats*, no order for commutation could have been made under section 40. The order made by the Revenue Court was consequently without jurisdiction, the essential foundation for the exercise of jurisdiction, namely, that the tenant whose rent was sought to be commuted was an occupancy *raiyat*, is proved to have been non-existent. If the commutation order is out of the way, there is no room for controversy that the plaintiffs are entitled to realise rent at the rate mentioned in the plaint.

The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored. This order will carry costs in all the Courts.

Appeal allowed.

(1) 9 C. W. N. 122.
(2) 3 C. W. N. 311.

KALAPPA KAMTHI *v.* KACHUR SAKHA RAMA RAO.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1962 OF 1913.

April 20, 1915.

Present:—Mr. Justice Coutts-Trotter and Mr. Justice Kumaraswami Sastri.

KALAPPA KAMTHI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

KACHUR SAKHA RAMA RAO, BY HIS AGENT MAGESHWAR KRISHNAYA —PLAINTIFF AND ANOTHER DEFENDANT —RESPONDENTS.

Construction of document—Sale or mortgage—Test—Suit to cancel reconveyance—Limitation Act (IX of 1908), Sch. I, Art. 113.

The question whether a transaction is a mortgage by way of conditional sale or a sale with a provision for re-purchase depends ultimately upon the intention of the parties to be gathered from the instrument and the surrounding circumstances. [p. 898 col. 2; [p. 901, col. 1.]

Per *Kumaraswami Sastri, J.*—Two tests are generally applied in deciding whether a transaction which is on its face a sale, is only a mortgage, because of the condition to reconvey. One is whether there was a debt subsisting at the time to discharge which the document was executed and the other is whether the value of the land conveyed is so disproportionate to the amount mentioned in the document as the alleged consideration for the sale as to raise a reasonable presumption that the parties intended only a security. [p. 901, col. 1.]

The plaintiff's father and the 1st defendant's father who were brothers, divided their family property, and the 1st defendant's father sold his share, the property in dispute, to the plaintiff's father, the sale-deed containing a provision that if the purchase-money should be re-paid together with the value of any improvements effected, the land should be surrenderd to the first defendant's father. On the death of the plaintiff's father his mother acted as his guardian and conveyed the land back to the 1st defendant's father on his re-paying the purchase-money. The plaintiff sued for a declaration that his mother's release was not binding upon him and that he was entitled to get back the property on paying the original purchase-money:

Held, (1) (*Coutts-Trotter, J. dissenting*) that the document executed by the 1st defendant's father was a deed of sale and not a mortgage; [p. 901, col. 2.]

(2) that the right which the 1st defendant acquired under the option to re-purchase was in effect a right to demand specific performance of the contract to reconvey, and there being no refusal to perform in this case the question of limitation did not arise. [p. 899, col. 1; p. 901, col. 2.]

Venkappa Chetti v. *Akku*, 7 M. H. C. R. 219, distinguished.

Second appeal against the decree of the District Court of South Canara, in Appeal Suit No. 58 of 1912, preferred against that of the District Munsif of Kasaragod, in Original Suit No. 618 of 1910.

Mr. *B. Sitarama Row*, for the Appellants.

Mr. *K. Sundara Row*, for the Respondents.

JUDGMENT.

COUTTS-TROTTER, J.—The plaintiff's father and the 1st defendant's father were brothers. They divided their family property in 1879, and on that division the property in question in the suit was allotted to the share of the 1st defendant's father by a deed dated the 22nd of October 1880. The 1st defendant's father sold this property to the plaintiff's father for Rs. 400 and the document contains a provision that if Rs. 400 should be re-paid together with the value of any improvements effected, the land should be surrendered to the 1st defendant's father. The plaintiff's father died and his mother acted as his guardian and managed his affairs. While she was so acting, and while the plaintiff was still a minor, the 1st defendant's father paid the Rs. 400 referred to in the deed of the 22nd of October 1880 and she conveyed the land back to him by a document dated the 16th of February 1905. Both the Courts below have found that this was a perfectly genuine transaction untainted by any fraud and honestly executed for the benefit and supposed benefit of the plaintiff. The plaintiff's suit is brought to declare that the transaction of the 16th February 1905, is not valid or binding upon him and that he is entitled to get back the land on condition of paying the Rs. 400. His case is that the right, if any, of the 1st defendant's father to get back the lands on payment of Rs. 400 was statute-barred in 1905 and that the mother of the plaintiff had no authority to carry out a transaction giving effect to a statute-barred right. The defendant contends, *first*, that the document of the 22nd October 1880 was, in its true construction, a mortgage or *alternatively*, that even if it was not a mortgage, the right conveyed by it to re-purchase was not statute-barred in 1905. The lower Courts have decided against the defendant on both issues and against their decision he appeals.

As to the first contention, the line of division between mortgages by conditional sale and sales with provision for re-purchase is a very fine one. It must ultimately depend upon what was the intention of the parties to be gathered from the instrument

and a consideration of the surrounding circumstances. As pointed out in *Swaminatha Aiyar* v. *Appasami Aiyar* (1), that does not mean that extrinsic evidence is to be admitted to qualify or expand the terms of a written instrument, but only that circumstances in which the contracting parties stood and their relation to one another may be taken into consideration in order to ascertain what the real intention was. The words of the document in this case cannot be said to be conclusive either way. The fact that all the earlier transactions between the parties are set out and the balance due from the 1st defendant's father to his creditor is struck at Rs. 960, a larger sum than the Rs. 400 allocated to the land conveyed, points slightly in the direction of the document being a mortgage. The fact that no time limit is fixed for the exercise of the option to re-purchase also slightly points in the same direction. Much stronger, in my opinion, is the fact that the two parties to the deed were members of a united family who had only recently divided their property and the fact that the land conveyed was part of the share just recently allocated on partition to the 1st defendant's father. On the whole the balance of my opinion inclines, though not strongly, towards regarding the document as a mortgage.

But even if this be not so, I think the defendant is entitled to succeed on another ground. The Courts below have held that the 1st defendant's father's right to obtain a reconveyance was statute-barred on the authority of *Venkappa Chetti* v. *Akku* (2). That case was decided under the old Limitation Act, which contained no Article corresponding to Article 113 of the first Schedule of the Act of 1908 now in force. I think the right which the 1st defendant's father acquired under the option of re-purchase was in effect a right to demand specific performance of the contract to reconvey. No date being fixed for the performance, the period of limitation will begin to run "from the time when the plaintiff had notice that the performance was refused". As there was no refusal in this case, no question of limitation arises and the transaction of February 1905 was unimpeachable.

The plaintiff's case, therefore, fails and the appeal must be allowed and the suit dismissed with costs throughout.

KUMARASWAMI SASTRI, J.—The 6th and 7th defendants are the appellants. The plaintiff sued for a declaration that the deed of release executed by his mother in favour of the 1st defendant's father is not binding upon him and for possession of the property specified in the plaint. The case for the plaintiff was that the property specified in the plaint belonged to the ancestor of plaintiff and 1st defendant and fell to the share of 1st defendant's father at partition, that the 1st defendant's father conveyed the property to the plaintiff's father by outright sale on 22nd October 1880 for Rs. 400, that after his (plaintiff's father) death, the plaintiff's mother in collusion with the 1st defendant's father executed a document purporting to be a deed of relase with fictitious recitals and put 1st defendant's father in possession of the property, that plaintiff's mother was not competent under Hindu Law to execute the release and convey the property to 1st defendant's father and that the document is not valid as it is not supported by consideration and is fraudulent. The case for the defendant was that the property was not conveyed to plaintiff's father absolutely but only by way of mortgage, that the deed expressly provided that it should be reconveyed on re-payment of Rs. 400 and that the transaction impeached in the plaint was a *bona fide* one for consideration and was binding on the plaintiff.

The District Munsif was of opinion that the transaction between plaintiff's father and 1st defendant's father (Exhibit III) was an absolute sale-deed and not a mortgage and that the deed of release impeached in the plaint (Exhibit IV) was not a fraudulent transaction unsupported by consideration. He, however, held that Exhibit IV was not binding on the plaintiff as it was executed after the right of the 1st defendant's father to obtain a reconveyance became barred and as the plaintiff's mother had no power to give up the right to improvements which had been effected on the property. Contrary to the terms of Exhibit III, he gave a decree in favour of the plaintiff, but directed him

(1) 27 Ind. Cas. 305; 27 M. L. J. 686; (1914) M. W. N. 906.

(2) 7 M. H. C. R. 219.

to re-pay Rs. 572-15-0 being made up of Rs. 400 and the value of the improvements by tenants. On appeal the District Judge held that there was no evidence that plaintiff's mother acted collusively and observed as follows:—"There can be no doubt that the transaction was a reconveyance in accordance with the stipulation in Exhibit III and under the rulings quoted by the District Munsif, the 1st defendant's father's claim for reconveyance had become barred. The fact that Exhibit III does not provide for any period for the purchase does not affect the question (statutory limitation). The Munsif was right in holding that the plaintiff's mother acted beyond the scope of the powers as guardian of the plaintiff in executing Exhibit IV. Her conduct could only be regarded as having been induced by a mistaken impression that the claim was not barred."

It is argued for the appellants that Exhibit III is on a true construction a deed of mortgage, that both the lower Courts having found on the evidence that Exhibit IV was not fraudulent or collusive, the release which was executed in pursuance of the obligations created under Exhibit III is valid and binding on the plaintiff and that no question of limitation arises having regard to the terms of the document (Exhibit III). As regards the *first* contention, I am of opinion that Exhibit III has not been shown to be a deed of mortgage. It purports to be a deed of sale executed in consideration of Rs. 400. The material portion runs as follows:—"As mentioned in the said deed of partition above referred to the principal payable by me to you in the matter of sale of Kukkaje property is Rs. 900, the interest due thereon till now is Rs. 95, in all the amount due by me to you is Rs. 995 deducting herefrom the sum of Rs. 35, being the rent due to me till now in respect of the said garden land pertaining to my share, the balance due is Rs. 960. Out of this amount of Rs. 960 a portion (*viz.*, Rs. 400) having been set off by you against this sale-deed you have thereby paid to me the sum of Rs. 400. Rupees four hundred have been paid to me as per particulars noted above. Therefore I have forthwith surrendered to you the garden land, building and all else pertaining to my share and comprised within the boundaries shown below. You may happily enjoy the same hereditarily. You shall yourself pay to the heirs of the *wargdar* the sum of annas twelve, being the *mulgani* hereof. Hereafter I and my heirs have no right or interest whatever in the said garden land and house. Further, if this sum of Rs. 400 now set off against the sale-deed in respect of the land and house together by four persons in respect of such improvements as may be effected by you is paid to you out of my self-earning, you shall surrender to me the said land and house belonging to my share. To this effect is this deed of sale executed".

It is argued by the appellants' Vakil that the fact that no time is fixed for the execution of the reconveyance and that the agreement is embodied in the same document as the sale-deed, indicates that the document is a mortgage; reference has also been made to the cases of *Palaniappan* v. *Subbaraya Gounden* (3) and *Singaram Chettiar* v. *Kalyanasundaram Pillai* (4), where it was held that the presumption in such cases should be that the transaction was a mortgage. Numerous cases have been cited on both sides as to the construction of an agreement to reconvey, but I think that each case has to depend upon its peculiar facts and that no general rule can be laid down in the matter. The points to be taken into consideration in determining the question have been set out by their Lordships of the Privy Council in *Balkishen Das* v. *W. F. Legge* (5), where their Lordships observe as follows:—"Their Lordships do not think that oral evidence of intention was admissible for the purpose of construing the deeds or ascertaining the intention of the parties. By section 92 of the Indian Evidence Act (I of 1872) no evidence of any oral agreement or statement can be admitted as between the parties to any such instrument or their representatives-in-interest for the purpose of contradicting, varying or adding to or subtracting from its terms, subject to the exceptions contained in the several provisos. It was conceded that this case could not be brought within any of them. The cases in English Court of Chancery which were referred..... have not, in the opinion of their Lordships, any application to the law of India as

(3) 22 Ind. Cas. 4; 14 M. L. T. 579; (1914) M. W. N. 222; 1 L. W. 80.

(4) 26 Ind. Cas. 1; (1914) M.W.N. 735; 1 L. W. 687.

(5) 22 A. 149; 27 I. A. 58; 4 C. W. N. 153; 2 Bom. L. R. 523.

laid down in the Acts of the Indian Legislature. The case must, therefore, be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts."

It is, therefore, unnecessary for me to consider the various cases where Courts have applied the principles of English Law in determining whether a transaction is an out right sale or a mortgage. Two tests, however, have been generally applied in deciding whether a transaction which is on its face a sale is only a mortgage, because of the condition to reconvey. One is whether there was a debt subsisting at the time to discharge which the document was executed, and the other is whether the value of the land conveyed is so disproportionate to the amount mentioned in the document as the alleged consideration for the sale as to raise a reasonable presumption that the parties intended only a security. In the present case there is no satisfactory evidence on either of the above points. On the meagre materials before me, I cannot hold that the District Munsif was wrong in construing Exhibit III as a deed of sale.

The *next* contention of the appellants is that at the date of Exhibit IV the right to claim the reconveyance under Exhibit III was not barred and consequently both the Courts were wrong in holding that it was beyond the competence of plaintiff's mother to have executed the release. The clause relating to the reconveyance has already been set out by me in dealing with the contents of the document (Exhibit III). There can be little doubt that the contract between the parties was that the plaintiff's father should reconvey the property to the 1st defendant's father on the latter paying the former the sum of Rs 400. The claim for a reconveyance would, therefore, be a claim to enforce specific performance of contract to reconvey and would fall under Article 113 of the 2nd Schedule to the Limitation Act, which provides a period of three years from the date fixed for the performance, or if no such date is fixed when the plaintiff has notice that performance is refused. There is no date fixed for the performance in Exhibit III and there is no evidence that any performance was demanded or refused within three years prior to the date when the plaintiff's mother executed, Exhibit IV. It is difficult to see how it can be said that, when Exhibit IV was executed the right to claim reconveyance was barred. Reference has been made by the lower Court to *Venkappa Chetti* v. *Akku* (2). This case was decided before the Limitation Act of 1877 was passed and there was no provision corresponding to Article 113 in that Act. The suit was, therefore, treated as a suit to recover prossession of property and the 12 years' rule was applied. It is argued that even assuming that the claim was not barred by limitation, the plaintiff's mother had no power to give up the value of the improvements and accept Rs. 400. Both the lower Courts found that the mother acted *bona fide* and so far as the improvements are concerned there is no definite evidence as to what the improvements were. Such evidence as there is as regards the improvements made between the dates of Exhibits III and IV shows that the improvements were about Rs. 20 or Rs. 30 in value. Exhibit IV states that there was no improvement and I do not think it can be said that the plaintiff's mother in taking the principal amount of Rs. 400 and giving up the small sum of Rs. 20 acted in a manner prejudicial to the interests of the plaintiff.

I reverse the decrees of both the lower Courts and dismiss the plaintiff's suit with costs throughout.

Appeal allowed; *Suit dismissed.*

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1369 OF 1914.

February 25, 1915.

Present:—Mr. Justice Shadi Lal.

KALU AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

BIR SINGH—DECREE-HOLDER—RESPONDENT.

Appeal, second—Omission to consider oral evidence—Material irregularity in procedure—Punjab Courts Act (III of 1914), s. 41 (1) (c).

KALYAN SINGH *v.* RAM GULAM SINGH.

An omission by a lower Appellate Court to consider the oral evidence and record a finding thereon, is a material irregularity in procedure, and is a good ground for second appeal.

Second appeal from the order of the Divisional Judge, Ambala, dated the 19th May 1914, reversing that of the Munsif, first Class, Ambala, dated the 7th April 1914, allowing judgment-debtors' objections.

Mr. *Gulu Ram*, for the Appellants.

Mr. *Nihal Chand Mehra*, for the Respondent.

JUDGMENT.—The contention of the judgment-debtor was that there was an adjustment of the decree on the 28th September 1913, when the decree-holder received Rs. 230 in lieu of his decree for restitution of conjugal rights, and Rs. 20 for costs, and that the latter is, therefore, precluded from executing the decree. In support of that contention two documents, Exhibits J D-1 and J D-2, and six witnesses were produced by the judgment-debtor and the Munsif after a full consideration of the evidence came to the conclusion that the due execution of those documents and the adjustment of the decree had been satisfactorily established and he accordingly dismissed the application for execution. Upon appeal the learned Divisional Judge reversed the finding of the Munsif and it appears that he based his judgment practically on two grounds (1) that the thumb-print marked (X) does not tally with the admitted thumb impression of the decree-holder, Bir Singh; and (2) that in the criminal proceedings the appellant Kalu stated on the 14th August 1912 that he had bought the woman of the respondent for Rs. 200 and that if he had so bought the woman in that year, there was no need for him to pay Rs. 230 on the 28th September 1913.

Now the learned Judge has entirely ignored the oral evidence and has not given any reason whatsoever why the stamp-vendor, the scribe and four attesting witnesses, upon whose testimony the Munsif based his judgment, should be disbelieved. As regards the thumb-prints on the documents I notice that no attempt was made to obtain expert opinion on the question of their genuineness and there is no evidence on the record to justify the finding of the learned Divisional Judge that the thumb-print marked (X) does not tally with the appellant's thumb-print.

In regard to the second reason given by the Divisional Judge, it seems to me that it is a matter of inference, pure and simple. The previous statement may or may not be capable of explanation, but it is wholly insufficient for condemning the documents as forged and the witnesses as perjurers. In the presence of direct evidence as to the transaction there is no room for argument based upon its alleged improbability.

The omission to consider the oral evidence and record a finding thereon is a material irregularity in the procedure of the lower Appellate Court and there has been, it appears, no proper trial of the appeal. The question as to the genuineness of the thumb-prints is one of great importance and ought to have been settled by sending the disputed thumb-marks to an expert for his opinion. The judgment as it stands cannot be upheld. The only course open to me in second appeal is to set it aside and remand the case for re-decision. I accordingly accept the appeal and setting aside the decree of the lower Appellate Court direct it to adjudicate upon the appeal of Bir Singh in accordance with law. Costs in this Court shall be costs in the cause.

Appeal accepted; Suit remanded.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL No. 12 OF 1913.

June 4, 1915.

Present: - Mr. Justice Chapman and Mr. Justice Richardson.

KALYAN SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAM GULAM SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Possession, recovery of, suit for—Civil Procedure Code (Act V of 1908), O. IX, rr. 8 and 9, scope of—Former dismissal of suit, when bar to future suit.

Where the dismissal of a suit takes place under the provisions of section 102 of the old Code (Order

IX, rule 8, of the new Code), the plaintiffs are precluded under Order IX, rule 9, (section 103 of the old Code) from bringing a fresh suit on the same cause of action. [p. 903, col. 2.]

Appeal from the decree of the Subordinate Judge of Monghyr, dated the 14th of August 1912.

Babu *Kali Kinkar Chakravarti*, for the Appellants.

Babus *Joges Chandra Roy* and *Haradhan Chatterjee*, for the Respondents.

JUDGMENT.

CHAPMAN, J.—This is an appeal from a judgment of the learned Subordinate Judge of Monghyr, dated the 14th August 1912. The suit was brought by the plaintiffs who are the appellants to this Court, to recover possession of certain lands—a share in a *patti* called Busi Sing's *patti* This property was leased out by the plaintiffs by a document dated the 1st March 1889 to one Mr. Hollway for a term of nine years and on the same day Hollway sub-let the property back to the plaintiffs. On the 16th January 1893, Mr. Hollway granted a lease of the property to the defendants, the defendants, therefore, dispossessed the plaintiffs. The plaintiffs then brought on the 27th September 1894 a suit (No. 95 of 1894) asking for possession of the property, the subject-matter of the suit, namely 105 *bighas* 24 *cottas* of land. The suit was decreed by the Court of first instance and the plaintiffs then obtained possession of the property in execution. On the 4th September 1896 the defendants preferred an appeal to this Court against that decree. In May 1897 that appeal was allowed and the defendants applied to be restored to possession in execution of the High Court's decree. The plaintiffs objected that the lease under which Hollway held the property had expired; but the Court held that it could not go into such a matter in the execution proceeding. An appeal was then filed to this Court against the latter order and the plaintiffs had also prior to the filing of that appeal instituted a regular suit against the defendants, being Suit No. 359 of 1900. This Court dismissed the appeal against the refusal of the learned Judge to allow this question, which was raised by the present plaintiffs, to be gone into in execution, the Court remarking that the present defendants undertook that neither the proceedings for restitution nor the fact that the previous suit brought by the appellants (No. 359 of 1900) was subsequently dismissed for non-prosecution on the 5th March 1903, should in any sense be treated as a bar to any fresh suit which the present appellants might be advised to institute in relation to the disputed property. The question is whether the Court could place such a condition upon the respondents. It seems to me it could not. The decree in Suit No. 359 of 1900 shows that the case was one where the dismissal took place under the provisions of section 102 of the old Code of Civil Procedure which corresponds with Order IX, rule 8, of the new Code. That being so, the plaintiffs were precluded by law, that is under section 103, from bringing a fresh suit on the same cause of action. No Court in its judgment can say that, in a future suit, section 103 should not operate as a bar to the plaintiffs' suit. The real truth is that the plaintiffs ought to have applied in the manner provided by section 103 of the old Code to set aside the order of dismissal of Suit No. 359 of 1900, and the order of the Court saying that the fact that the suit had been dismissed for non-prosecution should not be treated in any sense as a bar to any fresh suit, is obviously *obiter* and not binding upon the defendants. It is an unfortunate position no doubt but we cannot give the go-by to section 103 of the old Code of Civil Procedure. That section is manifestly a bar to the present suit.

Whether or not the plaintiffs can now have their appeal revived against the refusal of the learned Judge to go into this question in execution, which was dealt with by the judgment of the 12th February 1906, it is not necessary for us to consider. All that we say in this case is that the former dismissal of Suit No. 359 of 1900 is a clear bar to the present suit brought by the plaintiffs. The result, therefore, is that, though for different reasons, I concur in the result arrived at by the learned Judge of the Court below and dismiss the appeal. As this point is one for which the plaintiffs themselves are not responsible, I think there should be no order for the costs of this appeal.

THAKAR DAS *v.* SHAH DIN.

RICHARDSON, J.—I agree.

Appeal dismissed.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 167 OF 1914.

April 14, 1915.

Present:—Mr. Justice Rattigan.

THAKAR DAS AND ANOTHER—OBJECTORS —PETITIONERS

versus

SHAH DIN—RESPONDENT.

Patents and Designs Act (II of 1911), ss. 26, 28—Petition for revocation of patent—Burden of proof.

In a petition under section 26 of the Patents and Designs Act (II of 1911) for revocation of a patent, the onus lies heavily on the petitioner to show that the respondent is not the true and first inventor of the invention. [p. 904, col. 2.]

Petition, under section 26, Act II of 1911 (Indian Patents and Designs Act, 1911), for the revocation of a patent granted to Shah Din Mistri.

Mr. *Bhagat Ram Puri*, for the Petitioners.

Lala *Hukam Chand*, for the Respondent.

ORDER.

RATTIGAN, J.—(*April 17th*, 1914).—Mr. Hukam Chand, on behalf of the respondent, files a written statement in reply to the allegatioas in the petition.

After questioning the learned gentlemen who respectively represent the petitioners and the respondent and after careful consideration of the allegations in the petition and in the written statement, I am of opinion that the points at issue between them are as follows:—

(1). Are the petitioners the true and first inventors described in paragraph (1) of the petition?

(2). Was the patent granted to respondent by the order of the Controller of Patents, dated 20th February 1914, obtained by respondent in fraud of petitioners' rights?

Under section 28 of Act II of 1911, I direct that the two issues above stated be tried before the District Court at Gurdaspur and that the said Court shall proceed in accordance with the provisions of sub-section (3) of section 28 of the said Act. The trial shall proceed with all convenient despatch, and pending its progress the respondent is to be at liberty to make all legitimate use of the invention. The parties are agreed that it will be in the interests of all concerned if the District Court appoints a responsible person to act as an *ad interim* Receiver of the profits (if any) accruing from such user of the invention, the said Receiver to keep the usual accounts and from the said profits (if any) to allow, from time to time, such sums of money to the respondent as in the opinion of the Receiver may be reasonable and proper for the efficient working of the invention by the respondent and his servants. I direct the District Court to take action accordingly.

The petitioners must give security, to the satisfaction of the District Court, for payment of any costs which may ultimately be awarded to the respondent. The record of the case will be forwarded as soon as possible to the District Court, Gurdaspur, for favour of compliance with the above orders

JUDGMENT.—A return has now been made to my order dated the 17th April 1914, and the District Judge, in his order dated the 23rd January last, carefully reviews the whole of the evidence produced by the parties before him. In his opinion this evidence clearly shows that the respondent Shah Din is the true and first inventor of the Mill and there is nothing whatever to support petitioners' allegation that Shah Din stole his idea from them. After perusal of the evidence taken on remand, I entirely agree with the District Judge's conclusions. The onus heavily lay upon the petitioners and the evidence adduced by them is of the vaguest and most unconvincing character, while a very strong point against them is that

neither of them ventured to go into the witness-box to testify on oath to the truth of their assertions. As a result I must (as I hereby do) reject this petition with costs.

Petition rejected.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 102 OF 1914.

April 15, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

N. GOVINDA CHETTY—PLAINTIFF—APPELLANT

versus

N. DORAISWAMI CHETTY—DEFENDANT—RESPONDENT.

Partition, suit for—Collection of rent by one of defendants subsequent to suit—Account—Procedure—Civil Procedure Code (Act V of 1908), s. 47 (2).

Where in a partition suit it is alleged that one of the defendants collected rents of houses, the subject of suit, subsequent to the suit and the application is made to include that amount in the accounts between the parties, the proper course is not to treat the application as one for execution of the partition decree, but to treat it as a suit under section 47 (2) of the Code of Civil Procedure and to levy additional Court-fee thereon and to direct the parties to submit a true and correct account of the rents and profits collected.

Appeal from the order of the Hon'ble Mr. Justice Bakewell, dated the 10th November 1914, in ordinary original civil jurisdiction of this Court, in Civil Suit No. 6 of 1908.

Mr. *W. V. Rangaswami Aiyangar*, for the Appellant.

Mr. *K. Ramachandran*, for the Respondent.

JUDGMENT.—We are unable to agree with the learned Judge that it must be assumed that if the 1st defendant "had collected any rents, they were taken into account in the proceeding upon which" the decree was passed.

If any such sums had been so taken into account, it lay upon the 1st defendant to prove that fact as a defence to the plaintiff's claim.

The plaintiff's claim for rents of the house purchased by him from April 1910 was not a matter (so far as we could see) which could have been or was

intended to be gone into in the suit for partition.

We think that the most appropriate course is (in discharge of the learned Judge's order)

(*a*) to direct under section 47 (2) of the Code of Civil Procedure this application by Judge's summons to be treated as a suit, the appellant to pay the additional Court-fees within two weeks;

(*b*) to direct the appellant to file in Court an additional statement in which the necessary additional allegations should be made (in addition to the allegations contained in the affidavit filed in support of the Judge's summons), showing particulars as to the actual collections of rents and profits made by the respondent and also indicating, where any portion of the claim is *prima facie* barred by limitation, how it is not barred.

The additional statement ought to be filed in four weeks. The case is remanded for final disposal as suit, the costs hitherto being costs in the cause.

Appeal allowed; Suit remanded.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 163 AND 164 OF 1913.

March 26, 1915.

Present:—Mr. Justice Richardson and Mr. Justice Mullick.

IN APPEAL No. 163

AMBICA CHARAN DAS—DEFENDANT No. 1—APPELLANT

IN APPEAL No. 164

PRIYA NATH DAS—DEFENDANT No. 2—APPELLANT

versus

HARINATH DAS AND OTHERS—PLAINTIFFS—RESPONDENTS IN BOTH.

Principal and Agent—Joint property of brothers—Some brothers taking management of property—Relation created—Managers, duty of—Government Revenue, payment of, if for upkeep of estate.

Where by agreement two of the five brothers agreed to take over the management of their joint

property for a period of five years for the improvement and upkeep of the estate:

Held, that the relationship of principal and agent created by the agreement must not be overlooked and that the managers are under a legal duty to exercise reasonable care and diligence in the management of the estate. [p. 906, col. 2.]

A payment on account of the Government revenue of an estate is a payment for the upkeep of the estate. [p. 906, col. 2.]

Appeal against the decree of the Subordinate Judge, Khulna, dated the 28th November 1912, affirming that of the Munsif, second Court at that place, dated the 26th of March 1912.

Babu *Surendra Chandra Sen*, for the Appellants in No. 163.

Babu *Hemendra Chandra Sen*, for the Appellan in No. 164.

Dr. *Nares Chandra Sen Gupta*, for the Respondents in Nos. 163 and 164.

JUDGMENT.

RICHARDSON, J.—By an agreement, dated the 17th *Chaitra* 1315 B. S., two of five brothers agreed to take over the management of their joint property for a period of five years from the 1st *Baisakh* 1316 to *Chaitra* 1320. The case was argued before us with sole reference to clause 8 of the agreement. In that clause the management is expressed to be for the "improvement and upkeep" of the estate. The managers were to take two-fifths of the profits and to be liable for two-fifths of the profits and expenses, the remaining three-fifths of the profits and expenses being respectively payable to and by the other three brothers who renounced their rights of management during the period in question. The clause ends as follows:—"If for the protection of the property the managers are required to pay any money in advance they shall make such payment and protect the property and they will be afterwards entitled to recover the same with interest; if the managers fail to pay the profits in proper time they shall be bound to pay the same with interest."

The plaintiff in this suit is one of the two managers and the defendant No. 2 is the other. It appears that the estate stands in the Collectorate in the name of the plaintiff, and that a certificate having been issued against him he was compelled to pay the sum of Rs. 1,256-6-0 on account of arrears of Government revenue due in respect of the year 1910. The payment was made on the 28th March 1911 and on the 19th April following he brought this suit for contribution against his brothers. He obtained a decree in the Court of first instance which was confirmed by the learned Subordinate Judge in the Court of Appeal below. Two of the brothers, the defendant No. 1 and the defendant No. 2, have preferred appeals (Nos. 163 and 164 of 1913) to this Court.

For the defendant No. 1 it is argued in effect that the Government revenue was payable in the first instance by the plaintiff and the defendant No. 2 as managers out of collections which they made or ought to have made from the estate and in the circumstances a claim for contribution is untenable. There is undeniable force in this argument. It is not suggested that the agreement of 17th *Chaitra* 1315 was for any reason invalid. As the suit is framed, the plaintiff can only succeed by bringing his case within the terms of section 69 of the Contract Act:—"A person who is interested in payment of money which another is bound by law to pay, and who, therefore, pays it, is entitled to be re-imbursed by that other." No doubt in a sense all the brothers were responsible for the Government revenue and the payment made by the plaintiff was made on behalf of them all. But the relationship of principal and agent created by the agreement must not be overlooked. The managers were under a legal duty to exercise reasonable care and diligence in the management of the estate. As both Courts below have held, a payment on account of Government revenue is a payment for the upkeep of the estate and it is difficult to see how the managers or either of them can recover anything on account of such a payment unless and until they or he shows that he is entitled as agent to charge his principals. The plaintiff has not attempted to prove anything of the kind. He has simply ignored his obligations under the agreement, as to which the plaint is entirely silent. As between the plaintiff and the defendant No. 1, therefore, it is not shown that the latter was legally bound to make the payment in respect of which contribution is sought. On the contrary the presumption is that as between the parties, the plaintiff and the defendant No. 2

are the persons primarily responsible and no attempt has been made to displace that presumption.

As to the concluding part of clause 8 of the agreement it is obvious that the payment of arrears of Government revenue cannot be regarded as a payment in advance, at any rate until it is shown that there were no assets from which a payment could have been made in the ordinary course. What seems to have been contemplated by advances was expenditure on account of improvements.

As to the case of defendant No. 2, here again it is difficult to see how a claim for contribution can be maintained on the footing adopted in the plaint. It is impossible to say what the relative rights and obligations of the plaintiff and the defendant No. 2 may be, without reference to what took place under the agreement and such questions as the actual control which both or either had over the assets.

In my opinion no claim for contribution can be maintained in the suit as framed. The appeals, therefore, succeed and the suits must be dismissed with costs here and in the Courts below.

MULLICK, J.—I agree.

Appeals allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2266 OF 1912.

March 22, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

M. K. VEERARAGHAVA CHARIAR—DEFENDANT—APPELLANT

versus

A. KRISHNAMACHARIAR—PLAINTIFF—RESPONDENT.

Madras Survey and Boundaries Marks Act (IV of 1897), s. 13—Adverse possession—Starting point of limitation.

Where an original order of a Survey Officer, adverse to the plaintiff, was dated 31st October 1908 but both parties' cross-appeals were heard together and disposed of by a single order dated the 18th January 1909:

Held, that the date of the latter order was the starting point of limitation for the plaintiff's suit for possession. [p. 908, col. 2.]

Second appeal against the decree of the District Court of Chingleput, in Appeal Suit No. 598 of 1911, preferred against that of the District Munsif of Chingleput, in Original Suit No. 66 of 1910.

Mr. *N. B. Doraisawmy Aiyangar*, for the Appellant.

Mr. *P. V. Ramachandra Raju*, for the Respondent.

This second appeal coming on for hearing on the 18th August 1914, the Court delivered the following

JUDGMENT.—There is no finding by the District Judge on the plea of adverse possession set up by the defendant, and embodied in issue No. 3, though this was made the 7th ground of appeal before him. It appears to have been overloked. We must call for a finding on this point.

As regards limitation, the appellant's Vakîl urges that the original order of the survey officer adverse to the plaintiff was dated 31st October 1908, and that Exhibit C is only an order on his (appellant's) appeal and will not give the respondent a starting point for limitation under section 13 of Madras Act IV of 1897. The respondent has now been allowed to file a public copy of an appeal petition filed by him against the Survey Officer's order (Exhibit D) and he represents that this appeal also was disposed of by Exhibit C.

As the facts are not clear, we must call for a finding: "Was there any decision of an appellate authority adverse to the plaintiff within the meaning of section 13 of Madras Act IV of 1897, which he might take as a starting point of limitation under that section, and if so, of what date?"

On this issue, both sides may adduce further evidence if they so desire.

The findings should be submitted within two months from this date and seven days will be allowed for filing objections.

In accordance with the order contained in the above judgment the District Judge of Chingleput submitted the following

FINDING.—The first issue on which the High Court has called for a finding is, "whether the suit is within time." This is issue No. 3 in the suit.

2. The plaintiff deposes that till two or three years prior to the suit he had a shed on the suit site and was tying cattle therein. P. W. No. 2 corroborates him, P. W. No. 3 says in general terms that the site is in the enjoyment of the plaintiff.

3. None of the defendant's witnesses says that either he or his vendor was even in enjoyment of the suit site. In Exhibit B the defendant acknowledged the plaintiff's right to the suit site. The District Munsif finds for these reasons that the suit is within time. On the evidence this is the only conclusion possible, and I find that the suit is within time.

4. The next issue on which a finding is called for is, "was there any decision of appellate authority adverse to the plaintiff within the meaning of section 13 of Madars Act IV of 1897 which he may take as a starting point of limitation under that section, and if so, of what date."

5. The defendant's contention is that the order, of which Exhibit C is a copy, was passed on his appeal petition, Exhibit B, and not on any petition presented by the plaintiff to the Survey Department. For the plaintiff it is urged that he put in an appeal petition of which Exhibit D is a copy and that the order Exhibit C was received by him from the Survey Department as having been passed on his appeal. From the application put in by the plaintiff for copies of his appeal petition and the order passed thereon and the reply received from the Survey Department—Exhibit D series—it is clear that the appeals presented by him and the defendant were both heard together and that a single order—the original of Exhibit C—was passed. This is not improbable. It may be observed that from Exhibit C it appears that the plaintiff was also heard. I do not think there is much importance in the contention raised on behalf of the defendant that the plaintiff should have preferred his appeal under section 12 of Act IV of 1887 to the Sub-Assistant Surveyor who is the immediate superior to the Survey Officer, and not to the Assistant Director. I find the first part of this issue in favour of the plaintiff. The date of the order, Exhibit C, is 18th January 1909 and I find that it is the starting point of limitation for plaintiff's suit.

This second appeal coming on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the findings and dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

REFERRED CASE No. 7 OF 1913.

March 3, 1915.

Present:—Sir John Wallis, KT., Chief Justice, Mr. Justice Ayling and Mr. Justice Sadasiva Aiyar.

RAJAMMAL—PLAINTIFF—APPELLANT

versus

NARAYANASAMY NAICKER AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 63—Claim Proceedings—Suit to establish right—Jurisdiction of Small Cause Court—Presidency Small Cause Courts Act (XV of 1882), s. 19 (s).

A suit to establish a right given to the unsuccessful party in claim proceedings under the Code of Civil Procedure involves in every case a prayer for the setting aside of a summary order of a Civil Court. Such a suit cannot be regarded as a suit for a mere declaration and is not excluded from the jurisdiction of a Small Cause Court under section 19 (s) of the Presidency Small Cause Courts Act. [p. 916, col. 1.]

Case stated under section 69 of the Presidency Small Cause Courts Act, XV of 1882, by the Registrar of the Court of Small Causes, Madras, in Suit No. 3117 of 1913.

Mr. *P. Sambandam*, for the Plaintiff.

Mr. *C. Pattabirama Iyengar*, for the Defendants.

FACTS of the case appear from the following judgment of Oldfield and Tyabji, JJ., who referred the case to a Full Bench:

JUDGMENT.

"OLDFIELD, J.— The facts, as submitted, are that the 1st defendant in execution of his decree attached moveable property as belonging to the 2nd defendant, his judgment-debtor. The plaintiff claimed unsuccesfully and then

brought the present suit for the return of the property or payment of its value by the 1st defendant. The property is in the custody of the Court. The questions referred are:—

(1) Is the suit maintainable?

(2) Is the plaintiff bound to ask for an express declaration of her right to the property?

(3) Is the suit one contemplated by Order XXI, rule 53, of the Small Cause Court Rules and is it cognizable by the Small Cause Court?

It is to be observed first that questions 1 and 2 may, for the purpose of the reference, be treated as alternative. The object is to determine the form in which the plaintiff should ask for relief and the Court, to be determined with reference to that form, which can give it. If she is bound to ask for a declaration and cannot obtain one in a Small Cause Court, she will not be able to alter the latter fact by asking also for a decree for possession which such a Court ordinarily could give, because she either is obliged or chooses to do so.

The 1st defendant's objection to the suit as framed is shortly that the plaintiff's claim for recovery of property from a person who is not in possession of it, is meaningless and not maintainable. *Contra*, it is urged that in fact the 1st defendant is in possession of it through the attaching Court, since the Court holds it on his behalf, either generally or as his agent. This view is not tenable. Two aspects only have been referred to in which the possession of the Court resembles that of an agent, that (1) its officers would be liable to the 1st defendant in case the property were lost or damaged through their negligence, (2) the 1st defendant can at any time terminate the Court's possession by withdrawing his attachment. But as regards (1) the liability to the 1st defendant would be only for such proportion of the value of the property, not exceeding the amount of his decree, as might have been recoverable by its sale, the 2nd defendant being entitled to recover also, in case the 1st defendant's claim did not exhaust the whole value; and as regards (2), though the 1st defendant could terminate the Court's custody at his option, he could not himself obtain possession, since it would revert to the person from whom it was taken. In other respects, the attempt to represent the Court's possession as that of the 1st defendant's agent fails entirely. The property is not the 1st defendant's and did not come into the Court's possession as his; and he would not suffer, except indirectly and in the event of his not being able to recover his decree amount otherwise, by its loss or deterioration in circumstances in which no compensation could be claimed. Nor, the analogy with agency falling, is the contention that the Court's custody is in some less specific way equivalent to the 1st defendant's better established. For the distinctions drawn between the former and the custody of an agent are equally applicable to any more general relation which can be suggested. The difficulty in the plaintiff's way is still that attachment does not affect ownership and that the Court, though it holds the property at the creditor's instance, holds it in no way at his direct disposal or more for his benefit than for that of the debtor, to whom it belongs and whose debt it is to discharge. It is not necessary to decide whether the Court's custody is *sui generis* or is covered by any of the general legal descriptions of possession. It is sufficient that the property has not been shown to be in the possession of the 1st defendant. He, therefore, cannot be sued for its recovery. The alternative is that the plaintiff must establish her right against him by a suit for a declaration.

The Madras cases are consistent with this. The first referred to here, *Jankiammal* v. *Vithenadien* (1), is, no doubt, in plaintiff's favour. Its authority is, however, doubtful because the report does not refer explicitly to the Court's custody of the property and because the case was not argued. The next, *Kundeme Naine Booche Naidoo* v. *Ravoo Lutchmeepaty Naidoo* (2), is not in point, because the Court's custody had ceased on the sale of the attached property to the 2nd defendant, from whom possession or the value was claimed. *Kolasherri Illath Narainan* v. *Kolasherri Illath Nilakandan Nambudri* (3) was decided under the Code of Civil Procedure, and the property being immoveable, the Court's custody was not in question. The decision, however, laid down generally that an

(1) 5 M. H. C. R. 191.
(2) 8 M. H. C. R. 36.
(3) 4 M. 131.

unsuccessful claimant cannot ask for the discharge of the order of attachment in his suit, but must obtain a declaration and carry it to the attaching Court which will act on it. The point actually decided was that the plaintiff was not bound to ask for specific relief in the shape of a discharge of the attachment, besides a declaration regarding it or the ownership of the property; and it is to be presumed that any contention regarding specific relief at the hands of the defendants would have been similarly negatived. In *Naranayyan* v. *Nageswarayyan* (4), the Court, no doubt, said generally that a plaintiff in a suit under section 283 of the Civil Procedure Code could ask for specific relief as well as a declaration. But this statement had no bearing on jurisdiction or the facts of the case, which do not appear to have included possession by an attaching Court. The two next decisions are greatly relied on by the plaintiff. In *Mahomed Koya* v. *Kasmi* (5), decided under the Provincial Small Cause Courts Act, it was held consistently with the 1st defendant's present argument that the plaintiff was not bound to sue for recovery of the moveables under attachment and had sued rightly for a declaration. But reliance has been placed on the words "if plaintiff had sued for recovery of the property, the suit would be cognizable by a Court of Small Causes." They are, however, followed immediately by others, which show that this statement was conditional on the circumstances enabling the plaintiff to sue for possession at all and that they in fact did not do so, because the property was in the possession, not of any private person, but of the Court, which could not be sued. Next in *Ambu* v. *Kellilamma* (6), immoveable property was in question and there was, therefore, no possession by an attaching Court, the property being in fact in possession of an auction-purchaser. The plaintiff had already sued once under section 283 of the Code of Civil Procedure, and the question was whether she could sue again after the sale for possession. The observations of Muthusami Aiyar, J., regarding the claimant's right to sue once only after her title has been declared are, therefore, not now relevant. They were disapproved in *Kunhiamma* v. *Kunhunni* (7), but finally approved in the Full Bench case of *Kristnam Sooraya* v. *Fathma Bee* (8). But the last-mentioned decision really did no more than endorse the learned Judge's opinion that section 42 of the Specific Relief Act does not take away the plaintiff's right to sue only for a declaration under section 283 of the Code of Civil Procedure and in no way authorised the principle, on which the plaintiff's argument depends, that independently of the circumstances of the case and the nature of the possession in which the disputed property is, a suit for possession with or without a prayer for declaration is the proper remedy. As to that, the current of Madras authority is in the 1st defendant's favour.

So also in Calcutta and Allahabad. In *Shiboo Narain Singh* v. *Mudden Ally*, *Natabar Nandi* v. *Kali Das Pali* (9), section 283 of the Code of Civil Procedure was in question and the Court was dealing directly with a suit against a purchaser in possession. It, therefore, held that a suit for possession or the value of the property would lie. But in doing so, it distinguished between such a case and one similar to *Ram Dhun Biswas* v. *Kefal Biswas* (10) or that now before us, in which no sale had taken place and a declaration had, therefore, to be asked for. This decision is explained by the Allahabad High Court in the Full Bench case of *Godha* v. *Naik Ram* (11). In it a claim to property in the possession of the Court was in question, and a conclusion consistent with that already based on Madras authorities was reached. The expression of dissent at the end of the judgment from the Madras view can be accounted for by the fact that only the two earliest cases above referred to were considered and the facts in the later were misunderstood.

On the other hand, the plaintiff is, no doubt, entitled to rely on the most recent case in Bombay. The earlier cases, *Nathu*

(4) 17 M. 389.
(5) 9 M. 206.
(6) 14 M. 23.
(7) 16 M. 140.
(8) 29 M. 151 (F. B.).
(9) 7 C. 608; 9 C. L. R. 8.
(10) 10 W. R. 141; 1 B. L. R. (S. N.) 10.
(11) 7 A. 152 (F. B.); A. W. N. (1883) 349.

Ganesh v. *Kalidas Umed* (12) and *Gordhan Pema* v. *Kasandas Balmukundas* (13) are also in her favour, though they are of small weight, since neither was decided after argument. But in *Raghunath Mukund* v. *Sarosh K. R. Kama* (14), the Court held that a suit for possession would lie against the attaching creditor although a claim had been made and failed and that no declaration need be asked for. It was regarded as conclusive that "the direct object of a claimant whose goods have been attached by the Sheriff is to get his goods released from attachment and not merely to have it declared that they are his." It can only be replied that this is irreconcilable with the view taken by this Court in *Kolasherri Illath Narainan* v. *Kolasherri Illath Nilakandan Nambudri* (3) and the procedure laid down therein as appropriate.

In these circumstances in accordance with general principles and the balance of authority including that of this Court, question 1 must be answered in the negative and question 2 in the affirmative.

This decision renders it unnecessary to answer question 3 as it stands. For the suit, as brought, is not such as Order XXI, rule 53, and the facts authorise. It may, however, be observed that there is no reason why the suit for a declaration contemplated by Order XXI, rule 53, should not be covered, like other suits for declaration, by section 19 (*s*) and excluded from the Court's jurisdiction. It is not necessary to go through the different Codes, Small Causes Court Acts and Rules, since they all provide in practically identical terms for a suit to establish the claimant's right. It would be useless to follow the learned Judges in their conjectures as to the intention of the Legislature in using those words, since no certain basis for such conjectures has been suggested. A more legitimate ground of decision is the fact that in the Provincial Small Cause Courts Act in force before 1887, suits for declaratory decrees were excepted generally from the small cause jurisdiction, whereas in Act IX of 1887 suits for declarations other than suits under sections 283 and 332 of the Code of Civil Procedure were excepted by Schedule II, Article 19, and suits under those sections were excepted specifically by Article 20. This is not significant, as the plaintiff contends, as a special treatment of such suits for the provincial Courts, but rather as indicating the manner in which the term "suits for declaratory decrees" should be understood, with reference to its use in a similar enactment. It would serve no useful purpose to go through the authorities again with regard to this point. In those in which conflict between ordinary and small cause jurisdiction is in question, the decision depends on the presence or absence of an obligation to ask for a declaration and to get the adverse order on the plaintiff's claim petition set aside. It is with reference to the existence of that obligation that a conclusion must be reached, Order XXI, rule 53, providing only for the suit, but not specifying the *forum* in which it should be brought. If, therefore, question 3 is really whether a person in plaintiff's position can sue in the Small Cause Court, it must be answered in the negative.

As my learned brother differs, the case must be placed before a Full Bench for disposal.

TYABJI, J.—The present suit must, it seems to me, be considered, by reason of the allegations in the plaint, as set out in the reference to us, to be one for "the establishment of a right" under Order XXI, rule 53 of the Small Cause Court Rules (corresponding to Order XXI, rule 63 of the Civil Procedure Code). It does not appear whether the Order and rule are specifically mentioned in the plaint, but the circumstances alluded to in rule 53 are set out and there seems no doubt that the plaintiff and all concerned considered the suit to be instituted under the said rule. In none of the numerous reported cases where similar allegations were made, has any question been raised about the suit being for the establishment of the right, under the rule or the corresponding sections. See for instance, prayer (*d*) in *Kishori Mohun Rai* v. *Hurscok Das* (15) affirmed in *Kishorimohun*

(12) 2 B. 365.
(13) 3 B. 179.
(14) 23 B. 266.
(15) 12 C. 696.

Roy v. *Harsukh Das* (16) and the prayers in *Phul Kumari* v. *Ghanshyam Misra* (17).

The attachment and unsucessful claim affect the rights of the parties not only as to limitation, but also, it seems to me, by giving rise to a new cause of action "to establish the right which he" (the unsuccessful claimant) "claims to the property in dispute." See *Godha* v. *Naik Ram* (11) (Straight, Oldfield, Broadhurst and Tyrell, JJ.), *Phul Kumari* v. *Ghanshyam Misra* (17).

Though this cause of action is similar to that on which a suit for a declaratory decree is based [Presidency Small Cause Courts Act, section 19 (*s*)], yet it is different in the following and perhaps other respects:—

(1) The granting of a declaration, falling as it does under section 42 of the Specific Relief Act, is discretionary; establishing the right is not discretionary. *Raghunath Mukund* v. *Sarosh K. R. Kama* (14) (Farran, C. J., and Strachey, J.).

(2) A suit for "establishment of right" is not subject to the rule contained in the last cited section that if the plaintiff, being able to seek further relief than a mere declaration, omits to do so, the declaration cannot be granted: *Narayanrav Damodar Dabholkar* v. *Balkrishna Mahadev Gadre* (18) (Westropp, C. J., M. Melvill, J., F. D. Melvill, J.), *Krishnam Sooraya* v. *Fathma Bee* (8) (White, C. J., Subramania Aiyar and Davies, JJ.), adopting Muthusami Aiyar, J.'s view in *Ambu* v. *Ketlilamma* (6) and overruling Collins, C. J., and Wilkinson, J., in *Kunhiamma* v, *Kunhuni* (7), though further and consequential reliefs *may* be prayed for and granted: *Sadu* bin *Raghu* v. *Ram* bin *Govind*(19), *Naranayyan* v. *Nageswarayyan* (4).

(3) "A suit for establishing a right of the kind contemplated" in the section or rule in question "seeks not only a declaration of the plaintiff's right, but also substantial consequential relief in the setting aside or restoration of the attachment:" *Dayachand Nemchand* v. *Hemchand Dharamchand* (20) (see the question referred to the High Court at page 517); and the suit to establish a right has been considered as distinct from one for a declaration, (though as the result of a strict construction of a fiscal enactment like the Court Fees Act, the stamp duty on the two suits may be the same): *Dhondo Sakharam Kulkarni* v. *Govind Babaji* (21) *Phul Kumari* v. *Ghanshyam Misra* (17).

(4) "The direct object of a claimant whose goods have been seized by the Sheriff is to get his goods released from attachment, and not merely to have it declared that they are his goods. In substance the suit is for the goods, though as a matter of form the decree may contain a declaration. * * * * It would be an error to call a suit intended to have such a result a suit for declaration:" *Raghunath Mukund* v. *Sarosh K. R. Kama* (14). Such a suit, therefore, though it may not be "a suit for possession of personal property pure and simple"—*Makund Lal* v. *Nasiruddin* (22); *Ilahi Bakhsh* v. *Sita* (23)—yet it differs from it merely by reason of the attachment, and may, therefore, "be properly regarded as a suit for personal property:' " *Chhaganalal Nagardas* v. *Jeshan Rav Dalsukhram* (24) (Melvill and Pinhey, JJ.), *Pagi Partap Hamir* v. *Varajlal Mulchand* (25) (Sargent, C. J., and Kemball, J.). Nor does the section (or rule) "prevent a tribunal, before which such a party (*i. e.*, "against whom an order upon an application under that section has been made") "might have brought his suit, if there had not been any application made' under that section from entertaining it," per Westropp, C. J., and Melvill, J., *Nathu Ganesh* v. *Kalidas Umed* (12), *Gordhan Pema* v. *Kasandas Balmukundas* (13) (Melvill and Kemball, JJ.).

(5) The suit to establish the right supplies the absence of any provision by which a Court other than a Court of Appeal or a High Court may discharge an order for attachment. "It is, in substance, to reverse the order of the Court out of which the execution issued:" *Alexander Mitchell* v.

(16) 17 C. 436 at pp. 437, 441 (P. C.); 17 I. A. 17; 13 Ind. Jur. 452; 5 Sar. P. C. J. 472.
(17) 35 C. 202 (P. C.); 12 C. W. N. 169; 35 I. A. 22; 7 C. L. J. 36; 5 A. L. J. 10; 17 M. L. J. 618; 2 M. L. T. 506; 10 Bom. L. R. 1.
(18) 4 B. 529.
(19) 16 B. 608.
(20) 4 B. 515 at p. 521.
(21) 9 B. 20.
(22) 4 A. 416; A. W. N. (1882) 93.
(23) 5 A. 462.
(24) 4 B. 503.
(25) 8 B. 259.

Mathura Das (26). The effect of a judgment in such a suit is "to supersede" the order on the claim petition, and "to render it altogether inconclusive:" *Kishori Mohun Roy* v. *Harsukh Das* (16). Lord Watson speaks of the "*decree* of the Subordinate Judge dismissing the respondent's claim." I have substituted "order;" *Sadu* bin *Raghu* v. *Ram* bin *Govind* (19). This jurisdiction may be exercised according to *Kolasherri Illath Narainan* v. *Kolasherri Illath Nilakandan Nambudri* (3) by a Court whose jurisdiction is inferior to that of the Court which issued the order for attachment; see also *Krishnappa Chetty* v. *Abdul Khader Saheb* (27). The Allahabad High Court, on the other hand, considered that this would be so inconvenient as to justify their differing from the Madras and Bombay High Courts. *Godha* v. *Naik Ram* (11).

(6) Attachment of moveable property is for the purposes of suit to "establish the right" not equivalent to dispossession, *Pagi Partap Hamir* v. *Varajlal Mulchand* (25) following *Chhaganlal Nagardas* v. *Jeshan Rav Dalsukhram* (24). The attaching creditor is responsible for the property while it is under attachment: *Kishori Mohun Roy* v *Harsukh Das* (16).

(7) The phrase "suit to establish his right" construed in its narrowest sense does not exclude a suit in which reliefs consequential upon a declaration are expressly prayed for. If the phrase is more largely construed, even a suit to obtain partition and separate possession may not inaptly be described as a suit to establish his right: *Sadu* bin *Raghu* v. *Ram* bin *Govind* (19). This case refers to the various reliefs which have been either actually granted in a suit to establish a right, on the ground that the other reliefs (though not expressly prayed for) are included in or flow from the establishment of the right; or have been considered as capable of being asked as consequential reliefs; *e. g.*,

(*a*) setting aside the sale: *Bank of Hindustan* v. *Premchand Raichand* (28),

(*b*) directing the money to be restored: *Bank of Hindustan* v. *Premchand Raichand* (28),

(*c*) recovery of the attached property from the purchaser: *Jetti* v. *Sayad Husein* (29),

(*d*) setting aside or restoration of the attachment: *Dayachand Nemchand* v. *Hemchand Dharamchand* (20),

(*e*) re-placing the plaintiff in possession of the property in question: *Narayanrav Damodar Dabholkar* v. *Balkrishna Mahadev Gadre* (18),

(*f*) protection from sale: *Ram Prasad* v. *Sukh Dai* (30),

(*g*) partition and separate possession: *Sadu* bin *Raghu* v. *Ram* bin *Govind* (19).

In the result (A) a series of the most distinguished Judges of the High Court of Bombay have consistently held that where a suit is instituted under the circumstances referred to in Order XXI, rule 53 of the Small Cause Courts Rules, its maintainability in that Court is affected neither by section 19 (*s*) of the Presidency Small Cause Courts Act nor by section 42 of the Specific Relief Act, but depends on the character and value of the property, provided that the plaintiff is the person who alleges that his goods have been wrongly attached. The distinction where the suit is by a decree-holder who asks for his judgment-debtor's rights to be established is very clearly pointed out in *Chhaganlal Nagardas* v. *Jeshan Rav Dalsukhram* (24). But I need not express any opinion as to a decree-holder's suit and I do not intend to do so, nor in any way to conclude myself with reference to a suit different from the present one, either as regards the plaintiff's position, or the *forum*, or the cause of action. (B) The same view is the only one that seems to me to be reconcilable with the decisions of the Madras High Court in *Janakiammal* v. *Vithenadien* (1), *Kundeme Naine Booche Naidoo* v. *Ravoo Lutchmeepaty Naidoo* (2) and *Daud Beg* v. *Kullappa* (31). There is one other decision of this Court to which I shall refer later. (C) In Calcutta the cases of *Woomesh Chunder Bose* v. *Muddun Mohun Sircar* (32) (*per* Steer and Jackson, JJ.) and *Ram Dhun Biswas* v. *Kefal Biswas* (10) (*per* Peacock C. J. and Mitter, J.) together

(26) 8 A. 6 at pp. 9, 11; 12 I. A. 150; 4 Sarasvati's P. C. J. 663.
(27) 25 Ind. Cas. 11; 26 M. L. J. 449 at p. 455.
(28) 5 B. H. C. R. 83 at p. 93.
(29) 4 B. 23 *note*.
(30) 2 A. 720.
(31) 11 M. 264.
(32) 2 W. R. 44.

contain the same principles as prevail in Bombay; though a third decision, *Moozdeen Gazee* v. *Dinobundhoo Gossamee* (33) (L. S. Jackson and Glover, JJ.,) misapplied the 2nd decision, as was pointed out in *Shiboo Narain Singh* v. *Mudden Ally*, *Natabar Nandi* v. *Kali Das Pali* (9). There may, however, be some doubt as to the applicability of the last case to the present question, as, though the observations seem directly in point, the property there concerned was no more under attachment, but was being followed in the hands of the execution purchaser; and the Court held that the judgment-debtor and decree-holder were not proper parties to the suit. See, however, the cases cited in paragraphs numbered (4) and (6) above. (D) The Allahabad High Court has expressly dissented from the view taken in Bombay and Madras and held that such a suit as the present is not cognizable by the Small Cause Court: *Godha* v. *Naik Ram* (11).

With reference to the case last cited, I may point out (*a*) that the Allahabad Court has no original civil jurisdiction and there is no Presidency Small Cause Court; and (*b*) that its decision is now embodied in Provincial Small Cause Courts Act, IX of 1887, Schedule II, Articles 19 and 20. It seems to me that neither the decision nor the Articles furnish a safe guidance in the present case. I refer first to the wording of the Articles, and contrast them with section 19 (*s*) of the Small Cause Courts Act. I refer also to the fact that the Presidency Small Cause Courts Act of 1882 was not amended so as to make its terms conform to the said Articles. Lastly to hold that the Presidency Small Cause Courts Act, section 19 (*s*), is synonymous with the said Articles 19 and 20 read together, would (in the case of a person whose moveable property of small value has been wrongly attached) ordinarily cause a denial of justice by cutting off all remedy except the remedy furnished by the prohibitively expensive suit on the original side of the High Court, or perhaps the somewhat less expensive suit in the City Civil Court, Madras. The cases that have been taken to the Privy Council above referred to seem to lend some support to the trend of view taken by the Bombay High Court.

(33) 13 W. R. 99.

It may, no doubt, be argued that this consideration has not induced the Courts to permit a decree-holder "to establishing his right to attach and sell certain property as belonging to his judgment-debtor" in the Small Cause Court: *Chhaganlal Nagardas* v. *Jeshan Rav Dalsukhram* (24). But this consideration may perhaps apply in a stronger degree in regard to a person who claims that the property belongs to himself, and has been wrongly attached for the liabilities of a stranger. The Legislature may not have desired to place both plaintiffs in the same position.

In any case, it seems to me difficult to conceive that the original side of the High Court should have been intended to try a suit for establishing rights as regards moveable property worth Rs. 53. No precedent has been cited to us of its ever having done so. And if the enactments are so worded that any suits for such a relief can be brought in the High Courts, it seems to me that that anomalous result should be restricted within as narrow limits as the canons of construction will allow.

I must now deal with the Madras decision to which I alluded above.

In *Mahomed Koya* v. *Kasmi* (5) Muthusami Aiyar and Hutchins, JJ., held that a Small Cause Court could not make a declaration that moveable property "which had been attached in execution of a decree" was not liable to be sold for the judgment-debt created by the decree. The *ratio decidendi* seems to have been that the suit was one merely for a declaration, that section 42 of the Specific Relief Act was not in the plaintiff's way because section 283—the equivalent to Small Cause Court Order XXI, rule 53—permitted him simply "to establish his right." It is expressly stated that if "he had sought recovery of the property, there is no doubt that the suit would be cognizable by a Court of Small Causes." The present suit is for the recovery of the property. It is true that it is also stated that "the property was not in the possession of any private person; and he could not sue the Court which attached it." This sentence taken by itself is opposed to the view that the plaintiff can sue for possession while the property is under attachment. But its rigour is somewhat modified by the remark a little before: "We do

not think he was *bound* to sue for possession" —which might imply that he could have sued for possession. See also the cases cited in paragraphs numbered (4), (6) and (7) above.

It must, however, be admitted that the remark that the property after attachment is not in the possession of any private person and the Court could not be sued, is opposed to the suit being treated as one for possession. But if that remark is to be given its full effect to the extent of disallowing the jurisdiction of the Small Cause Court in the present case, it seems to me to be opposed to the decisions in *Janakiammal* v. *Vithenadien* (1), *Kundeme Naine Booche Naidoo* v. *Ravoo Lutchmeepaty Naidoo* (2) and to the trend of the decisions of the Privy Council and of all the Courts except that of Allahabad. I do not think any such result was intended to be imported into the remark. It may be that the decision merely permitted remedies in either Court, the choice depending upon the relief sought, a result which was contemplated with equanimity in *Davud Beg* v. *Kullappa* (31) in a matter not so di similar as to offer no analogy. The decision was perhaps not unaffected by the principle which is now embodied in the last words of section 21 of the Civil Procedure Code.

It may be, on the other hand, that if the Judges had heard the arguments based on their remark, they would have been not unwilling to adopt the language of a very distinguished Judge who once said: "An extrajudicial remark by himself does occur in that case, and to that remark the District Judge has assigned too much importance. The remark would have been better unmade." *Dayachand Nemchand* v. *Hemchand Dharamchand* (20) *per* Westropp, C. J.

I shall now deal with the arguments in the learned 3rd Judge's judgment which I am unable to agree with my learned brother in endorsing. If, he says; (1) the suit is for possession, it must fail because the defendants are not in possession; (2) if it is for a declaration, it is not cognizable by the Small Cause Court; (3) if it is for the value of the property, it must fail, because a decision in favour of the plaintiff would keep the attached property for ever in suspense, inasmuch as it would be obviously improper to let the plaintiff have both the property itself and its value, and it would be equally against principle and good conscience to let a person other than the plaintiff take away or deal with property which has been established to be the plaintiff's.

The answer to the first two alternatives seems to me that the suit is neither exactly for possession nor purely for a declaration; it is a suit on a special cause of action and according to the decisions of that and of the Bombay High Court, its maintainability and *forum* are governed by somewhat special rules.

With reference to the third alternative.—

(*a*) The learned Chief Judge and the 2nd Judge shrewdly suspect that if the decree is given, as prayed, for the return of the property or in the alternative its value, then the defendants will somehow procure delivery of the property to the plaintiff. The learned Judges support their surmise by the experience of what has happened in the case of other defendants in a similar plight.

(*b*) Nor do I see any great difficulty in the plaintiff's being enabled (should she succeed in establishing her right) to make the same use of the decree as is referred to in *Kolasherri Illath Narainan* v. *Kolasherri Illath Nilakandan Nambudri* (3) (*per* Turner, C. J. and Muthusami Aiyar, J.).

(*c*) In this connection, I do not see what difference is made by the *forum* in which the right is established; nor why the property should remain in suspense only if the Small Cause Court passes the decree.

(*d*) Sir Charles Farran, C. J., and Strachey, J., thought the decree of the Small Cause Court, as a matter of form, might contain a declaration: *Raghunath Mukund* v. *Sarosh K. R. Kama* (14) but if that is obnoxious to section 19 (*s*), a clause may be inserted in the decree "establishing the plaintiff's rights." The form of the decree rests with the Court.

For these reasons, I would answer the reference by saying (1) that the suit as framed is maintainable; (2) the plaintiff is not bound to ask for an express declaration of her rights, but that the decree may contain a declaration to that effect; and (3) the suit falls under Order XXI, rule 53, and is cognizable by the Small Cause Court.

The reference will be referred to a Full Bench as my view differs from that of my learned brother."

Mr. *P. Sambanda Mudaliar*, for the Plaintiff.

Mr. *C. Pattabhirama Aiyangar*, for 1st Defendant.

OPINION OF THE FULL BENCH.

We think that this suit is not excluded from the jurisdiction of the Small Cause Court under section 19 (*s*) of the Presidency Small Cause Courts Act as a suit for a declaratory decree. Their Lordships of the Judicial Committee have recently pointed out in *Phul Kumari* v. *Ghanshyam Misra* (17) that the statutory suit to establish his right given to the unsuccessful party in claim proceedings under the Code involves in every case a prayer for the setting aside of a summary order of a Civil Court. This being so, such a suit cannot, in our opinion, be regarded as a suit for a mere declaration. The Small Cause Court Rules reproduce the provisions of the Code as to claim petitions and cases under them must be governed by the same considerations. We may further observe that our decision is in accordance with the well-established practice under which suits of this nature arising out of orders made by the Presidency Small Cause Court have always been brought in that Court and not in the High Court or the City Civil Court.

CALCUTTA HIGH COURT.

CIVIL RULE No. 5864 OF 1912.

April 23, 1913.

Present:—Justice Sir Harry Stephen, KT., and Mr. Justice Mullick.

DENO NATH DEY SARKAR—PETITIONER

versus

KALI KUMAR ROY—OPPOSITE PARTY.

Mortgage—Non-transferable occupancy holding—Rent-sale, effect of—Civil Procedure Code (Act V of 1908), O. XXI, r. 89, scope of—Decretal amount, who may deposit in Court.

Where the mortgagee of a non-transferable occupancy holding, which was brought to sale in execution of a rent-decree and purchased by the landlord decree-holder, sought to deposit in Court the decretal amount and compensation under Order XXI, rule 89, Civil Procedure Code:

Held, that the mortgagee had not any interest under the rule in question, and so his deposit could not be accepted by the Court.

Nalini Behari Roy v. *Fulmani Dasi*, 13 Ind. Cas. 487; 15 C. L. J. 388; 16 C. W. N. 421, followed.

Rule against the order of the Munsif, second Court, Kishoregunge.

Babu *Gobind Chandra Dey Roy*, for the Petitioner.

Babu *Sasadhar Roy*, for the Opposite Party.

JUDGMENT.

STEPHEN, J.—The petitioner before us is a mortgagee of a non-transferable occupancy-holding which was brought to sale in execution of a rent-decree and purchased by the landlord decree-holder. Subsequently he sought to deposit in Court the decretal amount and compensation under Order XXI, rule 89, but the Court refused to accept it on the ground that he had not any interest under the rule in question. A Rule has been granted to show cause why the order should not be set aside on the ground that he had such an interest. We are, however, of opinion, that the case is covered by the authority of *Nalini Behari Roy* v. *Fulmani Dasi* (1) on which the lower Court relied; and the Rule is accordingly discharged with costs. Hearing fee one gold *mohur*.

MULLICK, J.—I agree.

Rule discharged.

(1) 13 Ind. Cas. 487; 15 C. L. J. 388; 16 C. W. N. 421.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 244 OF 1912.

April 15, 1915.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

ARUMUGASUNDARA MAHARAJA PILLAI AND OTHERS—DEFENDANTS—APPELLANTS

versus

K. NARASIMHA IYER AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Mortgage—Equity of redemption purchased by mortgagee—Merger—Incumbrances in favour of mortgagee, effect on—Extinguishment of mortgage—Transfer of Property Act (IV of 1882), s. 101, scope of—Question of intention in each case—Proof of intention.

A purchase by a mortgagee of the equity of redemption extinguishes the mortgage, unless circumstances exist at the time of the purchase which show an intention to prevent the merger. [p. 921, col. 1.].

A mortgagee-purchaser of the equity of redemption of his mortgage can use his previous mortgage only as a shield if there are mesne incumbrances and only in respect of the properties which are covered by such incumbrances, but he is not entitled to sue upon his mortgage. [p. 921, col 2.]

Musammat Bhawani Kumar v. *Mathura Prasad Singh*, 16 Ind. Cas. 210; 40 C. 89; 16 C. W. N. 985; 23 M. L. J. 311; 12 M. L. T. 352; (1912) M. W. N. 944; 14 Bom. L. R. 1046; 16 C. L. J. 606 (P. C.); and *Laxman* v. *Mathurabai*, 23 Ind. Cas. 121; 38 B. 369; 16 Bom. L. R. 26, followed.

ARUMUGASUNDARA v. NARASIMHA IYER.

Per *Wallis, C. J.*—The word 'absolutely' in section 101 of the Transfer of Property Act, cannot mean that there are no mesne incumbrances. [p. 918, col. 1.]

Per *Seshagiri Aiyar, J.*—In cases where a subsequent clause in a deed is inconsistent with the operative portion of it, the cardinal principle of construction which should guide Indian Courts is to ascertain the intention of the parties. Technical rules of construction should, as far as possible, be avoided. [p. 921, col. 1.)

Section 101 of the Transfer of Property Act leaves untouched the general rule of law that when a mortgagee purchases the equity of redemption, the incumbrance in his favour is extinguished. It only enacts that where there are other mortgages on the property, an intention will be imputed to the mortgagee-purchaser that he intended to keep alive his own mortgage as a protection against subsequent claimants. [p. 921, cols. 1 and 2].

Appeal against the decree of the Court of the Subordinate Judge of Madura, in Original Suit No. 115 of 1910.

Mr. *K. Srinivasa Aiyangar*, for the Appellants.

Messrs. *C. Padmanabha Aiyangar*, *C. T. Venkatachariar* and *A. Srinivasa Aiyangar*, for the Respondents.

JUDGMENT.

WALLIS, C. J.—In 1882 the 1st defendant executed a mortgage, Exhibit A, of the suit properties in favour of one Mahalinga Aiyar, who transferred it on 15th August 1892 by Exhibit B to the father of the 1st plaintiff, whose son, the 1st plaintiff, was married to the 1st defendant's daughter. On 13th February 1893, the plaintiff's father obtained a lease, Exhibit E, of the suit properties from the 1st defendant at a rent of Rs. 300, which would appear to have been an undervalue. On 9th February 1897 the 1st defendant executed a fresh mortgage, Exhibit F, in favour of the 1st plaintiff's father for the amount found due on the mortgage Exhibit A. Subsequently in December 1899, the 1st defendant's equity of redemption was sold in execution by a decree-holder (see Exhibit K) and except as regards 9-5/8 *cawnies* was purchased at the Court sale for Rs. 182 by one Sundara Raja Aiyangar, who a few days later by Exhibit 3 transferred the interest he had acquired to the 1st plaintiff for the same sum of Rs. 182. Between four and five years later, the 1st plaintiff re-conveyed the suit properties except the 9-5/8 *cawnies* to the 1st defendant for Rs. 185. The document reads at first sight like an out-and-out sale but beneath the signature of the vendor and his witnesses there is a further statement signed by the 1st plaintiff alone, to the effect that the sale was subject to two mortgages one of which was the suit mortgage. In 1910 the 1st plaintiff and his sons instituted the present suit on the mortgage so reserved and obtained a decree and one of the main contentions raised by the present appellants, who represent subsequent alienees from the 1st defendant, is that the suit mortgage was extinguished when under Exhibit 3 the 1st defendant's equity of redemption in the suit properties was acquired by the 1st plaintiff. This acquisition must be considered to have been made on behalf of his joint family, which included a younger brother since deceased and the 1st plaintiff's sons who are co-plaintiffs with him in this case, and it was treated as joint family property in Exhibits 10 and 11. It may, therefore, be said that by Exhibit 3 the mortgagees acquired the equity of redemption except as regards 9-5/8 *cawnies*. The owners of these items are not parties to the present suit and though the items acquired by them may be liable for their proportionate share of the mortgage-debt, that does not appear to affect the question whether there has been a merger as regards the items of the mortgaged properties which have been acquired by the mortgagees.

This question of merger has recently been considered by the House of Lords in *Whiteley* v. *Delaney* (1) and by the Privy Council in *Bhawani Kumar* v. *Mathura Prasad Singh* (2). As pointed out in the former case by the Lord Chancellor, where the mortgagor himself has purchased the interest of the 1st mortgagee he cannot derogate from his own bargain by setting up the mortgage so purchased against the 2nd mortgage created by himself: *Otter* v. *Lord Vaux* (3). Next there is the case of a third party purchasing the mortgaged property and paying off a prior mortgage out of the purchase-money as in *Toulmin* v. *Steere* (4). The Privy Council have held that

(1) (1914) A. C. 132; 83 L. J. Ch. 349; 110 L. T. 434; 58 S. J. 218.

(2) 16 Ind. Cas. 210; 40 C. 89; 16 C. W. N. 985; 23 M. L. J. 311; 12 M. L. T. 352; (1912) M. W. N. 944; 14 Bom. L. R. 1046; 16 C. L. J. 606.

(3) 2 K. & J. 650, affirmed 6 DeG. M. & G. 638; 26 L. J. Ch. 128; 3 Jur. (N. S.) 169; 5 W. R. 188; 69 E. R. 943; 106 R. R. 235.

(4) 3 Mer. 210; 17 R. R. 67; 36 E. R. 81.

decision to be inapplicable to India in *Gokaldas Gopaldas* v. *Puranmal Premsukh Das* (5) and the Lord Chancellor in the case just cited, whilst refraining from expressing any opinion as to whether or not it was correctly decided, observed that it amounted to no more than this that in such circumstances the presumption was that the purchaser did not intend to keep the mortgage alive. So that even here the question was treated as one of the intention of the purchaser. Lastly we have cases like the present where it is an encumbrancer who acquires the equity of redemption [see *Hayden* v. *Kirkpatrick* (6)] and to these cases section 101, Transfer of Property Act, expressly applies. The section is as follows:—"Where the owner of a charge or other incumbrance on immoveable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished, unless he declares, by express words or necessary implication, that it shall continue to subsist or such continuance would be for his benefit". The word "absolutely" cannot mean that there are no mesne incumbrances outstanding, as the very object of the exception to the section is to protect the prior mortgagee against such incumbrances. When, as in the recent cases of *Bhawani Kunar* v. *Mathura Prasad Singh* (2) and *Laxman Ganesh Rajendra* v. *Mathurabai Narayan Govind* (7), there are no such incumbrances, there can scarcely be any room for the exception, and there is a merger under the section. In the former case where under the local revenue law, land was sold for arrears of revenue subject to any mortgage subsisting at the date the arrears fell due, and it appeared that the arrears fell due between the date when the mortgagee purchased the property under his mortgage-decree and the confirmation of the sale to him, it was held that the mortgage-debt was extinguished as from the date of the purchase and that there was consequently no mortgage subsisting at the date when the arrears fell due. The only mortgage of any of the suit properties effected by the 1st defendant subsequently to the suit mortgage and before he parted with his interest in the equity of redemption under Exhibit K was in favour of the father of the 31st defendant of items 53 and 56 for Rs. 160 under Exhibit 19. The 1st defendant whose evidence must be received with caution deposes that subsequently to the original mortgage, Exhibit A, which was renewed by the suit mortgage, Exhibit F, he executed two mortgages in favour of one Ramasami Iyer, a District Registrar, and these mortgages if are still outstanding on the date of Exhibit 3 would have been postponed to the suit mortgage. It appears, however, from Exhibits 43 and 44 that on the 7th December 1889 the 1st defendant sold two villages for Rs. 30,000 to one Thimma Reddy, who undertook to discharge these mortgages out of the purchase-money and as we find no reference to them either in Exibits F, L or 19—the mortgage-deeds have not been produced—I think it is not shown that these mortgages were outstanding at the date of Exhibit 3 as to afford any ground for supposing that it was the intention of tha 1st plaintiff to keep the suit mortgage alive as a protection against them or to bring the case within the exception to section 101 of the Transfer of Property Act.

The subsequent mortgage of two items only for the small sum of Rs. 160 under Exhibit 19 could not affect the mortgagee's intention as regards the other items. We find the 1st plaintiff and his brother in 1901 pleading in the plaint, Exhibit 11, that by virtue of Exhibit 3, the entire interest in the suit lands, which were included in the properties mortgaged under Exhibit F, belonged exclusively to them and in 1903 by Exhibit 10, they mortgaged the suit properties for Rs. 2,000 without any reference to any subsisting mortgage on them. In these circumstances and apart from Exhibit L, I do not think it is shown that there was not a merger under the terms of section 101, Transfer of Property Act, when the mortgagees acquired the equity of redemption under Exhibit 3. As to Exhibit L, I cannot agree with the Subordinate Judge that the reservation of the suit mortgage inserted out of its proper place in that document is sufficient evidence of an intention, on the part of the mortgagees at the date of the purchase of the equity of redemption some

(5) 11 I. A. 126; 10 C. 1035; 8 Ind. Jur. 396; 4 Sar. P. C. J. 543.

(6) 34 Beav. 645; 11 Jur. (N. S.) 836; 13 L. T. 56; 13 W. R. 1010; 55 E. R. 784; 145 R. R. 717.

(7) 23 Ind. Cas. 121; 38 B. 369; 16 Bom. L. R. 26.

five years previously, to keep alive the suit mortgage: it might be otherwise if the purchaser of the equity of redemption under Exhibit 3 by the 1st plaintiff was *benami* for the 1st defendant, but that is not the plaintiffs' case and is negatived by the way in which the plaintiffs subsequently dealt with the property as full owners.

If there was a merger under Exhibit 3, the suit mortgage was discharged and the suit as framed must fail. The Subordinate Judge has dismissed the suit as regards some of the subsequent alienees for value from the 1st defendant, on the ground that the 1st plaintiff attested the conveyances under which they claim, but has overruled that plea in the case of the present appellants in the absence of such attestation. Even if the facts do not amount to an estoppel, the conduct of the 1st plaintiff in executing Exhibit L in a form which at first sight represents the 1st defendant as purchasing free from incumbrances and his subsequent conduct in treating the 1st defendant as full owner and attesting alienations by him to third parties, would appear to have misled the present appellants and having regard to these and to other suspicious circumstances going to the foundations of the plaintiffs' claim, I think it sufficient to say that that claim fails as laid and that the appeal must be allowed and the suit dismissed with costs throughout.

SESHAGIRI AIYAR, J.—I entirely agree with my Lord. The 1st defendant was the owner of the properties in the suit. He mortgaged them to the father of the 33rd defendant in 1882 (Exhibit A). The 1st plaintiff's father obtained an assignment of that mortgage (Exhibit B) in 1892. Some payments were made towards the debt. Finally in 1897, the 1st defendant executed Exhibit F for the debt remaining unpaid under Exhibit A to the 1st plaintiff's father. Previous to it a lease (Exhibit E) was granted to the mortgagee for a period of 10 years from 1893. The 1st plaintiff's father was in possession under that lease. The rent reserved was only Rs. 300 a year, which on the evidence was far below what the 1st defendant could have got as income from the mortgaged property. It was suggested that this low rent was paid as the arrangement was that the 1st plaintiff's father should pay himself the amount due under the mortgage from the surplus income. But there is no clear evidence of this agreement. While the 1st plaintiff's father was in possession, a money decree was obtained against the 1st defendant by a third party, and in execution of that decree the equity of redemption in the mortgaged properties was purchased by one Sundara Raja Aiyangar for Rs. 185. It was said that this purchase by Sundara Raja Aiyangar was really *benami* for the plaintiff. There are recitals in some of the documents which show that Sundara Raja Aiyangar was only a name-lender for the 1st plaintiff; but it is not necessary to pursue this matter further, because nothing turns upon it. Sundara Raja Aiyangar conveyed the equity of redemption purchased by him to the 1st plaintiff by Exhibit III in 1900. The 1st plaintiff sold to the 1st defendant all his right, title and interest in the properties subject to a reservation, which I shall refer to later on, under Exhibit L on the 30th of June 1905. It is proved that after this purchase by the 1st defendant, he either sold or mortgaged the properties as if he were absolute owner thereof. On the 20th March 1906 he mortgaged to the 6th defendant some of the properties which were covered by Exhibit L for Rs. 1,000 (Exhibit XX). This was attested by the 1st plaintiff. By Exhibit IV on the 27th April 1906 the 1st defendant transferred to his daughter another portion of the property. This again was attested by the 1st plaintiff. By Exhibit II of the 13th May 1906, he transferred to his wife some property. On the 26th November 1906 he mortgaged to certain persons another portion of the property under Exhibit IX. Both these alienations were similarly attested by the 1st plaintiff. I will now refer to transactions which were not attested by the 1st plaintiff. On the 7th April 1907, the 1st defendant by Exhibit XV mortgaged to the 8th defendant some properties included in Exhibit L. By Exhibit XIII on the 10th May 1907, he mortgaged to the same person, the 8th defendant, another property for Rs. 600. On the 15th August 1907 by Exhibit XVI, he sold other properties to the 12th defendant. In all these documents, whether attested by the 1st plaintiff or not, there are recitals which were calculated to induce the transferee to believe that the

1st defendant was the absolute owner of the properties he was dealing with. The 1st plaintiff instituted the present suit to enforce his mortgage rights under Exhibits A and F. No claim is put forward in respect of the reservation contained in Exhibit L. The basis of the 1st plaintiff's claim is that the mortgage of 1892 and of 1897 is still subsisting, and that he is entitled to proceed against the properties for the debt due to him. The 1st defendant is the original mortgagor and the transferee of the rights of the 1st plaintiff in the equity of redemption. The other defendants are the alienees of the mortgaged properties from the 1st defendant. The defence of these alienees was, the right of the 1st plaintiff under the mortgages was extinguished by the transfer which he obtained from Sundara Raja Aiyangar of the equity of redemption. The Subordinate Judge came to the conclusion that as against those alienees whose conveyances or mortgages were attested by the 1st plaintiff, the 1st plaintiff is not entitled to rely on his mortgage to bring the properties in their possession to sale, but that the 1st plaintiff was entitled to proceed against the properties of the other defendants whose alienations were not attested by him (1st plaintiff). These latter defendants have preferred this appeal.

Before dealing with the questions of law argued by Mr. K. Srinivasa Aiyangar, it is well to point out that the 1st plaintiff is the son-in-law of the 1st defendant, and that the appellants are strangers to both the 1st plaintiff and the 1st defendant. The result of the conclusion at which the Subordinate Judge has arrived is to throw on the property in the hands of these appellants the whole burden of the mortgage-debt amounting to Rs. 23,000 and odd. It is clear that these properties are not worth more than Rs. 16,000 or Rs. 17,000 at the utmost. There is the question that these appellants were *bona fide* purchasers for value. I am unable to accept the contention of the appellants that the 1st plaintiff is estopped by his conduct in attesting the sale-deeds in favour of his wife and mother-in-law from now disputing that the 1st defendant had not an absolute interest in the properties. There is unfortunately no clear evidence that these appellants took the properties on the faith of the conduct of the 1st plaintiff. Although I have come to the conclusion, I feel little hesitation in saying that this is an iniquitous attempt on the part of the 1st defendant to charge the whole mortgage-debt upon properties in the hands of strangers after having secured to his relations with the concurrence of the 1st plaintiff a large slice of the property originally mortgaged.

One other circumstance may be mentioned. This suit is not based upon Exhibit L, which is a conveyance from the 1st plaintiff to the 1st defendant and which also contains a reservation in 1st plaintiff's favour in respect of his mortgage. It was argued by the learned Vakil for the appellants that the clause in this document which says "the amount due to the said Visvanatha Aiyar is Rs. 2,000. This sum of rupees two thousand and the hypothecation right which I have and which is mentioned on the first page hereof are not discharged from the deed", can have no effect as against the clear and unambiguous recital in the operative portion of the document. It has to be noticed that, while the first portion of the document was signed and attested, this latter portion is not attested. It has been suggested that this latter clause was a memorandum made at the time of registration to enable the executant to pay less stamp duty upon the document than he would have been obliged to do if the property was conveyed free of encumbrances. This suggestion receives support from the fact of the so-called reservation not being attested and also from the fact that subsequently the Collector to whom the document was sent by the Registrar levied the full stamp duty on the document, treating apparently the new clause as of no effect. It has also been argued before us that if in a deed the subsequent clause is inconsistent with the operative portion of it, effect should not be given to it. Norton on Deeds, page 80, and the observations of Tindal, C. J., in *Durham and Sunderland Railway Co.* v. *Walker* (8), were quoted for the proposition. It is not necessary to give a decision whether the highly artificial rules of construction regarding deeds drawn up by solicitors fully conversant with con

(x8) 2 Q. B. 940 at p. 967; 2 G. & D. 326; 11 L. J. Ex. 442; 114 E. R. 364; 57 R. R. 842.

veyancing can be applied to documents executed in this country. The cardinal principle which should guide Indian Courts in such matters is to ascertain the intention of the parties. Technical rules of construction should as far as possible be avoided. Therefore, I do not rest my decision upon the construction to be placed on Exhibit L. This suit was not based upon that document; it is not necessary in the view I am taking to decide whether by this memorandum, made at the end of the document, the 1st plaintiff reserved to himself the right to proceed against the properties. Exhibit L will be relevant in considering whether the alienees, who must be deemed to have had constructive notice of its contents, understood the document to convey only a limited interest to the 1st defendant. This document and the other evidence bearing on the question will be considered in that connection.

The main point for decision is whether, by the purchase of the equity of redemption from Sundara Raja Aiyangar, the 1st plaintiff's mortgage-debt was extinguished. Mr. Srinivasa Aiyangar contended that if there are intervening incumbrances, the purchaser of the equity of redemption may use his mortgage as a shield to protect himself against them, but that he could not sue upon his mortgage. There is no document from the 1st defendant to the 1st plaintiff which secures any right to proceed against the property in the hands of the former. Section 101 of the Transfer of Property Act was relied upon very strongly by Mr. Venkatachariar for the respondent. That section was intended to introduce with some limitations the rule of law enunciated in *Toulmin* v. *Steere* (4). That decision has been the subject of considerable adverse criticism in the English Courts. Quite recently, the House of Lords in *Whiteley* v. *Delaney* (1) discussed that judgment. Some of the observations of the learned Lords who delivered their opinions indicate that this case is no longer a binding authority. However that may be, Courts in India are governed by the statutory provisions contained in section 101 of the Transfer of Property Act. It is clear that section contemplates the existence of puisne encumbrances. Unless that may be the object, the clause relating to the subsistence of the encumbrance being for the benefit of the purchaser can have no meaning. The person who becomes absolutely entitled to the property cannot reserve in his favour and as against himself his own mortgage. As I read the section, it leaves untouched the general rule of law that when a mortgagee purchases the equity of redemption the incumbrance in his favour is extinguished. It only enacts that where there are other mortgages on the property, an intention will be imputed to the mortgagee-purchaser that he intended to keep alive his own mortgage as a protection against subsequent claimants. The discussion in the House of Lords in the case already referred to shows that the rule enabling the purchaser to fall back on his mortgage is an infringement of legal rights. Consequently a strict construction should be placed on this provision of law. I am of opinion that the mortgagee-purchaser can use his previous mortgage only as a shield if there are mesne encumbrances, and that also only in respect of the properties which are covered by such encumbrances. I shall deal with the questions whether there were any subsisting encumbrances at the time the equity of redemption was purchased later on. Even if there are such encumbrances, I am of opinion that the mortgagee-purchaser is not entitled to sue upon his mortgage. I am also of opinion that the 1st plaintiff did not intend to keep alive the 1st mortgage for his benefit. The clause in Exhibit L reserving such right is suspicious. The relationship of the parties (son-in-law and father-in-law) suggests that the 1st plaintiff parted with his absolute rights. It is true that the low price for which the sale was effected is an element for consideration. As against this, there is the fact that upon the properties of the value of over Rs. 50,000 the 1st defendant recovered only Rs. 300 a year for 10 years. It may be that the son-in-law parted with his full rights in view of his having enjoyed the large income from the properties. There is the further fact that after the transfer under Exhibit L absolute conveyances attested by the 1st plaintiff were effected of the properties. The 1st plaintiff could not have intended to reserve his mortgage rights when he knew that these properties were to be sold to his own wife and his mother-in-law. To my mind the

relationship of the parties, the enjoyment of a large income by the 1st plaintiff without accounting for it to the 1st defendant and the subsequent conduct in attesting conveyances, all show unmistakably that the 1st plaintiff never intended to keep his mortgage alive. Further, the 1st plaintiff before the sale to the 1st defendant conducted proceedings as absolute owner. See Exhibits XI, S, X and Q 4. It is clear from these documents that it was not for his benefit to regard himself as a mortgagee.

The contention that the purchaser has two distinct and separate interests in the property in all cases where there are mesne incumbrances found favour with Mookerjee, J., in the case reported as *Bhawani Koer* v. *Mathura Prasad* (9), but the Judicial Committee reversed this decision. See *Bhawani Kumar* v. *Mathura Prasad Singh* (2). The observations of their Lordships leave no room for doubt that where there are no encumbrances, there is an extinguishment of the right under the mortgage when the equity of redemption is acquired. *Laxman Ganesh Rajendra* v. *Mathurabai Narayan Govind* (7) and *Munna Lal* v. *Munnu Lal* (10) are to the same effect. In *Ramu Naickan* v. *Subbaraya Mudali* (11), it was decided by this Court that the mortgage right can only be used as a shield against puisne encumbrances. Considerable stress was laid on behalf of the respondent upon the decision of the Full Bench in *Mulla Veetil Seethi* v. *Korambath Paruthooli Achuthan Nair* (12). In that case there was first a simple mortgage, then the mortgagor granted a usufructuary mortgage. The first mortgagee became the owner of the equity of redemption by purchasing it at a sale in execution of a decree in a suit on his mortgage to which the usufructuary mortgagee was not a party; and then brought a suit to recover possession of the property from the usufructuary mortgagee. The learned Judge held that he was not entitled to possession, the ground of decision being that the 1st mortgagee can only claim to stand in the shoes of the mortgagor, and as the mortgagor had given a usufructuary mortgage the first mortgagee-purchaser acquired no right to sue for possession. There can be no question that this conclusion is correct. But the respondent's Vakil relies upon certain observations in the judgment for the position where there are puisne encumbrances, the first mortgagee-purchaser can never get an absolute title to the property. In page 225 it is stated: "Merger, on principle, is impossible, for the case of first mortgagee acquiring the equity of redemption, when a second mortgage is still outstanding, is not one of the rights and correlative objection coalescing in the same person, or of a smaller interest getting absorbed by a larger, or of two contiguous interests carved out of property combining to form a larger whole." No authority is quoted for this broad proposition excepting an extract from Lindley's Jurisprudence, Appendixes 57 and 58 I may mention that the term *merger* is not appositely used in this connection. The rights of puisne encumbrancers are neither lost nor *merged* in the title acquired by the mortgagee-purchaser. They would be outstanding—See section 55, clause (*d*) of the Transfer of Property Act. The only question is whether the first mortgage is capable of enforcement as such in a suit founded on it. If it was intended to lay down that it is open to a mortgagee-purchaser to sue on his mortgage to foreclose the latter mortgages, I respectfully dissent from the conclusion. In my view the mortgage was extinguished when the 1st plaintiff acquired the equity of redemption and it is not open to him to sue upon it, whatever may be his rights to use the mortgage as a defence against puisne encumbrancers. See *Syed Ibrahim Sahib* v. *Arumugathayee* (13). Moreover, there is no satisfactory evidence in this case of any subsequent mortgages having subsisted at the time the equity of redemption was purchased from Sundara Raja Aiyangar. This question was not argued before the Subordinate Judge; the documents creating these mortgages have not been exhibited. But reliance is placed upon two judgments in which reference is made to them. Those judgments do not show that the mortgages were valid and subsisting at the time when the equity of

(9) 7 C. L. J. 1 at p. 32.
(10) 23 Ind. Cas. 559; 36 A. 327; 12 A. L. J. 457.
(11) 7 M. H. C. R. 229.
(12) 9 Ind. Cas. 513; (1911) 1 M. W. N. 165; 21 M. L. J. 213; 9 M. L. T. 431 (F. B.).
(13) 16 Ind. Cas. 877; 38 M. 18.

redemption was acquired by the 1st plaintiff and his predecessor. On the other hand Exhibits 43 and 44 show that the previous encumbrances were intended to be paid off in 1889. *Non constat*, they have not been discharged.

I would, therefore, allow the appeal and dismiss the suit against these defendants with costs here and in the Court of first instance.

Appeal allowed; Suit dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1168 OF 1914.

June 29, 1915.

Present:—Mr. Justice Chamier.

JWALA PRASAD RAI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RAM SARUP RAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Occupancy holding and fixed-rate holding mortgaged together for lump sum—Whole transaction, if illegal.

Where an occupancy holding and a fixed-rate holding are mortgaged together for a lump sum, and the contract is one and indivisible the whole transaction is void.

Second appeal from the decision of the Subordinate Judge, Ghazipur, dated the 19th June 1914.

Mr. *Bajpai*, for the Appellants.

Mr. *M. L. Agarwala*, for the Respondents.

JUDGMENT.—*Musammat* Jhiria, represented in this suit by her heir Deoki, who was at first plaintiff No. 1 but subsequently became defendant No. 13, mortgaged five plots of land to Sukhdeo Rai in July 1877. Shortly before this suit was brought Deoki transferred to Jwala Prasad and Siri Kishun, the present appellants, 9 or 10 plots which are said to include the five plots covered by the mortgage. The appellants on the strength of the sale-deed sued the representatives of the original mortgagee for redemption of the five plots mortgaged. The Munsif decreed the claim, but his decision was reversed by the Subordinate Judge who held that as the deed of sale in favour of the present appellants included plots which were part of an occupancy holding and, therefore, not legally transferable, the deed of sale was void and conferred no title upon the appellants. There is no definite finding and Counsel in this Court are not agreed as to which of the plots are part of the occupancy holding and which are part of a fixed-rate holding. Counsel for the respondents maintains that all five plots mortgaged were held by the mortgagor as an occupancy tenant. The learned Vakil for the appellants maintains that Nos. 167 and 169/1 mentioned in the sale-deed correspond with No. 129 mentioned in the mortgage. If Counsel for the respondents is right, there can be no doubt whatever that this appeal should be dismissed for the appellants as transferees of an occupancy holding have clearly no right to maintain this suit. I will assume, however, that one of the plots covered by the mortgage (No. 129) was part of a fixed-rate holding and that the transfer to the appellants covered an occupancy holding and also part of a fixed-rate holding. It is contended that the transfer was valid as regards plot No. 129 and conferred upon the appellants at least a right to redeem that plot. The respondents, on the other hand, objected to the redemption of one plot only. It appears to me that the Subordinate Judge was right in dismissing this suit. Regarded in the light most favourable to the appellants, the transfer was a transfer of parts of an occupancy and of fixed-rate holding for a lump sum. The contract was one and indivisible, and it seems to me that as the transfer of an occupancy holding is void the whole transfer failed. But apart from that, it appears to me that the appellants are not entitled to pick out one of the plots in possession of the respondents and redeem, that leaving them with the other plots. The appeal is dismissed with costs, including fees on the higher scale.

Appeal dismissed.

SESHAGIRI AIYANGAR *v.* SADACHI.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 752 TO 754 OF 1913.

April 8, 1915.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

SESHAGIRI AIYANGAR—PLAINTIFF—APPELLANT

versus

SADACHI AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence—Written statement—Admission by one defendant, when admissible against others.

An admission of one defendant in a written statement in a suit will not be evidence against others unless it is made evidence at the trial by examining that defendant who made the statement. [p. 924, col. 2.]

Appavu Chettiar v. *Nanjappa Goundan*, 20 Ind. Cas. 792; 14 M. L. T. 117; 25 M. L.J. 329, followed.

Second appeals against the decrees of the District Court of Trichinopoly, in Appeal Suits Nos. 462, 463 and 464 of 1912 respectively, preferred against those of the District Munsif of Kulitalai, in Original Suits Nos. 270, 179 and 188 of 1911.

Messrs. *T. Rangachariar* and *K. Parthasaradhy Aiyangar*, for the Appellant.

Mr. *T. Natesa Aiyar*, for the Respondents.

These second appeals coming on for hearing on the 15th September 1914, the Court delivered the following

JUDGMENT.—We are not prepared to hold that the lower Appellate Court's treatment of Exhibits D and K would justify interference.

The learned District Judge has, however, made no reference to Exhibits F and H series, and in view of the description of their purport in the District Munsif's judgment, we cannot assume that the District Judge considered them. In these circumstances we must ask him to submit revised findings on the questions raised in the appeals with reference to them.

He has also made no reference to the fact that 2nd defendant in Original Suit No. 179 of 1911 (2nd Respondent in Second Appeal No. 753 of 1913) admitted plaintiff's claim fully in her written statement. The importance of this seems to have been recognized in neither Court. For no issue was framed with reference to it, though on this pleading plaintiff was clearly entitled to a decree against 2nd defendant for any portion of the suit site found to be in her exclusive possession; and it was, therefore, necessary to ascertain the extent of such site, if any.

It is further urged that 2nd defendant's admission should have been considered as evidence against her co-defendants and against the defendants in the other suits tried with Original Suit No. 179 of 1911 and now under appeal. As regards 2nd defendant's co-defendants we adopt the reasoning contained in the judgment delivered by one of us in *Appavu Chettiar* v. *Nanjappa Goundan* (1) and hold that, as 2nd defendant's plea was not made evidence at the trial by examining her or otherwise, it cannot be considered except with reference to the determination of the extent, if any, recoverable from her. *A fortiori* it cannot be considered against the defendants in the other suits.

There must, therefore, be a remand in order (1) that the lower Appellate Court may submit fresh findings on the questions raised in the appeals with reference to Exhibits F and H series, (2) that it may frame, try and find on any issues involved by 2nd defendant's admission, taking any fresh evidence relevant to them which may be adduced, and (if necessary) considering any supplementary written statements which it may think it advisable to call for from the other defendants. It is because it appears advisable to give the parties an opportunity for filing such statements that we do not frame additional issues in this Court. Findings should be submitted within six weeks from the date of this order and seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment, the District Judge of Trichinopoly submitted the following

FINDING.—Plaintiff sued various alleged tenants in three suits and got decrees that plaint property belonged to plaint *devasthanam*, to recover possession thereof after removing certain buildings and for certain arrears of rent.

2. On appeal, my predecessor, while upholding plaintiff's title, found that Exhibits D and K series of accounts did not help plaintiff in any way, there was no evidence

(1) 20 Ind. Cas. 792; 25 M. L. J. 329; 14 M. L. T. 117.

that, defendants ever paid rent to plaint *devasthanam* and their possession was adverse to plaintiff and the 12 years' rules. He, therefore, allowed the appeal.

3. On second appeal, the High Court upheld this Court's rejection of Exhibits D and K series, but asked me for revised findings on the question raised in the appeals with reference to Exhibits F and H series and also to frame, try and find on any issues involved by the admission of 2nd defendant in Original Suit No. 179 of 1911 of plaintiff's claim. I have, therefore, framed an issue, "was 2nd defendant in exclusive possession of any, and what, portion of the property in suit in Original Suit No. 179 of 1911 at the time of suit."

4. The parties have taken no steps beyond argument on the existing record. The points raised on appeal are that defendants are not shown to be tenants of plaintiff and plaintiff has not shown possession within 12 years.

5. Exhibit F is a delivery *attakshi* showing delivery of plaint *Kadaimli* tope to plaintiff in 1902. Plaintiff admittedly did not dispossess the tenants of the houses therein which are plaint houses. There is, however, no evidence since Exhibits D and K series are ruled out, that defendants ever attorned to plaintiff as landlord or paid him rent.

6. Exhibit H series shows that plaintiff leased the trees in the tope. Defendants concede this and it is clear from plaintiff's oral evidence that he leased all the trees, even those that stand in land used rightly or wrongly as backyard of some of the defendants. But H series throws no light on the question of whether defendants were ever tenants under plaintiff and paid him rent. It may easily be that they built houses long ago on vacant village site—as people do in *natham* lands and the *Inamdar* is claiming rent for houses on village-site because the whole village is *inam*.

7. I, therefore, find the defendants are not tenants of plaintiff and that since the long possession is admitted, it is adverse to plaintiff.

8. As regards 2nd defendant, beyond her written statement that she occupied a site as tenant of plaintiff there is no evidence. She did not go into the box and her husband, 1st defendant, did and denied it.

9. I find, therefore, that the 2nd defendant was not really in possession of any portion of the property in Original Suit No. 179 of 1911.

These second appeals coming on for final hearing this day, after the return of the findings of the lower Appellate Court upon the questions referred by this Court for trial, the Court delivered the following

JUDGMENT.—The objections to the findings raise no question of law. We accept the findings. The second appeals are dismissed with costs.

Appeals dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1253 OF 1913.

May 12, 1915.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Chapman.

SANATAN CHAKRAVARTI *alias* AMRITA LAL CHAKRAVARTI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Srimati KAURI MANI DASI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage, redemption of—Husband's mortgage, if widow can redeem unconditionally.

In a case where the wife wants to recover the property which is found to have been mortgaged by her husband for debts for which her husband's property in her hands would be justly liable:

Held, that to allow her to recover her property without any condition is not equitable. [p. 926, col. 2.]

Appeal against the decree of the Additional District Judge, 24-Perganas, dated the 14th of March 1913, reversing that of the Munsif, 3rd Court at Alipur, dated the 16th of December 1910.

Babu *Atul Krishna Roy*, for the Appellants.

Babus *Sib Chandra Palit* and *Jogesh Chandra Bose*, for the Respondents.

JUDGMENT.—The admitted facts of the case are that one Kala Chand Naskar died leaving three sons, Gopinath, Hem and Uma Charan and a widow, Muktakeshi. Uma Charan was a minor at the time. Gopinath, Hem and Muktakeshi on behalf of the minor mortgaged 16 annas of certain property to

defendant No. 5. Defendant No. 5 sold the mortgage to the grandfather of the appellants, defendants Nos. 1, 2 and 3. Jadunath, the father of the appellants, brought a suit on the mortgage against Hem alone, as Muktakeshi, Gopinath and Uma Charan were all dead at the time. It appears, however, that Gopinath left a widow, who is the plaintiff and who was not made a party to the mortgage suit. A decree was made in favour of Jadunath, and Jadunath in execution of his decree purchased the mortgaged property. One Gopal Chandra Ghose having obtained a money-decree against Jadunath sold the right, title and interest of Jadunath in execution and purchased it himself. Gopal Chandra then sold the right so purchased by him to defendant No. 7, Hari Das, and defendant No. 7 let out the property to Jadunath, the father of the appellants. After this, the widow of Gopinath brought a suit for recovery of an 8-annas share to which her husband was entitled. Upon the admitted facts of the case, the plaintiff was not bound by the mortgage-decree. She was, therefore, entitled to redeem the mortgage of Jadunath which would be vested in defendant No. 7; and the Court of first instance made a decree in favour of the plaintiff for possession of her 8-annas share upon redemption. The order was—"The plaintiff be put in joint possession of the property to the extent of her half share in it, on her payment of Rs. 200, towards the redemption of the mortgage as found in the judgment, to defendants Nos. 1—3 and defendant Haridas Ghose. After the redemption either party may sue for partition." There was an appeal to the learned District Judge by the plaintiff and we understand that there was also a cross-appeal by the appellants. The learned Judge in dealing with the appeal has made a mistake with regard to the law applicable to the case. He has held that the purchaser in execution of the mortgage-decree purchased the right, title and interest of the judgment-debtor Hem Chandra and nothing else.

There is no dispute in this Court that that judgment is not right. The point, however, which is disputed is that the appellants who were the lessees of Hari Das have not the same rights as Hari Charan had and as Hari Das has not appealed, the decree as made by the Court of Appeal below, that the plaintiff should recover her 8-annas share of the property unconditionally, ought to remain, subject in future to the working out of any rights which Hari Das or anybody claiming under him may have. Ordinarily that may be the right mode of looking at the facts of the case. This, however, is a case in which the plaintiff wants to recover the property which, upon the finding, was mortgaged by her husband for the debts for which her husband's property in her hands would be justly liable. To allow her, therefore, to recover her property without any condition would not be equitable. At the same time the appellants claiming merely as lessees would not be entitled to the same rights as Hari Das. But Hari Das is a party respondent before us, and under Order XLI, rule 33, of the Civil Procedure Code, we can pass a decree that ought to be passed. We think the most proper decree in this case would be something like what was passed by the learned Munsif in this case, that is, that Hari Das must be redeemed, and that the plaintiff will recover possession upon payment of Rs. 200 to Hari Das or anybody that may establish a title to the rights of Hari Charan.

It is alleged that Hari Charan has executed a conveyance in favour of the appellants pending this appeal. But that document is not before us, and we leave that to be worked out during the execution of the appellants' claim under their conveyance from Hari Das.

In the circumstances of the case, we make no order as to the costs in this appeal.

Ordered accordingly.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1324 OF 1914.

July 8, 1915.

Present:—Mr. Justice Tudball.

KATWAROO SINGH—PLAINTIFF—APPELLANT

versus

DHARAM DEO SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Suit against all adult members—Subsequent suit by a minor member

KATWAROO SINGH *v.* DHARAM DEO SINGH.

to set aside decree on ground that he was no party to former litigation—Burden of proof—Legal necessity.

A suit was brought against all the adult male members of a Hindu joint family on the basis of a mortgage-deed executed by all the adult male members and a decree was obtained. In execution of the decree, the mortgaged property was foreclosed and the decree-holder obtained possession of it. Subsequently, a minor member of the family brought a suit to set aside the decree on the ground that he was not a party to the suit in which the decree had been obtained:

Held, that he was fully represented in the former litigation; that he was not entitled to any relief on the mere ground that he was no party to the former suit, and that it was necessary for him to prove in the present case that the loan was not taken for a family necessity. [p. 928, col. 1.]

Second appeal from the decision of the Subordinate Judge of Ghazipur, dated the 16th July 1914.

FACTS of the case appear fully from the judgment.

Mr. *Hameedullah*, for the Appellant:—The minor plaintiff was made no party to the suit on the mortgage nor was he represented in any way. In fact the interests of his brother were adverse to his. He can be in no way bound by any acts of the other adult members of the family, who did not execute the bond in their capacity as managers of the family. Nor is there anything to show that there was any legal necessity. It was for the defendants to prove that they advanced money for the use of the family. The decree not being against the plaintiff he can question it by way of a separate suit. He relied on *Baldeo Sonar* v. *Mobarak Ali Khan* (1).

Mr. *Parmeshwor Dyal*, for the Respondents, was not heard in reply, but he referred to *Jaddo Kuar* v. *Sheo Shankar Ram* (2), *Hori Lal* v. *Niman Kunwar* (3), *Bhagwati Prasad* v. *Bhagwati Prasad* (4).

JUDGMENT.—The facts of this case are very simple. The plaintiff in the year 1903 was a minor member of a joint Hindu family. There were three branches of this family in existence; that of the plaintiff, which was represented by the plaintiff's brother, Charitar Singh, and himself; that of Hanuman Singh and Sita Ram Singh, and the third branch of Chatursal Singh. In the year 1903 on the 16th of July, Hanuman Singh, Sita Ram Singh, Charitar Singh and Chatursal Singh, that is, all the then adult male members of the family, combined together to borrow the sum of Rs. 99-8-0 on a mortgage of some of the family property. In the deed it is set out that the money was taken for the purpose of purchasing bullocks. The family was a family which depended upon agriculture for its subsistence. The plaintiff's name does not appear in the bond. A suit was brought and a decree obtained on the 23rd of August 1912. The four executants of the bond, and all their sons and grandsons, in fact all the members of the family *except the plaintiff*, were made parties to that suit. The plaintiff was still a minor. The decree was obtained and on the 2nd of June 1913, there was a final decree for foreclosure. Possession was taken by the mortgagee on the 14th of June 1913. On the 26th of November 1913, the present suit was brought in the name of the plaintiff to set aside the whole transaction and to recover possession of the property on the one ground only that he was not a party to the previous suit. Among other defences the defendants pleaded that the sum of Rs. 99-8 was taken for family necessity. The Court of first instance framed an issue as to whether or not the money had been taken for family necessity. The learned Munsif in writing down the issue in his judgment omitted certain words, but this omission was only in the judgment and not in the issue which was drawn up in the vernacular. The Munsif held that the loan had been taken for family necessity, that the plaintiff had been fully represented at the trial in the former suit and dismissed the suit. The Court below stated in its judgment that there was no evidence whatsoever to show that the money had been borrowed for family necessity but it went on to hold that the plaintiff was effectively represented in the former suit by the adult male members of the family, and that it was for him to prove that the loan had not been taken for any family necessity, and as the plaintiff had failed to prove any such thing, the suit was bound to be dismissed. The main point pressed before me is that it was for the defendants to prove that the loan was taken for family necessity and was binding on the plaintiff and that the defendants not having proved it the

(1) 29 C. 583; 6 C. W. N. 370.
(2) 7 Ind. Cas. 902; 33 A. 71; 7 A. L. J. 945.
(3) 15 Ind. Cas. 126; 34 A. 549; 9 A. L. J. 819.
(4) 17 Ind. Cas. 846; 35 A. 126; 11 A. L. J. 76.

plaintiff was entitled to a decree at least as to his $\frac{1}{8}$th share of the estate, if not of the whole of the mortgaged property. The plaintiff in his plaint had asked for possession of $\frac{1}{8}$th (his own share) of the property without payment of any sum and for the remaining $\frac{7}{8}$ths on payment of what had been found due from the other members of the family. It seems to me that it is clear that the adult members of the family who took this loan were acting as the managing members of the family. There were no other adult male members at all. They were sued by the mortgagee. The latter took the precaution of making all their sons and grandsons parties to the suit. He apparently was unaware, though this is by no means clear, of the existence of the present plaintiff. It is difficult to understand why if he had been aware of his existence, he should not have made him a party to the suit. Be that as it may, it is quite clear that the four adult male members of the family who contracted the mortgage were also sued and were the managing members of the family. There is no allegation of fraud or of any dishonesty in the matter. The plaintiff came into Court and asked for relief on the sole ground that he had not been made a party to the former suit. He did not even allege that the mortgage was not binding upon him or that it was incurred for other than family necessity. In the circumstances of this case it seems to me that the plaintiff was fully represented in the former litigation; that he is not entitled to any relief on the mere ground that he was no party to the former suit, and it will be necessary for him to prove in the present case that the loan was not taken for family necessity. This he did not attempt to do. In my opinion he is not entitled to any relief and the Court below has properly dismissed the suit. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 32 OF 1912.

December 21, 1914.

Present:—Mr. Pratt, J. C., and Mr. Fawcett, A. J. C.

ALLAHRAKHIO AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Musammat NANJI—PLAINTIFF—RESPONDENT.

Hindu Law—Khojas—Khoja *widow's right to maintenance.*

As in matters of succession and inheritance *khojas* are governed by the the Hindu Law a *khoja* widow is entitled to claim maintenance from the person succeeding to her husband's estate, as this right is an essential part of the Hindu Law of inheritance and succession. [p. 929, col. 1.]

Jan Muhammad v. *Datu Jaffar*, 22 Ind. Cas. 169; 15 Bom. L. R. 1044; 38 B. 449, distinguished.

Appeal against the decree of the Additional Judicial Commissioner of Sind.

Mr. *C. M. Lobo*, for the Appellants.

Mr. *Kalumal Pahumal*, for the Respondent.

JUDGMENT.—Plaintiff-respondent is the widow of one Tharu, a Khoja Muhammadan, who died in 1903 and defendants-appellants are the sons of Tharu's two brothers, Meherali and Abdulla, who are also dead.

Plaintiff alleged that the family formerly constituted a joint one governed by Hindu Law in matters of inheritance and succession, and claimed maintenance from the two appellants at the rate of Rs. 40 a month, which she asked should be made a charge on her husband, Tharu's one-third share in certain immoveable property at Karachi. This claim has been partially awarded, and appellants dispute her right to any maintenance or at any rate to the amount actually awarded.

The trial Judge held that Tharu did own an undivided one-third share in the equity of redemption of one-half of the property mentioned in the plaint. This land was originally purchased by Meherali and one Chagla in equal shares, and in 1887, Meherali mortgaged his half share to Chagla. In 1898, Chagla's son transferred his half share of the land as well as his right, title, and interest as mortgagee in the other half share to Abdulla, the father of defendant No 1. The latter is, therefore, owner of half the land and mortgagee of the other half. The purchase of this other half by Meherali has been held by the Judge to have been on behalf of the family generally, and he has also held that Tharu had rights of

ownership over it. These findings have been disputed by Mr. Lobo, but the grounds on which the findings are based clearly justify them. There is the evidence of a reliable witness called by the defendants that during the life-time of the father of the three brothers the earnings went into a joint fund; Tharu himself erected an upper storey to the building on the land and lived in it with his family until his death, while after that his widow, the plaintiff, continued to live in it for about seven years, until she was turned out, and finally this property was shown in the Revenue Records in the names of Tharu, Abdulla and Meherali. Defendant himself admits that no other property stood in Tharu's name; and the entry of his name appears, therefore, to be deliberate, and not merely fortuitous. We see no reason to differ from the Court below on this finding as to Tharu's interest in the property.

In his opening arguments Mr. Lobo contended that the Hindu Law as to joint property did not govern *Khojas,* and that plaintiff, therefore, could have no right to maintenance under that law, but he subsequently withdrew this contention. It is not necessary, therefore, to consider the point; but it may be remarked that the views expressed by Beaman, J., in *Jan Mahomed* v. *Datu Jaffar* (1) are not directed against the exclusion of widows and daughters from sharing in a succession to joint family property, but against sons claiming a share in their father's property on the ground that there is a nucleus of ancestral property (see at pages 503 and 509 511) and that, if in matters of succession and inheritance it is to be taken as established that *Khojas* are governed by the Hindu Law, this must almost necessarily also cover the case of the right of a deceased brother's widow to maintenance, which is an essential part of the Hindu Law of inheritance and succession. If this law does not apply in this case, the plaintiff would be entitled to a share; and it was on this account that Mr. Lobo dropped his contention.

The only remaining question is whether the rates of maintenance allowed the plaintiff are excessive, as contended by appellants. The rate of Rs. 5 per mensem allowed for arrears of maintenance up to 1st May 1912 is certainly not excessive. The rate of Rs. 15 a month allowed for future maintenance after that date is based on an estimate of the value of Tharu's share in the equity of redemption, which the learned Judge estimates at Rs. 5,000 to Rs. 6,000. This estimate does not appear to be excessive, and the rate is only 3 per cent. on Rs. 6,000. We do not see any sufficient reason for interfering on this point.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

(1) 22 Ind. Cas. 195; 15 Bom. L. R. 1044; 38 B. 449.

CALCUTTA HIGH COURT.

CIVIL APPEAL FROM ORIGINAL DECREE NO. 464 OF 1912.

August 27, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

MANMATHA NATH MOOKERJEE—DEFENDANT—APPELLANT

versus

SARAT CHANDRA ADDY—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), *s.* 171, *scope of—Construction—Sum paid to avert rent-sale not considered part of mortgage-money—Transfer of Property Act (IV of* 1882), *s* 83, *scope of—"Money remaining due on mortgage", what includes.*

Whatever construction may be put on section 171 of the Bengal Tenancy Act, it cannot mean that the sum paid for the protection of the property becomes part of the mortgage-money. [p. 930, col. 1.]

In view of the specific provisions of section 171 of the Bengal Tenancy Act, the money paid to avert the rent sale does not become part of the mortgage-money so as to entitle the mortgagee to treat it as included in the amount remaining due on his mortgage under section 83 of the Transfer of Property Act. [p. 932, col. 1.]

Appeal against the decision of the Subordinate Judge of Hooghly, dated the 16th September 1912.

Babus *Sib Chandra Palit, Chandra Sekhar Banerjee* and *Sahayram Bose*, for the Appellant.

Babus *Mahendra Nath Ray* and *Manmatha Nath Ray*, for the Respondent.

JUDGMENT.—This is an appeal by the sixth defendant in a suit brought by a

mortgagee to enforce his security. The mortgagee also seeks to recover two sums of money paid by him in satisfaction of the dues of the superior landlord. The mortgage was granted by the first defendant on the 14th July 1909 for a loan of Rs. 2,500, which carried interest at 15 per cent. per annum with quarterly rests. The first of the two payments was made by the mortgagee on the 17th March 1910, under section 174 of the Bengal Tenancy Act, to set aside a sale of the mortgaged property held at the instance of the superior landlord in execution of a decree for arrears of rent. The second payment was made on the 15th June 1910, under section 171 of the Bengal Tenancy Act, to protect the mortgaged property from a sale which had been advertised to take place at the instance of the landlord in execution of another decree of rent. The appellant, the sixth defendant, acquired the equity of redemption under three conveyances from the other defendants, the original owners of the property, executed on the 3rd November 1910, 6th September 1911 and 9th September 1911. The contesting defendant argued in the Court below that the claim for interest on the mortgage should be disallowed, as there had been a valid deposit, under section 83 of the Transfer of Property Act, of the amount remaining due on the mortgage when the deposit was made in Court. He further contended that no decree should be made in favour of the plaintiffs as against him for either of the sums alleged to have been paid in satisfaction of the dues of the superior landlord. The Subordinate Judge has overruled the first contention and has in part allowed the second. On the present appeal, the decree of the Subordinate Judge has been assailed on three grounds, namely, *first*, that there was a valid deposit of whatever was due on the mortgage within the meaning of section 83 of the Transfer of Property Act, and that, consequently, the interest on the mortgage-money ceased to run under section 84; *secondly*, that the plaintiff is not entitled to a mortgage-decree for the sum paid by him on the 15th June 1910, inasmuch as it was not a deposit made in accordance with section 171 of the Bengal Tenancy Act; and *thirdly*, that the appellant is not personally liable for the money deposited by the plaintiff on the 17th March 1910.

The first contention raises a question of considerable importance. It is not disputed that the appellant deposited in Court a sum of Rs. 3,205 on the 16th March 1911 under section 83 of the Transfer of Property Act. This sum, it is conceded, represented the amount due from the mortgagor at that date if accounts were taken on the basis of the mortgage alone. The mortgagee, however, refused to accept the money, on the ground that the defendant was bound to deposit, not merely the sum calculated to be due on the mortgage, but also the sums paid by the mortgagee in satisfaction of the claim of the landlords together with interest thereon, inasmuch as, by operation of law, these sums had become assimilated with the mortgage-money. Consequently, the question arises, whether the sum deposited by the mortgagee to save the property from sale was included in "the amount remaining due on the mortgage" within the meaning of section 83 of the Transfer of Property Act. On behalf of the mortgagee, reliance has been placed upon the cases of *Anandi Ram* v. *Dur Najaf Ali Begum* (1), *Upendra Chandra Mitter* v. *Tara Prosanna Mukerjee* (2) and *Rakhohari Chattaraj* v. *Bipra Das Dey* (3), in support of the proposition that when a mortgagee has spent money for the necessary protection of his security, he is entitled to add the sums so spent to the mortgage-money. We may here observe parenthetically that in respect of the sum paid on the 17th March 1910 under section 174 of the Bengal Tenancy Act, the Subordinate Judge has held that the mortgagee has no charge on the property for the realization thereof. It is not necessary for us to decide whether this view is or is not well-founded, because the mortgagee has not taken exception to the decree of the Subordinate Judge on this ground. The only question for consideration is, whether the sum deposited by the mortgagee on the 15th June 1910 under section 171 of the Bengal Tenancy Act became part and parcel of the mortgage-money and must be

(1) 13 A. 195; A. W. N. (1890) 228.
(2) 30 C. 794; 7 C. W. N. 609.
(3) 31 C. 975.

deemed included in the amount remaining due on the mortgage on the 16th March 1911 when the appellant made his deposit under section 83 of the Transfer of Property Act.

Sub-section 1 of section 171 of the Bengal Tenancy Act provides that when any person having, in a tenure advertised for sale under Chapter XIV, an interest which would be voidable upon the sale, pays into Court the amount requisite to prevent the sale, the amount so paid by him shall be deemed to be a debt, bearing interest at 12 per cent. per annum and secured by a mortgage of the tenure to him. His mortgage shall take priority over every other charge on the tenure, other than a charge for arrears of rent, and he shall be entitled to possession of the tenure as a mortgagee of the tenant and to retain possession of it as such, until the debt, with the interest due thereon, has been discharged. Sub-section 2 then provides that nothing in the section shall affect any other remedy to which any such person would be entitled. It is plain from the terms of sub-section 1 that the sum paid to prevent the sale is secured by the mortgage of the tenure and that such mortgage takes priority over every other charge on the tenure other than a charge for arrears of rent. The terms of this section may be contrasted with those of section 72 of the Transfer of Property Act, which is applicable only to the case of a mortgagee in possession of the mortgaged property. That section provides that where, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he may spend such money as is necessary for its preservation from sale, and may, in the absence of a contract to the contrary, add such money to the principal money, to carry interest at the rate payable on the principal, and, where no such rate is fixed, at the rate of 9 per cent. per annum. Consequently, in a case where section 72 applies, the mortgagee who spends money for the preservation of the mortgaged property from sale, is entitled to add such money to the principal money. The sum so added carries interest at the rate payable on the principal, except where no such rate is fixed, in which event the interest is 9 per cent. per annum. Section 171 of the Bengal Tenancy Act, on the other hand, provides that the amount paid to prevent the sale carries interest at 12 per cent. per annum, regardless of the rate at which interest is payable upon the principal money. Section 171 further provides that the statutory mortgage, created thereunder in favour of the person who makes the payment and saves the property from sale, shall take priority over every other charge on the tenure other than a charge for arrears of rent. Consequently, where the payment under section 171 has been made by a mortgagee, the statutory mortgage which he acquires is entitled to priority even over the charge which he himself holds. It is, in our opinion, impossible so to construe section 171 as to entitle us to hold that the sum paid for the protection of the property becomes part of the mortgage-money. If the contention of the respondent were well-founded, the additional money would carry interest at the same rate, and would be realisable in the same manner, as the principal. The mortgagee would be deprived of the special advantage conferred upon him by clause (1) of section 171, namely, priority over every charge other than a charge for arrears of rent. The view we take, is in no way opposed to the decisions upon which reliance has been placed. In the case of *Anandi Ram* v. *Dur Najaf Ali Begum* (1) the payment was made by a usufructuary mortgagee in possession, to whom the provisions of section 73 of the Transfer of Property Act would be applicable. It was in these circumstances that the Court held that when money is paid by a mortgagee to protect the mortgaged property from sale for arrears of revenue, the mortgagee is entitled to add the amount to the principal money due under the mortgage, and the mortgage cannot be redeemed without payment of this money. In the case of *Upendra Chandra Mitter* v. *Tara Prosanna Mukerjee* (2) the payment was made by a mortgagee, who was also a co-proprietor in the estate, to prevent a sale for arrears of revenue. The provisions of section 171 of the Bengal Tenancy Act were obviously inapplicable, nor was the case covered by the terms of section 73 of the Transfer of Property Act. The Court held that, on general principles, the mortgagee

who had made a payment to save the property from a sale, which, had it taken place, would have destroyed his security, was entitled to a lien for the money paid by him; and, in support of this proposition, reliance was placed upon the decisions in *Leslie* v. *French*(4) and *Perianna Servaigaran* v. *Marudainayagam Pillai* (5). In the case of *Rakhohari Chaltaraj* v. *Bipra Das Dey* (3) the payment was made to set aside a rent sale under section 310A of the Civil Procedure Code of 1882 and the Court held that the mortgagee, who had made the payment, was entitled to a charge upon the property on principles of justice, equity and good conscience. It is plain that the question now raised for decision was neither raised nor considered in any of the cases mentioned. The case before us is clearly governed by the terms of section 171 of the Bengal Tenancy Act, and we feel no doubt whatever that in view of the specific provisions of that section, the money paid to avert the sale did not become part of the mortgage-money so as to entitle the mortgagee to treat it as included in the amount remaining due on his mortgage under section 83 of the Transfer of Property Act. It has been ingeniously argued, on behalf of the respondent, as a last resort that section 171 is not exhaustive, that notwithstanding its provisions, the mortgagee who has made a payment to avert a sale for arrears of rent, is entitled, on principles of justice, equity and good conscience, to claim a charge on the mortgaged property, and that he may from this standpoint treat the money paid as part of the mortgage-money. This contention is of no real assistance to the mortaggee in this case. Assume that the mortgagee is entitled to repudiate the statutory benefit conferred on him by section 171 and to fall back on the position he would have occupied independently thereof. Assume also that a mortgagee who has made a payment to save the mortgaged property from sale is, on general principles of equity independently of covenants in the mortgage and of statutory provisions, entitled to a charge upon the mortgaged p emises, additional to the original mortgage lien, but of the same grade and rank and to be enforced with and through the mortgage (Jones on Mortgages Volume II, section 1174). It is plain that, in the present case, the mortgagee has not elected between the two remedies. The election must be made at the time when the right originates, that is, when the payment was made by him under section 171. On the other hand, the very fact that he has claimed interest at the contract rate (15 per cent. per annum) on the principal amount and at 12 per cent per annum on the sum paid under section 171, indicates clearly that he relies upon the Statute, which, as we have already explained, does not entitle him to treat the additional sum as amalgamated with the principal. Consequently, the first ground taken by the appellant must prevail. We hold that there was a valid deposit of the sum due on the mortgage on the 16th March 1911, and that interest on the mortgage ceased to run from that date under section 84 of the Transfer of Property Act.

As regards the second ground, it is plain that the contention of the appellant cannot possibly prevail. The case was argued in the Court below on the assumption that the payment was properly made under section 171 of the Bengal Tenancy Act. Under that section a payment can be made only by a person who has such an interest in the tenure as would be voidable upon the sale. It is now sought to be argued that the interest of the mortgagee was not liable to be avoided upon the sale, because the execution proceedings had not been taken in conformity with the provisions of Chapter XIV of the Bengal Tenancy Act. To support this contention the appellant invites us to receive evidence of the nature of those proceedings. The application obviously comes too late, for if we were to accede to his request, time would have to be allowed to the respondent to give rebutting evidence. No good reason has been assigned for the grant of this indulgence to the appellant at this stage. The second contention accordingly fails.

As regards the third ground, which relates to the sum paid on the 17th March 1910, it has been argued that a personal decree should not be made against the appellant. No doubt, as the purchaser of the equity of redemption, he is *prima facie* under no present obligation to satisfy the claim of th

(4) (1883) 23 Ch. D. 552; 52 L. J. Ch. 762; 48 L. T. 564; 31 W. R. 561.

(5) 22 M. 332; 9 M. L. J. 166.

mortgagee, but i transpires that, under the conveyances which are the foundations of his title, he assumed responsibility for the dues of the landlord to the extent of Rs. 5,648, exclusive of Rs. 3,200 which was kept in his hands by the transferors for the satisfaction of the mortgage. In the case of two out of the three conveyances, reference is expressly made to the liability likely to be imposed on the appellant as the result of the present litigation. The appellant has failed to satisfy us that he has spent the whole of the sum of Rs. 5,648; in other words, that the personal liability imposed upon him by the Court below is in excess of the amount for which he assumed responsibility. The third contention, therefore, fails.

The result is that this appeal is allowed in part, and the decree of the Subordinate Judge modified in the manner following. Instead of a decree for Rs. 3,331-12 on account of the mortgage-bond, there will be a decree for Rs. 3,205, and the following passage will be expunged from the decree: "And that interest do run at the rate mentioned from the date of suit to three months after the date of the decree; if the defendants Nos. 1—6 do not pay up the decretal amount within the time fixed, the plaintiff will get an order absolute for sale of the mortgaged property and interest will run at the rate of 6 per cent. per annum on the decretal amount with costs." The decree will also be varied in respect of the amount of costs payable by the appellant to the respondent. In the view we take the plaintiff should not have sued for recovery of the sum due on the mortgage. Consequenly he cannot be allowed any amount for the Court-fees or Pleader's fees payable on that part of the claim. This means a reduction of Rs. 355 in the amount of costs as tabulated in the schedule to the decree. The costs payable by the appellant to the respondent in the Court below will thus be Rs. 248-10 instead of Rs. 603-10. Subject to variation in this respect the decree of the Court below will stand confirmed. As the appeal has failed upon two of the principal points urged before us, the appellant must pay the respondent his costs in this Court. We assess the hearing fee at five gold *mohurs*.

Appeal partly allowed.

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 15 OF 1914.

January 25, 1915.

Present:—Mr. Pratt, J. C.

MESSRS. FORBES, FORBES, CAMPBELL AND COMPANY—APPELLANTS

versus

THE OFFICIAL RECEIVER OF THE ESTATE OF MITHAMAL DWARKADAS —RESPONDENT.

Contract Act (IX of 1872), s. 74, 107—Right of re-sale by vendor where property not passed to purchaser—Re-sale commission and brokerage when goods not re-sold—Agreement to pay, unreasonableness of.

The right of re-sale after the breach of contract to purchase may be allowed as a means of ascertaining damages subject to the rule of reasonable compensation contained in section 74 of the Contract Act and is not limited to cases where property has passed to the buyer. [p. 934, col. 2.]

Moll Schutte & Co., v. *Lachmi Chand*, 25 C. 505; 2 C. W. N. 283, followed.

Where the property in the goods re-sold has not passed to the buyer, a re-selling commission cannot be allowed. [p. 934, col. 2.]

Re-selling brokerage and commission for goods not actually re-sold cannot be allowed as they are unreasonable and not justified by section 74 of the Contract Act, being imaginary and fictitious. [p. 935, col. 1.]

Appeal against the order of the Official Receiver.

Mr. *Dipchand Chandumal*, for the Appellants.

Mr. *Rupchand Bilaram*, for the Respondent.

JUDGMENT.—This is an appeal by a creditor against the order of the Official Receiver rejecting a part of his debt. The petition of insolvency was filed on 21st October 1913 and the debtor, Mithumal Dwarkadas, was adjudicated as insolvent on 23rd January 1914.

The appellants, Messrs. Forbes, Forbes, Campbell & Co., had entered into contracts with Mithumal Dwarkadas for the sale to him of goods to be imported from abroad. The material clauses of the contract are:—

"2. Goods to be removed by me direct from the Bunder of Mansfield Import Yard and any charges incurred for demurrage, godown rent, etc., to be paid by me.

"3. Should the goods be not paid for by me within seven days of arrival, interest shall be charged at 6 per cent per annum. But Messrs. Forbes, Forbes, Campbell & Co. Ld.'s responsibility as to loss in weight, damage or deterioration shall cease, and they may at any time thereafter dispose of the goods on

my account and risk either by auction or private bargain and I agree to make good any loss or expense sustained or incurred thereby together with a net commission of $2\frac{1}{2}$ per cent. on such re-sale.

"In the event of my committing any act of insolvency before paying for all the goods under this contract whether in stock or to arrive, Messrs. Forbes, Forbes, Campbell & Co., Ltd., are at liberty by notice in writing to cancel this contract at any time as regards any goods for which payment has not been made and damages shall be assessed at the market rate on the cancellation whether the goods are in fact re-sold or not and Messrs. Forbes, Forbes, Campbell & Co., Ld., shall be entitled to charge commission and brokerage on such cancelled goods whether re-sold or not."

Now, if the goods are not ascertained, then, so long as they are at Mansfield Import Yard they are the property of Messrs. Forbes, Forbes, Campbell & Co., for they are not appropriated to the contract, nor is such appropriation assented by Mithumal (sections 82 and 83, Indian Contract Act). On the other hand if the goods are ascertained, the result is the same, for property in goods not paid for does not pass until delivery (section 73, Indian Contract Act). The property in the goods undelivered, therefore, remains in the vendors appellants, although the risk by the expressed term of the contract is transferred to the buyer. The dates for taking delivery were prior to the filing of the petition of insolvency.

The appeal relates to two classes of such goods:—

A. Goods which the appellants re-sold on Mithumal's failure to take delivery, and

B. Goods which the appellants had not so re-sold.

As to *A* the appellants filed proofs for damages calculated at the difference between the contract price and the price realized by the sales *plus* interest on the contract price *plus* brokerage on the re-sales *plus* commission of $2\frac{1}{2}$ per cent. The Official Receiver has allowed the whole claim with the exception of commission. The appeal is for this item of commission.

Messrs. Forbes, Forbes, Campbell & Co. never gave notice in writing to cancel the contract and the claim is not based on the market rate at the date of cancellation. The second part of clause 3 of the contract does not apply and the claim for damages is made under the first part of clause 3. But as I have already shown, the goods belonged to Messrs. Forbes, Forbes, Campbell & Co. The provision that Messrs. Forbes, Forbes, Campbell & Co. should dispose of them on account of the buyer, proceeds on the mistaken view that the goods were the property of the buyer and that Messrs. Forbes, Forbes, Campbell & Co. were acting as buyer's agents in selling them. It is for this agency that a commission of $2\frac{1}{2}$ per cent. is charged whereas, as a matter of fact, there is no such agency, for Messrs. Forbes, Forbes, Campbell & Co. were selling their own goods. The right of re-sale after breach of contract to purchase may be allowed as a means of ascertaining damages and is not limited to cases where property had passed to the purchaser. This was decided in *Moll Schutte & Co.* v. *Lachmi Chand* (1). But this is subject to the rule of reasonable compensation contained in section 74 of the Contract Act. The claim for commission is based on a mistaken view of the right of the parties and is altogether unreasonable. The Official Receiver has rightly disallowed it.

As to *B*, Messrs. Forbes, Forbes, Campbell & Co. claim the difference between the contract rate and the market rate on the 17th of August 1914, *plus* interest *plus* re-selling commission *plus* re-selling brokerage. The Official Receiver has disallowed commission and brokerage, and the appeal is for these two items.

The goods were not re-sold and so damages are assessed under the second part of clause 3 of the contract. Messrs. Forbes, Forbes, Campbell & Co. never gave notice of cancellation, but I may presume they rescinded the contracts on the 17th of August, which was about the date on which the Official Receiver called for proof of debts. That being so, there is nothing unreasonable in the provision that damages should be assessed according to the difference of the rates of that day and the contract rate. But how is it possible to justify the further stipulation that damages should be enhanced by purely imaginary and fictitious charges for brokerage and commission on sales which had never

(1) 25 C. 505; 2 C. W. N. 283.

taken place? The sales not having taken place the sums on which these charges would be calculated never had existence and, therefore, their amounts are not even ascertainable. The Official Receiver has rightly disallowed these two items as being altogether unreasonable and not justified by section 74 of the Indian Contract Act.

I confirm the order of the Official Receiver and dismiss this appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

FULL BENCH.

APPEAL FROM ORIGINAL DECREE NO. 107 OF 1914.

April 12, 1915.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, Mr. Justice Woodroffe, Justice Sir Asutosh Mookerjee, KT., Mr. Justice Holmwood and Mr. Justice D. Chatterjee.

RUP KESHWAR LAL—OBJECTOR—APPELLANT

versus

JAIJAI BIBI AND OTHERS—APPLICANTS—RESPONDENTS.

Jurisdiction—District Judge, power of, to transfer particular case to Additional Judge—Bengal, N.-W. P. and Assam Civil Courts Act (XII of 1887), s. 8, sub-sec. (2)—Letters of Administration.

Under section 8, sub-section (2) of the Bengal, N.-W. P. and Assam Civil Courts Act it is competent to a District Judge to transfer a particular case to an Additional Judge. [p. 936, col. 2.]

Rakhal Chandra Tewari v. *Secretary of State for India in Council*, 8 C. L. J. 34; 10 C. W. N. 841, approved.

Muhammad Musa v. *Abdul Hassan Khan*, 22 Ind Cas. 951; 41 C. 866; 18 C. W. N. 612, overruled.

Appeal against the decree of the District Judge of Shahabad, dated the 9th March 1914.

FACTS of the case appear from the following Order of Reference made by Mookerjee and Beachcroft, JJ., dated the 12th August 1914:—

This appeal is directed against the grant of Letters of Administration, with a copy of the Will annexed, to the estate of one *Musammat* Mohan Koer. The application was presented to the District Judge on the 16th July and registered in his Court on the 1st August 1913. After various interlocutory orders, to which reference is not necessary for our present purpose, the case was transferred to the Additional Judge for disposal on the 18th December 1913. The record does not show that any objection was taken to the order of transfer or to the trial of the case by the Additional Judge; but it has been stated before us that an objection was taken verbally and was overruled. It is immaterial, however, whether such objection was taken or not, because the question is one of jurisdiction, and, if the order of transfer was made without jurisdiction and if the Additional Judge was incompetent to try the case, it is open to the appellant to challenge the legality of his order on that ground.

On behalf of the appellant it has been contended that, under section 51 of the Probate and Administration Act, the District Judge alone has jurisdiction in granting Letters of Administration in all cases within his district. The expression "District Judge" is defined in section 3 of the Probate and Administration Act to mean the Judge of a principal Civil Court of original jurisdiction. An Additional Judge is *prima facie* Judge of this description. Our attention is invited, however, to section 8, sub-section (2), of the Bengal Civil Courts Act, 1887, which provides that an Additional Judge appointed under sub-section (1) shall discharge any of the functions of a District Judge which the District Judge may assign to him, and, in the discharge of those functions, he shall exercise the same powers as the District Judge. The appellant argues that as the District Judge transferred only this particular case for trial to the Additional Judge, and did not assign to him his functions as a District Judge in respect of any specified class of cases, the Additional Judge was not competent to hear the case. In support of this contention, reliance has been placed upon the decision of *Muhammad Musa* v. *Abdul Hassan Khan* (1) which apparently supports the argument of the appellant. The view taken in this case, however, is opposed to that adopted in the case of *Rakhal Chandra Tewari* v. *Secretary of State for India in Council* (2). In that case, it was contended on behalf of the appel-

(1) 22 Ind. Cas. 951; 41 C. 866; 18 C. W. N. 612.
(2) 8 C. L. J. 34; 10 C. W. N. 841.

lant, that under section 8 of the Bengal Civil Courts Act, the District Judge had power only to assign certain functions to the Additional District Judge, that is to say, that he could assign to him particular classes of cases but could not transfer to him any particular case for decision. Rampini, J., in answer to this contention, stated that he was unable to accede to this view of the matter, and Woodroffe, J., expressed his concurrence with Rampini, J. But it has been suggested that the case of *Rakhal Chandra Tewari* v. *Secretary of State for India in Council* (2) is distinguishable, inasmuch as there the question arose in relation to the transfer of an appeal, as to which provision is made in sub-section (2) of section 22 of the Bengal Civil Courts Act. The distinction, however, is really not material because, under sub-section (2) of section 22, a District Judge is competent to transfer an appeal to a Court under his administrative control competent to dispose of it; and whether the Additional Judge is or is not competent to dispose of an appeal transferred to him by the District Judge, must depend upon the interpretation to be placed upon sub-section (2) of section 8. Consequently, there is a clear conflict of judicial opinion as to the true scope and effect of sub-section (2) of section 8.

We may add that we feel no doubt that the view taken in the case of *Rakhal Chandra Tewari* v. *Secretary of State for India in Council* (2) gives effect to the true intention of the Legislature. It appears to us to be fairly clear that, if it is competent to a District Judge under sub-section (2) of section 8 to assign his functions to an Additional Judge in respect of a class of cases, there is no intelligible reason why he should not do so in respect of a particular case comprised within that class. We may further observe that the case of *Rakhal Chandra Tewari* v. *Secretary of State for India in Council* (2) was not brought to the notice of the Divisional Bench which decided the case of *Muhammad Musa* v. *Abdul Hassan Khan* (1).

In these circumstances, we are constrained, under paragraph 1 of Chapter V of the Rules of the High Court, to refer this case for decision by a Full Bench. As the question arises in an appeal from original decree, under rule 3 the question of law alone is referred. The question is—whether in view of the provisions of sub-section (2) of section 8 of the Bengal Civil Courts Act (XII of 1887), it is competent to a District Judge to transfer a particular case to an Additional Judge.

Babu *Kulwant Sahai*, for the Appellants.

Babus *Umakali Mookerjee*, *Raghu Nath Singh* and *Sudhansu Sekhar Mookerjee*, for the Respondent.

JUDGMENT OF THE FULL BENCH.

The question proposed for our determination is, whether in view of the provisions of sub-section (2) of section 8 of the Bengal Civil Courts Act (XII of 1887), it is competent to a District Judge to transfer a particular case to an Additional Judge. We answer the reference in the affirmative, the reasons which induce us to adopt that conclusion are sufficiently set forth in the order of reference and we need not repeat them.

The case will go back to the Divisional Bench for final disposal. The Divisional Bench will deal with the costs of this reference.

Case sent back.

LOWER BURMA CHIEF COURT.

CIVIL REVISION PETITION No. 130 OF 1914.

March 29, 1915.

Present:—Sir Charles Fox, KT., Chief Judge.

VITHALDAS KHANDAS—APPELICANT

versus

S. N. INDRAVELLU—RESPONDENT.

Negotiable Instruments Act (*XXVI of* 1881), *ss.* 9, 32, 56, 59—*Promissory note, maker of, liability of—Continuing security—Indorsements, effects of—Fraud, person liable for.*

The maker of a promissory note undertakes and is bound to pay at its maturity according to its apparent tenor. [p. 937, col. 1.]

A promissory note payable on demand is regarded as a continuing security. [p. 937, col. 1.]

Indorsements of payment may be made on a negotiable instrument under section 56 of the Negotiable Instruments Act, (XXVI of 1881) and the note then becomes negotiable only for the balance due but if no indorsement is made, the note remains negotiable for the full amount expressed on it. [p. 937, col 2.]

If the payee commits fraud by transferring the note for the full value without informing the indorsee that some payments have been made, the person to suffer by the fraud is the person

who by his omission to insist on his payments being indorsed on the note enabled the fraud to be committed. [p. 937, col. 2.]

Glasscock v. *Balls*, (1889) 2 Q. B. D. 13; 59 L. J. Q. B. 51; 62 L. T. 163; 38 W. R. 155; *Nash* v. *De Freville*, (1900) 2 Q. B. D. 72; 69 L. J. Q. B. 484; 82 L. T. 642; 48 W. R. 434; 16 T. L. R. 268, referred to.

Mr. *Israel Khan*, for the Applicant.

JUDGMENT.—On the 19th August 1912 S. N. Indravellu executed a promissory note for Rs. 50 payable on demand in favour of Ramsamaj Singh or his order, bearing interest at 6 per cent. per mensem. Ramsamaj Singh indorsed the note in blank and delivered it to the plaintiff for value.

On the 2nd March 1914 the plaintiff sued S. N. Indravellu for the principal and Rs. 5 1-6 interest from 19th August to the 23rd February 1914. The defence was that the amount due on the note had been paid in full to Ramsamaj Singh by instalments. The learned Judge found that all the payments alleged by the defendant had been made but the last had been made after the 2nd June 1912, the date on which the note was indorsed and delivered to the plaintiff. He held that the plaintiff-indorsee could recover only the amount unpaid on the note on that date, which was Rs. 5-5. To this he added Rs. 3 for interest since the last payment and gave a decree for Rs. 8-5 with costs. What had to be dealt with was a negotiable instrument, an instrument on which not only the payee but also anyone to whom he might deliver the note after indorsing it could recover.

The maker of a promissory note undertakes and is bound to pay at its maturity according to its apparent tenor—section 32 of the Negotiable Instruments Act, 1881. A promissory note payable on demand is regarded as a continuing security: *Borough* v. *White* (1). There was no evidence to show that demand for payment had been made by the payee before the indorsement and delivery of the note to the plaintiff. Consequently the provisions of the 1st paragraph, section 59, of the Act did not apply. I understand the Judge to have held that the plaintiff was a holder in due course as defined in section 9 of the Act, that is to say, he had become the possessor of the note for consideration before the amount mentioned in it became payable, without having sufficient cause to believe that any defect existed in the title of the payee from whom he derived his title. No indorsements of payments had been made on the note; consequently there was nothing on it to show any one accepting it as a security or buying it that it was not negotiable for the full amount expressed on it. Indorsements of payments may be made on a negotiable instrument under section 56 of the Act, in which case the note becomes negotiable only for the balance due, but if no endorsement is made the note remains negotiable for the full amount expressed on it.

The payee, Ramsamaj Singh, committed a fraud by transferring and negotiating the note for the full value without informing the plaintiff that payments had been made in respect of it. Either the plaintiff or the defendant must suffer by the fraud. The one to suffer must be the defendant, because by his omission to insist on his payments being endorsed on the note he enabled the fraud to be committed. Instances of the right of a *bona fide* indorsee to recover in such a case are to be found in *Glasscock* v. *Balls* (2) and *Nash* v. *De Freville* (3).

The decision of the learned Judge was not according to law, in that it was opposed to one of the essential principles of the law relating to negotiable instruments.

The decree is set aside, and in lieu thereof there will be a decree for the plaintiff for the full amount claimed with costs, the amount decreed to carry interest at the rate of 6 per cent. per annum. The defendant must pay the plaintiff's costs of this application, two gold *mohurs* allowed as advocate's fee.

Decree set aside.

(1) (1825) 107 E. R. 1030; 4 B. & C. 325 at p 327; 6 D. & R. 379; 3 L. J. (o. s.) K B. 227; 2 Car. & P. 8.

(2) (1889) 2 Q B. D. 13; 59 L. J. Q B. 51; 62 L. T. 163; 38 W. R. 155.

(3) (1900) 2 Q. B. D. 72; 69 L. J. Q. B. 484; 82 L T. 642; 48 W. R. 434; 16 T. L. R. 268.

HARJAS RAI *v.* NARAIN SINGH.

PUNJAB CHIEF COURT.
FIRST CIVIL APPEAL NO. 238 OF 1914.
November 5, 1914.
Present:—Mr. Justice Chevis and
Mr. Justice Shadi Lal.
HARJAS RAI AND OTHERS—DEFENDANTS—APPELLANTS
versus
NARAIN SINGH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XVII, r. 3, scope of—Party's default after time has been granted to him—Court responsible for effecting service.

The stringent provisions of Order XVII, rule 3, cannot be invoked unless time has been granted to a party specifically for performing any of the acts mentioned therein and that party has committed a default in performance thereof. [p. 938, col. 2.]

Where a party has paid the process fee for summoning witnesses the Court and its officers are responsible for effecting service, and an adjournment caused by the non-attendance of witnesses for want of service is an adjournment in the ordinary course and does not amount to time granted to one party within the meaning of rule 3, Order XVII, Civil Procedure Code. [p. 939, col. 1.]

When an adjournment had already been rendered necessary by the non-appearance of the witnesses the fact that it was, at the same time, utilized for another purpose does not convert it into time granted to the defendants within the purview of rule 3 of Order XVII. [p. 939, col. 1.]

Miscellaneous first appeal from an order of the District Judge, Amritsar, dated the 6th January 1914.

Bakhshi *Tek Chand*, for the Appellants.

Mr. *Bahadur Chand*, for the Respondent.

JUDGMENT.—We have heard the appeal fully argued by Mr. Tek Chand for the appellants and Mr. Bahadur Chand for the respondent and, after giving our best consideration to the facts of the case and the law bearing thereupon, we are of opinion that the requirements of Order XVII, rule 3, have not been complied with and that the appeal must succeed. The relevant facts are that the District Judge framed on the 22nd of October 1913 three issues; the onus of the *first* issue was laid on the plaintiff, that of the *second* on the defendants and the *third* was an issue of a general character. The case was then adjourned to 12th November 1913 for the evidence of both the parties. It appears that both of them paid process fees for summoning two witnesses each, but the witnesses of neither party were served for 12th November 1913. The result was that on that day the Court adjourned the case to 3rd December 1913 and also ordered the defendants to pay by the 17th of November 1913 the cost of appointing a Commissioner for examining, at Delhi, the plaintiff and two other persons whom the defendants wanted to produce as their witnesses. The defendants did not, however, pay the expenses of the Commission which was not, therefore, issued and when the case came on for hearing on the 3rd of December 1913, they were absent and the plaintiff, after giving up his claim in issue 1, requested the Court to proceed with the decision on the merits. The Court, thereupon, decided to take action under Order XVII, rule 3, and passed a decree in favour of the plaintiff.

The defendants, treating the decree as an *ex parte* one, made an application under Order IX, rule 13, for an order to set it aside, but the District Judge dismissed it on the ground that the decree had been passed, not under Order XVII, rule 2, but under Order XVII, rule 3, and could not, therefore, be regarded as having been passed *ex parte*. The defendants have preferred to this Court an appeal from the order dismissing the application, and the question which we have to determine is whether the decree of the 3rd of December 1913 should, in the circumstances of the case, be treated as one passed under Order XVII, rule 2, or under Order XVII, rule 3.

It is an established principle of law that the stringent provisions of Order XVII, rule 3, cannot be invoked unless time has been granted to a party specifically for performing any of the acts mentioned therein and that party has committed a default in performance thereof.

Now, in this case, can it be said that the adjournment on the 12th of November 1913 was for the benefit of the defendants or at their instance, so as to bring the case within the purview of the above rule?

As stated above, it was the duty of each party to establish one issue, the onus of which had been placed on him. Both had, for that purpose, applied for summoning their witnesses, but the witnesses of neither party appeared on the 12th of November 1913 and, therefore, an adjournment became necessary in the interests of both. It will be observed that, on that day, the plaintiff had not given up his witnesses and it cannot, therefore, be said that the adjournment to the 3rd of December 1913 was solely for the

benefit of the defendants. The law is clear that unless time has been granted at the instance of one party only, the provisions of Order XVII, rule 3, cannot be brought into operation, *vide*, *inter alia*, *Ram Nath* v. *Mamraj* (1) and *Kale Shah* v. *Shahalal Shah* (2) This ground alone is sufficient for deciding the appeal in favour of the defendants.

But there is another aspect of the case which leads us to the same conclusion. When a party has paid the process fee for summoning witnesses, the Court and its officers are, in our opinion, responsible for effecting service, and an adjournment caused by the non-attendance of witnesses for want of service is an adjournment in the ordinary course and does not amount to time granted to one party within the meaning of rule 3. We have no hesitation in holding that the rule does not apply to a case in which an adjournment to enforce its processes is made by the Court; vide *Pearee Mohun Bera* v. *Shama Churn Mytee* (3).

We may remark that the fact that the defendants made default in paying the expenses of the Commission in accordance with the order of the Court, does not make any difference in the decision on the point before us. The adjournment to the 3rd of December 1913 had already been rendered necessary by the non-appearance of the witnesses and the fact that it was, at the same time, utilized for another purpose did not convert it into time granted to the defendants within the purview of order XVII, rule 3.

In view of the above decision, it is unnecessary for us to determine the question whether in a case in which there is a default of appearance under Order XVII, rule 2, and there is at the same time a default within the meaning of Order XVII, rule 3, the Court should proceed under rule 2 or rule 3.

For the aforesaid reasons, we are of opinion that the decree of the 3rd of December 1913 must be construed as an *ex parte* decree and that an application under Order IX, rule 13, is competent. We accordingly accept the appeal, quash the order refusing to adjudicate upon the application of the defendants to set aside the *ex parte* decree, and return the case to the Court of first instance, which is directed to decide whether there was sufficient cause for the non-appearance of the defendants on the 3rd of December 1913 and pass necessary orders on their application. The costs of this appeal shall be costs in the cause.

Appeal accepted.

(1) 139 P. R. 1884.
(2) 80 P. R. 1899.
(3) 19 W. R. 34 at p. 35.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 5 OF 1913.

January 28, 1915.

Present:—Mr. Pratt, J. C., and Mr. Fawcett, A. J. C.

HIROMAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

FARIDKHAN—DEFENDANT—RESPONDENT.

Civil Procedure Code Act (V of 1908), O. II, rr. 2, 4—Res judicata—*Suit for mesne profits of land—Subsequent suit for possession of the same land, if maintainable.*

Where the plaintiff on being dispossessed of land filed a suit for mesne profits only which was decreed in his favour and subsequently filed another suit for recovery of possession of the land:

Held, that the subsequent suit was barred by the former suit under the provisions of Order II, rule 2, of the Civil Procedure Code. [p. 941, col. 1.]

Ganesh Dutt Thakoor v. *Jewach Thakorain*, 31 C. 262 (P. C.); 31 I. A. 10; 8 C. W. N. 146; 14 M. L. J 6; 6 Bom. L. R. 1, referred to.

Appeal against the decree of the District Judge, Sukkur-Larkana.

Mr. *Isardas Oodharam*, for the Appellants.

JUDGMENT.

PRATT, J. C.—This is a suit for the recovery of the possession of land. The facts found by the District Judge are that the plaintiffs-appellants were dispossessed by the defendant-respondent at some time prior to 1903 (probably in May 1899 when the defendant went under the protection of the Manager). The plaintiffs filed suits for mesne profits in 1903 and in 1905. The first was for mesne profits of part of the land and the second for mesne profits of the whole of the land now in suit. Both suits were

decided in plaintiffs' favour and it was held that they had proved their title to the land as against the defendant.

The lower Courts have held that the plaintiffs not having sought recovery of possession of the land in the former litigation, the present suit is barred under Order II, rule 2.

For the appellant it is urged that Order II, rule 4, makes it clear that a claim for mesne profits is a separate cause of action to a claim for recovery of possession of land.

This rule follows closely the wording of the English rule—Order XVIII, rule 2, Rules of the Supreme Court. There the use of the word claim as synonymous with cause of action is probably due to the fact that in the phraseology of the English Law a plaint is called a statement of claim. The word claim, therefore, denotes not only the demand for relief, but the basis on which that demand is made. Rule 4, if literally interpreted, might lead to the inference that a claim for mesne profits involved a separate cause of action to a claim for the land, but section 44 (*a*) of the Civil Procedure Code of 1882 to which the rule corresponds, was interpreted by the Privy Council in the case of *Gunesh Dutt Thakoor* v. *Jewach Thakorain* (1). In that case the cause of action was the refusal of the defendants to recognize the right of the plaintiff, a widow, to succeed to her deceased husband's share in the family property under a partition which had not been completed at her husband's death. It was contended that section 44 (*a*) barred the claim to recover the moveable with the immoveable property, the subject of the partition in the same suit. Their Lordships said: "The rule, *i. e.*, section 44 (*a*), is not very happily expressed, but there can be nothing irregular in seeking to recover in one suit immoveable and moveable property if the cause of action is the same in both." I understand their Lordships' adverse criticism of section 44 (*a*) to mean that the provision as to mesne profits should not have been stated as an exception, but taken as a proviso or as an explanation. Being stated as an exception, it implied that no other claim for moveable property could be joined in a suit for recovery of land. But the intention that should have been expressed was that claims for mesne profits and rent being on the same cause of action were not within the rule. It is this judgment of the Privy Council which has undoubtedly led to the new clause (*e*) of the rule. This clause relates to claims on the same cause of action and is clearly no exception. So that the defect to which the Privy Council referred has been repeated instead of being corrected. In my opinion, clause (*a*) and clause (*e*) of the rule are of the same character. They are not exceptions but provisos added with a view to explain that the rule does not forbid the joinder of claims to moveable property when they arise out of the same cause of action.

Section 10 of the Civil Procedure Code of 1859 enacted that a claim for the recovery of land and a claim for mesne profits of such land "shall be deemed to be distinct causes of action" within the meaning of the sections referring to joinder of causes of action. The use of words "shall be deemed to be" shows that the Legislature was conscious that the rule was an artificial one. This section has been omitted in the subsequent codes and it would be very surprising if the present rule was intended to preserve this artificial distinction, for the object of the amendments made in Order II, rule 2, was to check multiplicity of litigation and to remove restrictions on the comprehensiveness of the suit.

It is difficult to see any distinction between dispossession of land and its profits and the dispossession of immoveable and moveable property, which was the subject of the judgment of the Privy Council in the case already referred to.

I need not refer to the various definitions of the phrase 'cause of action' that have been given in England. Some are more appropriate when the phrase is used with reference to local jurisdiction, *e. g.*, *Read* v. *Brown* (2), when it is used with reference to the Law of Limitation, *Reeves* v. *Butcher* (3). For the present purpose the best definition is that of the Privy

(1) 31 C. 262 (P. C.); 31 I. A. 10; 8 C. W. N. 146; 14 M. L. J. 8; 6 Bom. L. R. 1.

(2) (1888) 22 Q. B. D. 128; 58 L. J. Q. B. 120; 60 L. T. 250; 37 W. R. 131.

(3) (1891) 2 Q. B. 509; 60 L. J. Q. B. 619; 65 L. T. 329; 39 W. R. 626.

Council in *Chand Kour* v. *Partab Singh* (4): "It refers entirely to the grounds set forth in the plaint as the cause of action or, in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour." Here the *media* or the grounds of the suit of 1905 and of the present suit are the same, *e. g.*, title and dispossesion.

If the cause of action were not the same, plaintiff, even if he had failed to establish his right to mesne profits, would have been entitled to file a fresh suit to recover the land. But this he could not have done, for he would have been barred by the plea of *res judicata* as to his title. Order II, rule 2, is part of the law of *res judicata* or estoppel by record. As said in *Nelson* v. *Couch* (5): "Where the cause of action is the same, and the plaintiff has had an opportunity in the former suit of recovering that which he seeks to recover in the second, the former recovery is a bar to the latter."

I would, therefore, confirm the decree of the lower Court and dismiss this appeal with costs.

FAWCETT, A. J. C.—I concur. In my opinion rule 4 of Order II must be read with the provisions of rules 1 and 2, and construed consistently with them so far as possible. If this is done, I think it amounts to nothing more than saying "No *claim* shall, unless with the leave of the Court, be joined with a *claim*, for the recovery of immoveable property, except" the claims specified in clauses (*a*), (*b*) and (*c*). It is, of course, possible that a person might have a cause of action to sue for mesne profits or arrears of rent, when he had no cause of action to sue for recovery of possession, *e. g.*, a landlord suing to recover rent from a tenant whose lease had not expired; and in such a case he would not, of course, be debarred from bringing a subsequest suit for possession (unless his suit failed on the question of title), but when (as here) the cause of action for recovery of possession was identical with the cause of action for recovery of mesne profits — then, for the reasons given in the learned Judicial Commissioner's judgment, I think that clause (3) of rule 2 necessarily comes into operation:

The suggestion that there was a new cause of action because defendant Faridkhan had previously recognized plaintiffs' title, is opposed to the statement of facts contained in the lower Court's judgments, and no evidence to support it was brought to our notice.

Appeal dismissed.

(4) 16 C. 98; 16 I. A. 156; 5 Sar. P. C. J. 243; 12 Ind. Jur. 33.

(5) (1863) 15 C. B. (N. S.) 99 at p. 103; 33 L. J. C. P. 46; 10 Jur. (N. S.) 366; 8 L. T. 577; 11 W. R. 964; 143 E. R. 72 at p. 724; 137 R. R. 413.

LOWER BURMA CHIEF COURT.

FULL BENCH.

CIVIL REFERENCE NO. 3 OF 1915.

July 5, 1915.

Present:—Sir Charles Fox, KT., Chief Justice, Mr. Justice Ormond and Mr. Justice Twomey.

MG. MRA TUN—APPELLANT

versus

U KAING—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 58—Mortgage-decree—Attachment of property—Claims, investigation of—Procedure.

Proceedings by way of attachment are not applicable to mortgage-decrees, but if the decree-holder applies for and obtains an order for attachment and property is attached, claims and objection to the attachment can be brought under Order XXI, rule 58, of the Civil Procedure Code, and such claims and objections must be dealt with under that rule and the following rules prescribing the procedure for investigation of claims and objections. [p. 942, col. 2.]

S. R. M. A. N. Muthappa Chetty v. *S. A. R. M. Pallathappa Chetty*, 2 L. B. R. 138; *Gobalu* v. *Po Hla*, 4 L. B. R. 82, referred to and explained.

FACTS of the case appear from the following Order of Reference made by

Fox, C. J. - In the Regular Suit No. 22 of 1914 of the Township Court of Kyauktan, U Kaing obtained a decree against Pan Aung and Mg. Sein Bu on a bond by which they mortgaged or hypothecated to him 10 buffaloes. The decree directed that if the defendants failed to pay the amount found to be due the buffaloes should be sold. It amounted to a mortgage-decree. Four days after the date of the decree U Kaing applied for attachment of the buffaloes, and nine were attached. The report of the Deputy Bailiff is silent as to whose possession they were in when he attached them, and in what manner he did it. He reported merely that he attached the buffaloes and left them in the possession of Mra Tun,

Thugyi of Thawingaing village, for him to look after them. Mra Tun applied for removal of the attachment, alleging that the cattle had been made over to him before the attachment for a debt which Pan Aung owed him on a bond mortgaging the cattle to him.

The Township Judge held on the authority of *S. R. M. A. N. Muthappa Chetty* v. *S. A. R. M. Pallathappa Chetty* (1) that he was precluded from going into Mra Tun's application. The ruling of Birks, J., justified this part of the Township Judge's order. It appears to me that the matter requires reconsideration. U Kaing's decree being tantamount to a mortgage-decree, his application for attachment of the cattle was unnecessary and inapplicable according to the ruling. Assuming that at the time of this attachment the cattle were in the possession of Mra Tun, the latter is by the ruling deprived of the right which is given by the Code to a person in whose possession property is, when attached, to move the Court to remove the attachment. If the ruling is correct, a holder of a mortgage-decree may wrongly obtain an attachment which may be wrongly executed against property not in possession of the judgment-debtor at the time, yet the person in whose possession the property was when attached has no remedy except the regular suit. The position appears to me to be anomalous. The mortgagee decree-holder obtains an advantage which he was not entitled to by adopting a wrong procedure, yet the person who may be injured by this wrong procedure is deprived of the remedy provided in case the procedure of attachment is properly followed.

Possibly this Court might set aside the order for attachment and all proceedings subsequent thereto as materially irregular, but before a claimant could get this done the attached property may have been sold to a third party, and a claimant might have much difficulty in recovering it.

I agree with the judgment referred to in so far as it holds that procedure by attachment is not appropriate in a mortgage-decree. Courts should be careful not to issue attachments under such decrees except under ultimate final personal decrees. When, however, a mortgagee decree-holder wrongly obtains attachment of property under such a decree, it appears to me that it should be open to any person objecting to the attachment to adopt the procedure of rule 58 of Order XXI and following rules to obtain removal of the attachment.

As the Courts are at present precluded by the ruling of Birks, J., from hearing a case in such a case, I refer to a Bench the following questions:—

"When a holder of a mortgage-decree applies for and obtains an order for attachment and property is attached thereunder, is the Court, which issued the order, precluded from investigating a claim or objection to the attachment under rule 58 and following rules of Order XXI of the Civil Procedure Code".

OPINION OF THE FULL BENCH.

FOX, C. J.—We agree with Birks, J.'s judgment in *S. R. M. A. N. Muthappa Chetty* v. *S. A. R. M. Pallathappa Chetty* (1), and Hartnoll, J.'s judgment in *Gobalu* v. *Po Hla* (2), in so far as they hold that proceedings by way of attachment are not applicable to mortgage-decrees, but the decisions quoted in those judgments do not appear to us to be authorities supporting the rule that if a mortgagee attaches property under a mortgage-decree a claim under section 278 of the Civil Procedure Code of 1882 could not be brought or admitted.

It appears to us that in all cases of property being attached, claims and objections to the attachment can be brought under the corresponding provision of the Civil Procedure Code, 1908, namely, Order XXI, rule 58, and that such claims or objections must be dealt with under that rule and the following rules prescribing the procedure for investigation of claims and objections.

ORMOND, J.—I concur.

TWOMEY, J.—I concur.

Reference answered.

(1) 2 L. B. R. 138.

(2) 4 L. B. R. 82.

LOWER BURMA CHIEF COURT.
FIRST CIVIL APPEAL No. 21 OF 1914.
April 30, 1915.
Present:—Mr. Justice Twomey and
Mr. Justice Ormond.
RAMDAYAL—APPELLANT
versus
KUMAR GANGADHAR BOGLA AND ANOTHER—RESPONDENTS.

Stamp Act (II of 1899), Sch. I, Art. 1—Account book entries, if required to be stamped—Admissible in evidence.

The account book entries are not liable to stamp duty and are admissible in evidence for what they are worth.

Galstaun v. *Hutchison*, 15 Ind. Cas. 979; 39 C. 789; 16 C. W. N. 945; *Brojender Coomar* v. *Bromomoye Chowdhrani*, 4 C. 885; 3 C. L. R. 520; 2 Shome L. R. 177, referred to and followed.

JUDGMENT.

TWOMEY, J.—The learned Judge on the original side has held that if the clerk or cashier, Jagganath, made entries in Ramcharan's account books in respect of sums advanced to Jagganath and if Jagganath had authority to make entries on behalf of his employer, Shoshi, agent of Mohori Bi, the entries should be construed each as an acknowledgment of a debt and would, therefore, be liable to a stamp duty of one anna for each entry under Article 1, Schedule I, Stamp Act, and being in fact unstamped the entries are admissible in evidence.

We are unable to concur in this view. From the reasoning in *Galstaun* v. *Hutchison* (1) and the earlier case of *Brojender Coomar* v. *Bromomoye Chowdhrani* (2), cited therein, we have arrived at the conclusion that a book entry such as described may be an acknowledgment that the amount stated therein has been advanced, but it is not an acknowledgment of a debt. Whether the sum noted as advanced is due, depends on the state of the account between the parties. We are of opinion, therefore, that the account book entries are not liable to stamp duty and are admissible in evidence for what they are worth. We are unable to say how far the learned Judge's decision has been affected by the exclusion of Ramcharan's account book entries and in order that this evidence may be admitted and taken into consideration, we deem it necessary in the interests of justice to remand the case, although it may be argued that a remand in such circumstances is not strictly covered by the provisions of Order XLI, rule 25.

(1) 15 Ind. Cas. 279; 39 C. 789; 16 C. W. N. 945.
(2) 4 C. 885; 3 C. L. R. 520; 2 Shome L. R. 177.

The plaintiff will be at liberty to prove the entries and it will be open to the defendant to rebut this evidence by showing, for example, that there are no corresponding entries in the account books of the deceased Mohori Bi.

The learned Judge will then record fresh findings on the issues already found and will return the additional evidence with the findings and the reasons therefor in order that this appeal may be finally disposed of.

ORMOND, J.—I concur.

Case remanded.

BOMBAY HIGH COURT.
FIRST CIVIL APPEAL No. 281 OF 1912.
March 9, 1915.
Present:—Mr. Justice Heaton and
Mr. Justice Shah.
DALPATSINGJI NAHARSINGJI—
PLAINTIFF—APPELLANT
versus
RAISINGJI NAHARSINGJI AND ANOTHER
DEFENDANTS—RESPONDENT.

Hindu Law—Adoption—Adoption by widow in presence of natural son—Invalid adoption—Ceremonies, effect of—Maintenance—Performance of declaration during negotiations, value of.

In the presence of a natural son of a deceased Hindu, his widow cannot be presumed to have any authority from him to adopt, and if she does adopt a boy, the adoption will be invalid. [p. 944, col. 2.]

A boy whose adoption is found to be invalid, has no right to be maintained out of the estate of the adoptive family. The mere fact that ceremonies were properly performed and that the widow thought that she had authority to adopt would not affect the question. [p. 944, col. 2.]

A declaration or statement marking a stage in the negotiations as to the proposed amicable settlement between the parties, while admittedly a document giving effect to the declaration or statement was to be executed later on, is an undertaking, which, unless completed, may be broken off at any time by either side. [p. 945, col. 2.]

First appeal from the decision of the Joint Judge, Ahmedabad, in Suit No. 6 of 1911.

Mr. *H. C. Coyaji*, (with him Messrs. *G. N. Thakor* and *H. V. Divatia*), (for Mr. *T. R. Desai*), for the Appellant.

Messrs. *G. K. Parekh*, *D. A. Khare* and *U. K. Trivedi*, for Respondent No. 1.

Mr. *S. S. Patkar* (Government Pleader), for Respondent No. 2.

JUDGMENT.

SHAH, J.—The facts which have given rise to this appeal are briefly these. Narsingji, Thakor of Mehelol, died in the year 1883, leaving two widows, Dariaba and Bajirajba. Bajirajba gave birth to a son named Raisingji, whose legitimacy was disputed by Dariaba. Bajirajba filed Suit No. 967 of 1886 to establish that Raisingji was the natural son of Narsingji. She succeeded in the suit, but in appeal the High Court reversed the decree of the trial Court and held that Raisingji was not the son of Narsingji. There was an appeal, however, preferred by Bajirajba to Her Majesty in Council, with the result that the decision of the High Court was reversed and that of the trial Court restored in 1898. The High Court decided the appeal on the 25th July 1892. A few days after that Dariaba adopted Dalpatsingji, the present plaintiff, on the 8th August 1892, before the application for leave to appeal to Her Majesty in Council was made on the 17th November 1892. The estate was managed by the Collector after 1895 as the guardian of Dalpatsingji, and after 1898 on behalf of Raisingji. Even after Raisingji attained majority, the management of the estate remained with the Collector of the Panch Mahals under section 26 of the Gujarat Talukdars' Act (Bom. Act VI of 1888). The estate among other things consists of Talukdari estate and certain *wanta* lands. The Collector continued to give varying sums by way of maintenance to Dalpatsingji even after the judgment of the Privy Council. In September 1909, Dalpatsingji made an application to the Collector requesting him to bring about an amicable settlement between him and Raisingji. In this application he put forward his claim to a part of the estate as the adopted son of Narsingji. In 1910 it is said that Raisingji agreed to give to Dalpatsingji certain land known as Kankanpur *wanta* by way of *jivai* (maintenance). But Raisingji failed to carry out this agreement, and Dalpatsingji filed the present suit to enforce his rights as Narsingji's adopted son. He claimed one-fifth share in the estate and, in the alternative, the Kankanpur *wanta*, both according to law as well as under the agreement of 1st June 1910. The defendant, Raisingji, who is the really contesting party, resisted the claim on various grounds. The learned Joint Judge, who heard the suit, decided against the plaintiff on the material issues, and dismissed his claim.

The plaintiff has now appealed to this Court. Mr. Coyaji on his behalf has argued two points only in support of the appeal. *Firstly*, it is contended that even if the plaintiff's adoption be invalid he has a right of maintenance on his adoptive family according to Hindu Law, and *secondly*, that under the agreement the plaintiff is entitled to the Kankanpur *wanta*. It is conceded by Mr. Coyaji—and I think very properly conceded—that after the finding of the Privy Council as to the status of Raisingji, the plaintiff's adoption by Dariaba cannot be maintained as valid. Narsingji having a natural son, according to the finding of the Privy Council, at the date of adoption, Dariaba could not be presumed to have any authority from her husband to adopt. The fact that the adoption was made by her at a time when the High Court had decided in her favour and against Raisingji's status, and before an application for leave to appeal to Her Majesty in Council was made in November 1898, cannot affect the question. It is not necessary to deal with this point any further, as it is not contended before us that the adoption of the plaintiff by Dariaba is valid according to Hindu Law.

As regards the contention that a boy whose adoption is found to be invalid has a right to be maintained out of the estate of the adoptive family, there is neither text nor precedent in support of it. Dariaba had no authority to adopt. The mere fact that ceremonies were properly performed and that Dariaba thought that she had authority to adopt would not affect the question. As pointed out by Sir Michael Westropp, C. J., in *Lakshmappa* v. *Ramava* (1), "An invalid adoption works nothing. It leaves the alleged adoption precisely in the same position which he occupied before the ceremony, no matter how formally it may have been celebrated." The Madras High

(1) 12 B. H. C. R. 564 at p. 397.

Court has taken the same view in *Bawani Sankara* v. *Ambabay Ammal* (2), which is referred to with approval by Westropp, C. J., in *Lakshmappa* v. *Ramava* (1). Mr. Coyaji relied upon certain observations in *Ayyavu* v. *Niladatchi* (3). But they were not necessary for the decision of the case. It is difficult on principle to allow the contention that even though the adoption may be invalid, the adoptee has a legal right to maintenance in the adoptive family. I say this strictly with reference to the facts of this case. There is no question of acquiescence here on the part of Raisingji, apart from the agreement of June 1910. The plaintiff is not proved to have lost his right in the family of his birth. It may be that in consequence of the Mehelol Estate being far more valuable than the estate of his natural father he may have preferred to take his chance, whatever it may be, in the adoptive family. Mere omission on his part to assert his right to a share in the estate of his natural father cannot enhance his rights in the family of adoption. It is not necessary to consider whether the plaintiff would have any right of maintenance in his adoptive family, if it were proved that he had in fact lost his status in the family of his birth, though even then it would be difficult to accept the plaintiff's contention. I hold that having regard to the facts of the case, the plaintiff's adoption is invalid and that he has no legal rights in his adoptive family.

Coming to the argument based on the agreement, it is necessary to state a few facts relevant to the point. I have already mentioned the plaintiff's application to the Collector for an amicable settlement. The Collector consulted the Government Pleader of the District, who happened to know the case of Dalpatsingji. The Government Pleader advised that "in justice, equity and good conscience as well as according to law the petitioner (*i. e.*, Dalpatsingji) had a good cause." It is not unlikely that the Collector and the Assistant Collector were influenced by this opinion, Raisingji was persuaded to settle the matter. Accordingly he undertook on the 1st June 1910 in the presence of the Assistant Collector to give his Kankanpur *wanta* by way of maintenance to Dalpatsingji and his direct lineal heirs. It is not denied by the plaintiff, in fact it is his case, that a document conveying the *wanta* to him was to be executed and registered later on by Raisingji and that he (Raisingji) never appeared to execute the document. It is the declaration or the statement made by Raisingji before the Assistant Collector that is relied upon by the plaintiff as an agreement to give him the Kankanpur *wanta*. There are various difficulties in accepting the said declaration as a final and binding agreement. In the *first* place, it is clear that the declaration marks a stage in the negotiations as to the proposed amicable settlement. A document giving effect to the declaration or statement was to be executed later on, though it is not mentioned in the declaration. Raisingji refused to execute it, and after giving an undertaking never expressed his willingness to carry it out. In form the document is not an agreement. It is neither stamped nor registered. If in effect it creates an interest in immoveable property, it must be registered. The plaintiff contends, however, that it is merely an agreement to convey, and does not by itself create any interest in his favour in the property and that it should be specifically enforced as embodying a fair settlement of the dispute between the parties. The whole conduct of the defendant, Raisingji, shows that he was ready at the time of the declaration to give the Kankanpur *wanta*, and that he changed his mind when it came to the stage of giving effect to the settlement. Apparently the plaintiff had given no correlative undertaking at the time, and I am unable to see anything in the case which restricted his liberty in the eye of law to assert his claim to a fifth share in the estate, as he has done in the present suit. Of course it may be that, having regard to his own interests, he may not in fact have cared to do so. But that is not the test. Having regard to these considerations it seems to me that it was quite open to the plaintiff, Raisingji, to change his mind. There was no completed contract. An undertaking of this kind marks only a stage in the negotiations, which, unless completed, may be broken off at any time by either side.

(2) 1 M. H. C. R. 363.
(3) 1 M. H. C. R. 45.

Secondly, it is clearly an undertaking which no Court would enforce against Raisingji. He was admittedly a man of weak intellect. His estate was managed by the Collector under section 26 of the Gujarat Talukdars' Act, probably because he was incapable of managing his own estate as stated by the witness (Exhibit 52). He would be under a disability to enter into any agreement with reference to any part of his property without the sanction of the Managing Officer under section 29A of the Act. I do not desire to express any opinion on the question whether this agreement, even if otherwise good, is not invalid for want of the necessary sanction under section 29A, as the point is not argued and as it is not quite necessary to come to any definite conclusion on the point. But these facts clearly render it necessary to examine closely the promise made by such a man. The promise made by him is practically without any consideration to support it. I am not sure that the defendant fully realised the effect of the expression referring to the direct lineal heirs of Dalpatsingji in the statement, which would apparently include daughters. It is a matter of common knowledge that persons in the position of the Thakor of Mehelol would be ordinarily unwilling to give *jivai* lands on terms, which would make it possible for the property to go out of the hands of the male members of the family. The *wanta* land was selected because, as stated by the Assistant Collector in his evidence, it was not possible to alienate the Talukdars' estate under section 29A of the Gujarat Talukdars' Act. It was hardly realised that the sanction under section 29A would be necessary not only for the alienation of the Talukdar's estate but also for the alienation of *wanta* lands (*i.e.*, for non-Talukdari estate). Even if the reason for selecting the *wanta* land was to avoid the necessity of a sanction of the Governor-in-Council under section 31 of the Act, which is held by this Court to relate to the Talukdar's estate of a Talukdar and not to any property of the Talukdar held on non-Talukdari tenure, the result was that *wanta* land was to be given up by the defendant. It is obvious—and in fact it was not denied by Mr. Coyaji—that, generally speaking, the tenure of the *wanta* land would be more favourable to the holder than the Talukdari tenure. These are several considerations which render it necessary in the interests of justice to hold that Raisingji is not bound by a promise of this character. I would certainly decline to specifically enforce an agreement of this kind, even if the suit were treated as being substantially one for the specific performance of the agreement.

Lastly, it may be stated that Mr. Coyaji has discussed the oral evidence relating to the so-called agreement fairly and fully before us, and we have not found it necessary in this case to hear the Counsel for the defendant, Raisingji. It is clear that the Revenue Authorities acted fairly and honestly. They were persuaded by the Government Pleader to believe that Dalpatsingji had a good claim, and the Assistant Collector states that in bringing about this result he did use persuasion but no pressure. I do not think that the learned Judge below means to hold anything more than this, *viz.*, that a man of Raisingji's intellect, if persuaded by the Assistant Collector and Collector, is likely to yield even against his own real wishes, and that a consent given as the result of such persuasion should not be acted upon, if in fact it happens to be against the interests of the consenting party and if he has retracted it almost immediately after giving it. This appears to be a fair inference from the evidence on the point; and as I have already stated, the defendant cannot be bound by a bare promise of that character.

The result, therefore, is that the decree of the lower Court is affirmed with costs. Each respondent is to have a separate set of costs.

HEATON, J.—I wish to add only a few words in the matter of the conduct of the Revenue Officers which has been brought to our notice. I wish to say that, in my opinion, these Officers acted with perfect propriety. They obtained the legal opinion of their local advisers. They then endeavoured on the strength of that opinion to persuade this young Talukdar to make some provision for a very unfortunate man and in so doing, it seems to me, that they were acting very properly. But the document which this young Thakore signed was, it seems to me, merely a written record of a declaration. It was not in its

true sense an agreement at all. In so far as it had any formal character, it was merely a declaration made before the Collector. Obviously it was not intended to be a final declaration, because a more formal deed was to follow.

I agree in the order proposed by my learned colleague.

Decree affirmed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 18 OF 1914.

March 8, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

A. AHMED ALLY AND COMPANY—RESPONDENTS—APPELLANTS

versus

OFFICIAL ASSIGNEE OF MADRAS—RESPONDENT.

In the matter of MESSRS. M. MAHOMED ALLY JEEVAJEE & Co.—INSOLVENTS.

Presidency Towns Insolvency Act (III of 1909), ss. 52, 56—Sale by insolvent of stock in trade a few days before his insolvency—Possession of goods with insolvent—Sale, validity of—Fraudulent and void transaction.

Where the goods sold by an insolvent prior to his insolvency are allowed to remain in the shops of the insolvent, until the date of his insolvency, they are "in the possession, order and disposition" of the insolvent within the meaning of section 52 of the Presidency Towns Insolvency Act. [p. 947, col. 2.]

Where the sale by an insolvent is to a thick friend of his, only a few days before his insolvency and consideration for the sale consists of moneys borrowed both by the insolvent and the vendee from a third person, the transaction must be looked upon with great suspicion, and where the goods sold are not removed from the insolvent's premises till the date of the insolvency, the sale must be deemed to be fraudulent and void under section 56 of the Presidency Towns Insolvency Act. The fact that there were other sales by the insolvent prior to the insolvency is immaterial. [p. 948, cols. 1 & 2.]

Quære.—Where the sale by an insolvent is for a sum already due to the vendee, whether the vendee could rank as a secured creditor? [p. 948, col. 1.]

Appeal from the judgment and order of the Hon'ble Mr. Justice Bakewell, dated the 22nd January 1914, in the insolvency jurisdiction of this Court, in Petition No. 125 of 1913.

Messrs. *M. D. Devadoss* and *S. Subbiah Chetty*, for the Appellants.

Messrs. *Short, Bewes* and *Co.*, for the Respondent.

JUDGMENT.

NAPIER, J.—This is an appeal from the judgment of Mr. Justice Bakewell sitting in insolvency on a motion by the Official Assignee, calling on the respondents before him to show cause why an order should not be made declaring that the sale to them of the entire stock of the insolvent's girders, alleged to have been made on the 20th May 1913 for a sum of Rs. 23,608-11-4, should not be set aside on the ground that it was a fraudulent preference or that it was not made in good faith and for valuable consideration.

The learned Judge has held that the transaction was not a genuine sale but was a nominal one and was not intended to be an out and out sale; and that even if it was a sale the property was in the possession, order and disposition of the insolvent within the meaning of section 52 of Act III of 1909. On the latter point I am quite clear. There is no evidence worth the name that any attempt was made by the respondents to take possession of this property until after the act of insolvency and I entirely disbelieve the story of their having had their name painted up at the stores where the insolvent kept these girders prior to that date.

As to the transaction itself my own opinion is that it was not intended by both partiss to be a complete transaction taking effect from that time. Whether at a subsequent date the transaction might have been made complete would have depended on the course which the insolvent's affairs took and the extent to which he was able to meet his liabilities. I have no doubt that the first payment of Rs. 8,000 by cheque and Rs. 1,500 in cash on the 19th May was made prior to this transaction with respect to the girders; and that it was only later on the 19th or possibly on the 20th that the girder transaction was put through. I cannot accept the story that the bills for Rs. 7,500 were given as part payment for the girders. That story is negatived most clearly by the evidence in the case. The *hundis*, which were promissory notes, were signed by the insolvent and drawn in favour of one Champa Lal, while the respondents also signed them as drawers; defence third witness says, "Champa Lal said he would lend

money on joint signatures, so we went to insolvent's office and Allibhoy brought the *hundis* signed by Ahmed Ally." I have no doubt that this was an ordinary transaction under which the insolvent borrowed the money from Champa Lal, who at that time possibly having some doubt of the financial standing of the insolvent insisted on the second name. It is impossible to suppose that, if this was an ordinary transaction of purchase of girders and payment for them by the respondents, the *hundis* would have been drawn in this form.

A great deal was made of the fact that there appeared to be one or two small transactions in girders by the respondents after the 20th of May. These may be transactions of the nature which it is shown that the respondents entered into prior to the insolvency; that is to say, when they got an order for a small number of girders, they were in the habit of selling the girders and procuring them from the insolvent.

Mr. Devadoss has invited our attention to the whole of the evidence and has made as much as he could of the small points in his favour. But I am perfectly satisfied in my own mind that this was, as Mr. Justice Bakewell puts it, not intended to be an out and out sale and in that view I would dismiss this appeal with costs on the original side scale.

Mr. Devadoss raised the question whether the respondents would not be entitled to rank as secured creditors, on the view that the girders were mortgaged with them at the time that the insolvent procured their name to the promissory note. I express no opinion on this point as I do not think it is before us.

SADASIVA AIYAR, J.—It seems to me that the appellants and the insolvents were not only of the same "caste" as stated by the senior partner of the appellants' firm (namely, Abdul Husain, the defence sixth witness) and belonged to the same place (Sidpur), but they were also very thick friends. Defence 6th witness admits that he had known Jeevajee all his life. I do not believe that anything took place about the girders in dispute on the 19th May 1913, when Rs. 9,500 was lent by the appellants to the insolvents who must have been very hard up for money even on that date. The appellants, because they were such friends of the insolvents, drew all the money in deposit in their Bank and gave that sum of Rs. 8,000 and the balance of Rs. 1,500 in cash to the insolvents on the 19th of May. On the 20th May the insolvents were still very hard up for money. They then requested the appellants to help them by an accommodation signature to a promissory note for Rs. 7;500 and the appellants consented. The evidence of the 7th witness on the defendants' side (Fazi Ally) shows that the appellants must have known on the 20th May that the firm of Jeevajee has become very shaky. It was then that bill of sale Exhibit E was executed in favour of the appellants. The goods, however, were left in the office of the insolvents till (as I gather from the evidence) the morning of the 5th June 1913, the insolvents having committed their act of insolvency on the evening of the 4th June. On these facts, the bill of sale is clearly, in my opinion, fraudulent and void as against the Official Assignee under section 56, clause (1), of the Presidency Towns Insolvency Act, III of 1909, whether the sale was an out and out sale, or whether it was only intended as security for the prior debt of Rs. 24,000 and as security against the loss which the appellants might be put to in future by reason of their having accommodated the insolvents with their signature to the promisssory note in favour of Champa Lal. The learned Judge is, therefore, right in declaring the sale void and this appeal should be dismissed.

As regards the question whether the appellants could not rank as secured creditors in respect of the Rs. 24,000 which was due to them before the 20th May 1913 or in respect of the Rs. 7,500 or any lesser sum they lost after the date of the insolvency through the insolvents' inability to meet the promissory-note to Champa Lal on the due dates, that claim is not before us and it is unnecessary, as my learned brother said, to express any opinion on that question.

The appeal is dismissed with costs on the original side scale.

Appeal dismissed.

KHATIJA *v.* ADAM HUSENALLY VASI.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 23 OF 1914.

March 31, 1915.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Batchelor.

KHATIJA—PLAINTIFF—APPELLANT

versus

Sheikh ADAM HUSENALLY VASI—DEFENDANT—RESPONDENT.

Court Fees Act (VII of 1870), ss. 7 (iv) (f), 11—Suit for accounts and administration—Valuation in the discretion of plaintiff.

The plaintiff gave in the plaint all the facts and circumstances regarding her want of knowledge of the various interests, their nature, and state of accounts of the estate of her deceased ancestor, which obliged her to bring her suit in the form she did, and, therefore, sued for accounts and administration of the said estate and claimed her share therein. The suit was valued at Rs. 130 for purposes of Court-fees and at Rs. 30,00,000 for purposes of jurisdiction:

Held, that the suit was for an account and was properly valued under section 7 clause *(iv) (f)* of the Court Fees Act. [p. 950, col. 2.]

First Appeal from the decision of the District Judge of Surat, in Appeal No. 4 of 1913, rejecting the memorandum of appeal against the order passed by the first Class Subordinate Judge, Surat, in Suit No. 159 of 1912.

Mr. *Manubhai Nanabhai*, for the Appellant.

Mr. *G. S. Rao*, for the Respondent No 1.

Mr. *N. K. Mehta*, for the Respondent No. 4.

Mr. *B. D. Mehta*, for the Respondents Nos. 2, 22, 23 and 24.

JUDGMENT.—In this suit the plaintiff, a Muhammadan female, prays that accounts may be taken of the properties and business of the deceased Tyebally Sheikh Adam and his firm, and their claims and liabilities may be ascertained, and an order may be passed for its administration by the Court, and the claims of the claimants to the said estate and effects according to Muhammadan law applicable to the Ismaili Daoodi Shiah Sect and according to the custom of the said Daoodi Bohora community may be ascertained, proper direction may be given for that purpose and her share according to the claim that may be ascertained may be separated from the said properties and handed over to her; and that an order may be passed for the appointment of a Receiver for the management of the properties and business of the deceased Tyebally Sheikh Adam and his firm pending this suit.

The suit was valued at Rs. 130 for purposes of Court-fees. In the 39th paragraph of the plaint she says that "although it is not possible to fix the exact value of the property of the firm of Tyebally Sheikh Adam or of his any other property, according to my belief it must come to Rs. 3,000,000. For the purpose of the jurisdiction of the Court the claim has, therefore, been valued at Rs. 30,00,000".

It is argued on behalf of the defendants that the suit has not been properly valued for the purpose of Court-fees, and that the plaint should, therefore, be rejected. That contention has found favour with the lower Courts in Surat. The learned District Judge from whom this appeal is preferred says that "the appellant has treated her suit as an administration suit. It is not an administration suit. This is clear from the plaint. She claims her share in the property. The value of her share is Rs. 67,968-12-0, and stamp duty should be paid on this amount. Deficiency to be made good within ten days". As the stamp duty was not paid the appeal to the District Court was rejected.

It is not disputed that the plaintiff's ancestor under whom she claims carried on business, and that the firm started by him known as Tyebally Sheikh Adam is still continuing. It is, however, disputed by the defendants that any of the immoveable properties in which it is suggested that plaintiff claims a share belonged to the firm of Tyebally Sheikh Adam or to Tyebally himself, and it is suggested to us in argument by the respondents' Pleader that their contention will be that all immoveable properties to which the plaintiff is supposed to lay claim belonged to a firm named Abdul Kader Hassanally, and that she has no interest in the same. The statement is of value in this appeal, because there is always the possibility that in suits of this nature the plaintiff is professing ignorance as to specific properties where she has certain knowledge and could specify definite properties in which she is entitled to a share of a definite value. But in view of the position taken up by the defendants there is ground for supposing that the statement in paragraph 34 of the plaint represents the true position as far as the

plaintiff is concerned. In that paragraph she says: "Since the accounts of the said estate and effects and of the business have not been made-up, and many of the heirs of Tyebally Sheikh Adam have died leaving heirs behind them, and several out of them have been removed from the property of the firm, I have no means of knowing whether they have come to any understanding with the manager of the said firm. For that reason also, I have no means of knowing who the claimants are who can at present legally get their shares, and which of the heirs now desire to put forward their claims, and what property and claims and liabilities there are, and whose and of what nature the claims and interests in the firm's property there are at present, and what amount of property may be found on taking the accounts of the business. Similarly, as it is necessary to examine the accounts from the books of the firm, in order to know all this definitely, the value of this claim cannot be ascertained. For this and other reasons I am obliged to file this suit for taking accounts and for getting the estate administered."

There being then no apparent ground for distrusting the statement in that paragraph, the *dictum* of the learned District Judge that this is not an administration suit cannot be supported. According to the provisions of the Court Fees Act, if the plaintiff succeeds in showing upon the accounts that she is entitled to a share in the property and assets of Tyebally Sheikh Adam, she will not be able to obtain execution of any decree that may be passed in her favour by reason of the provisions of section 11 of the Court Fees Act, until the difference between Rs. 130 and the fee which would have been payable had the suit comprised the whole of the amount decreed has been paid to the proper officer. That being so, there does not appear to be any reason why this should not be treated as a suit for account and for the share which may be found due to the plaintiff upon taking of such account, and if it is a suit for an account falling under section 7, clause (*iv*) (*f*) of the Court Fees Act, the plaintiff is at liberty to value it at Rs. 130 or any other sum she pleases.

For these reasons we are unable to accept the decision of the learned District Judge. We set aside the rejection of the plaint and direct that it be taken on the file, and the plaintiff be allowed to proceed with the suit. The plaintiff must have from the defendants her costs in the three Courts referable to the question of Court-fee.

Decree reversed.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 50 OF 1915.

July 8, 1915.

Present:—Mr. Justice Tudball.

BANARSI DASS AND Co.—DEFENDANTS APPELLANTS—APPLICANTS

versus

LULLA MAL—PLAINTIFF—RESPONDENT OPPOSITE PARTY.

Evidence Act (*I of* 1872), *s.* 92—*Contract Act* (*IX of* 1872), *ss.* 73, 75—*Contract, breach of—Plaintiff, liability of, to prove damages—Written contract— Inconsistent contract, if can be proved.*

It is not open to a party to a written contract to prove a contract the terms of which are clearly inconsistent with the terms of the written contract [p. 951, col. 2.]

Sections 73 and 75 of the Contract Act make it compulsory on the plaintiff to show that he has suffered and the extent to which he has suffered, before a Court can award him damages for a breach of contract. [p. 952. col. 1.]

P. R. & Co. v. *Bhagwandas Chaturbhuj*, 10 Bom. L. R. 1113, referred to.

Petition for revision against the order of the Small Cause Court Judge of Agra, dated 7th December 1914.

Mr. *S. K. Dar*, for the Applicants.

Mr. *Narain Prasad*, for the Opposite Party.

JUDGMENT.—This is an application for revision arising out of a suit brought in the Court of Small Causes at Agra to recover the sum of Rs. 150 as damages for breach of contract. The plaintiff's case put briefly was, that the appellants had agreed to deliver to him certain goods at certain price in a certain month at Agra, that they had failed to fulfill their contract, that they had subsequently tendered the goods after consider-

able delay, and that these goods were not up to sample, and he, therefore, by reason of a breach of contract had suffered damage to the extent of Rs. 150. Many pleas were taken in defence. *One* raised the question of jurisdiction, namely, that the suit was not cognisable in the Court at Agra; *another* was that under the terms of the agreement made between the parties, the dispute had to be settled by arbitration and, therefore, the jurisdiction of the Court had been ousted; the *third* was that the plaintiff had suffered no damages. There were many other pleas which it is unnecessary to mention. The Court held that it had jurisdiction, that both parties had thrown on one side the agreement to settle their disputes by arbitration and, therefore, that agreement was no longer binding. In regard to damages it held that though the plaintiff had failed to prove what damage he had suffered, still he was entitled, to some damage and awarded "*nominal*" damages. The defendants have come here in revision and most of the legal points have been again pressed before me.

In so far as the question of arbitration was concerned. it seems to me that the Court below was quite right for it is clear that both parties had thrown over so much of their agreement as related to arbitration. Neither side had attempted to enforce that clause and both sides, as a matter of fact, had gone into Court to enforce their rights. The question of jurisdiction depends entirely upon the contract which was made between the parties. The defendants were agent of an English firm. That English firm manufactured cloth in England, and sold its goods on certain terms which are embodied in a document which has been described in this suit as an "indent" and which has been signed by the plaintiff in the present suit. According to the terms of that document the goods were to be delivered in Bombay, and the payment was to be made by the plaintiff at Delhi. The Court below came to the conclusion that because the conditions in question were all set out in English, and the plaintiff did not know that language, therefore, it must be presumed that they did not understand what they were signing. Further, it has come to the conclusion that the plaintiff received an assurance that the goods would actually be delivered to him at Agra on payment by him of the value into the Bank at Agra, and that this assurance was made at the time that the defendant invited the plaintiff to purchase the goods. It would be somewhat difficult, I must admit, to accept the inference drawn by the Court below that as the conditions of the document were in English, therfore, the plaintiff did not understand it. As a matter of fact such documents are very common indeed in this country, and those persons who habitually deal in cotton goods as a rule fully understand all that is set out therein. The document clearly and distinctly sets forth that the goods shall be shipped to Bombay and the meaning clearly is that the purchaser must make his own arrangements to take delivery from Bombay and convey to his own shop. Lastly, the lower Court has held that the contract was not completed on the 16th of December 1912, that on that date the plaintiff signed the document which constituted an offer to purchase on these terms, that the offer was communicated to the firm in England, accepted by it, and then the acceptance of the offer was sent by the defendants from Delhi by post to the plaintiff at Agra. The contract, therefore, was completed at Delhi and the verbal assurance of a *dalal*, on the 16th of December 1912, could form no part of the contract. It may be that a firm, like that of the defendants, does, as a matter of fact, assist purchasers in getting their goods cleared at Bombay and conveyed to their place of business, although it is no part of the contract entered into between the parties. On the lower Court's own finding the plaintiff purchased on the conditions entered in the document, and the offer to purchase on these conditions was subsequently accepted. It is not open, in my opinion, to the plaintiff to prove a contract the terms of which are clearly inconsistent with the terms of the written contract. Therefore, in my opinion, no portion of the cause of action arose at Agra and the Court at Agra had no jurisdiction to entertain the suit. The contract was not made at Agra; no portion of it had to be carried out in Agra; delivery was to be at Bombay and payment was to be made at Delhi. It, therefore, seems to me that the decision of the Court below cannot be allowed to stand. But there is

another point which clearly affects the plaintiff's case. The lower Court in its judgment was clearly of opinion that the plaintiff had failed to prove what damage he had suffered. It was clearly of opinion that the plaintiff refused to take delivery of the goods because, as a matter of fact, the price had considerably fallen and it was to his advantage to refuse to take delivery. Section 73 of the Contract Act clearly lays down that when a contract has been broken, the party who suffers by such breach is entitled to receive from the party who has broken the contract compensation for any loss or damage caused to him thereby. If section 73 applies and not section 75, as has been urged on behalf of the defendants, even then it was for the plaintiff to show that he had suffered from the breach of contract and the extent of his suffering. The finding of the Court below is that the plaintiff had actually gained instead of suffered, and it has awarded to the plaintiff not the damage which was caused to him by the breach of contract, but what it was pleased to call nominal damages to the extent of Rs. 75. If section 75 applied to the present case (and I would note that the plaintiff had stated that he did rescind the contract) it is clear that the person who rescinds a contract is entitled to compensation for the damage which he has actually sustained through the non-fulfilment of the contract. Whatever the English Law on the subject may be it is quite clear, in my opinion, that sections 73 and 75 make it compulsory on the plaintiff to show that he has suffered and the extent to which he has suffered, before the Court can award him damages for the breach of contract. The point was considered in *P. R. & Co.* v. *Bhagwandas Chaturbhuj* (1). Mr. Justice Knight who decided that case remarked as follows:—

"Studied in the light of this illustration, I am convinced that the Indian Act does not sanction or permit an action for breach of contract of sale save where specific damage is proved to have resulted from that breach. Section 73 not only confines the right of relief to the party who suffers, but provides how his loss is to be measured, what it is to include and what to exclude and what circumstances the Court must take into account in estimating the loss. For the party who does not prove that he has suffered it provides no relief whatever." In my opinion on both these points the plaintiff's case ought to have failed and should have been dismissed. I allow the application. I set aside the decree of the Court below and the plaintiff's suit will stand dismissed with costs in both Courts.

Decree set aside.

(1) 10 Bom. L. R. 1113.

BOMBAY HIGH COURT.

SECOND CIVIL APPEALS NOS. 1001 OF 1913 AND 80 OF 1914.

March 30, 1915.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Batchelor.

KESHAV HARGOVAN—

APPELLANT

versus

BAI GANDI—RESPONDENT.

Contract Act (IX of 1872), s. 23—Marriage—Divorce—Custom—Payment to caste—Repugnant to Hindu Law.

A custom by which the marriage tie can be dissolved by either husband or wife, against the wish of the divorced party, and for no reason but out of mere caprice, the sole condition attached being the payment of a sum of money fixed by the caste, is opposed to public policy within the meaning of section 23 of the Contract Act and is also repugnant to Hindu Law, and, therefore, cannot be judicially recognised. [p. 953, col. 2.]

Second appeals from the decision of the District Judge of Ahmedabad, in Appeals Nos. 335 and 336 of 1913, confirming the decree passed by the Joint Subordinate Judge at Ahmedabad, in Civil Suits Nos. 267 and 603 of 1912.

Mr. *G. N. Thakor*, for the Appellant.

Mr. *G. K. Parekh* for the Respondent.

JUDGMENT.—These appeals are brought in two suits, the one being a suit for the restitution of conjugal rights, and the other a suit for dissolution of marriage. The plaintiff in the suit for restitution is the adult husband of the defendant, a minor who has attained the age of puberty. The duty is imposed by Hindu Law upon

the wife to reside with her husband: see *Tekait Mon Mohini Jemadai* v. *Basanta Kumar Singh* (1). There is no evidence that he has been guilty of such conduct as would justify his wife in claiming the protection of the Court. The defence is that the defendant is no longer the plaintiff's wife and it is to obtain a declaration to that effect that the cross suit has been brought in her name. It is claimed that by virtue of a caste custom, the minor wife can by the expression of her desire so to do accompanied by a payment of money, the greater part of which goes to the caste and a small portion to the unwilling husband, free herself from the marriage tie. Whether such a custom could be recognised by the Court in the case of an adult wife will be discussed later in this judgment. The plea in the wife's written statement is that the marriage is a contract subject to a condition sanctioned by custom, that it may be put an end to at the wish of the wife subject to a payment of money. We cannot accept the position that marriage among Hindus is only a contract, but even if it were so, it could only be a contract when concluded between adults capable of contracting. That is not the case here, and it is probable that the child wife who is put forward as paying money for the caste and for the repudiated husband is merely a pawn in a game between those who are the real instigators of her suit and the opposite party in the caste who dispute the existence of the alleged custom.

The parties are Hindus of the Pakhali caste. It appears that, factions having broken out in the caste and the husband and his father-in-law taking different sides, the wife is anxious to divorce the husband. She claims to be entitled to do so by virtue of a caste custom which authorizes either spouse to divorce the other, against that other's will and with or without any assignable reason, on payment of a sum of money fixed by the caste from time to time. The lower Courts have passed a decree in the wife's favour, holding that the custom set up was proved, and that it is not opposed to public policy. Having regard to the recency of the caste resolutions purporting to affirm this custom, to the incompetence of the caste to pronounce marriages void, and to the recitals in various deeds to the effect that these *farkats* were executed with the consent of both spouses, we doubt very much whether the inference that the alleged custom is legally established can be supported by the evidence on the record. But we prefer to put our judgment on the broader ground that the alleged custom, assuming it to be proved, must be regarded or opposed to public policy within the meaning of section 23 of the Indian Contract Act. In our opinion this view is apparent from a consideration of the mere character of the custom set up, and it is also to be supported by the decisions of this Court.

The custom pleaded is, as we have said, a custom by which the marriage tie can be dissolved by either husband or wife against the wish of the divorced party, and for no reason but out of mere caprice, the sole condition attached being the payment of a sum of money fixed by the caste. That sum admittedly is liable to alteration from time to time at the will of the caste: Rs. 55 to-day, it may be Rs. 5 to-morrow. We need only say that, in our opinion, it is impossible for the Court to recognise any such custom as this; it is opposed to public policy as it goes far to substitute promiscuity of intercourse for the marriage relation, and is, we think, equally repugnant to Hindu Law, which regards the marriage tie as so sacred that the possibility of divorce on the best of grounds is permitted only as a reluctant concession. The requirement of the payment of a sum of money, on which the learned District Judge relies, seems to us to be immaterial, and we can see no substantial distinction between the recognition of this custom and the declaration that the tie of marriage does not exist among Hindus of the Pakhali caste.

As to the cases, it was laid down as early as 1876 in *Reg.* v. *Sambhu Raghu* (2) that "the Court does not recognise the authority of the caste to declare a marriage void, or to give permission to a woman to re-marry." It is true that this ruling

(1) 28 C. 751; 5 C. W. N. 673.

(2) 1 B. 347.

was not followed in *Jukni* v. *Queen-Empress* (3), but there the learned Judges found that the husband had relinquished his wife, so that this decision is of no authority on the present facts. In *Reg.* v. *Karsan Goja* (4), which were criminal cases, the question was whether a woman of the Talapda Koli caste was punishable under section 494, Indian Penal Code, or whether she could successfully plead a caste custom under which a married woman was permitted to leave her husband and contract a second marriage without the husband's consent; and the Court said that "such a caste custom, even if it be proved to exist, is invalid, as being entirely opposed to the spirit of the Hindu Law." That decision was given in 1864, and, so far as we are aware, has never since been doubted. It is, we think, direct authority in favour of the view that the custom which is set up in the present appeal, and which in essentials is indistinguishable from that pleaded in the cases of 1864, cannot be recognised by the Court. The decision in *Reg.* v. *Karsan Goja* (4) was approved and followed by Sir M. Westropp, C. J., and Melvill, J., in *Narayan Bharthi* v. *Laving Bharthi* (5). We may refer also to *Uji* v. *Hathi Lalu* (6), decided in 1870, where it was held that a custom which authorised a woman to contract a second marriage without a divorce, on payment of a certain sum to the caste, was an immoral custom which should not be judicially recognised. The custom in the present case seems to stand on no higher position; for if the mere payment of money to the caste cannot serve to validate a re-marriage without a divorce, the same reasoning would make it insufficient to validate a divorce without the consent of the other spouse, as the effect in the dissolution of the marriage bond would be substantially the same in both cases.

On these grounds we are of opinion that in the wife's suit for dissolution of marriage the appeal must be allowed and the suit dismissed with costs throughout. Mr. Gokuldas for the wife has read affidavits declaring that since the lower Court's decree the wife has contracted a second marriage with another man, but that fact appears to us to have no relevance to the only question raised in the appeal, the question, namely, whether she was entitled to divorce her first husband by virtue of the caste custom.

In the husband's suit for restitution of conjugal rights, the only defence now made is the divorce based on the alleged custom, and, since that fails, the suit must be decreed with costs throughout.

Appeals allowed.

(3) 19 C. 627.
(4) 2 B. H. C. R. 117 at p. 124.
(5) 2 B. 140.
(6) 7 B. H. C. R. 133.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY JURISDICTION APPLICATION No. 273 OF 1914.

April 9, 1915.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Batchelor.

SONU JANARDAN KULKARNI — PLAINTIFF—APPLICANT

versus

ARJUN BARKU KUNBI—DEFENDANT—OPPONENT.

Mamlatdars' Courts Act (Bom. Act II of 1906), s. 23—Collector, whether includes District Deputy Collector—High Court's power to revise.

A District Deputy Collector has no authority to pass an order under section 23 of the Mamlatdars' Courts Act of 1906. [p. 956, col. 1.]

Where a District Deputy Collector has assumed to act judicially, he will be treated as a Court under the superintendence of the High Court whose proceedings can be revised under the extraordinary jurisdiction. [p. 956, col. 1.]

Petition against the decision of the District Deputy Collector, East Khandesh.

Mr. *P. V. Kane*, for the Applicant.

Mr. *P. B. Shingne*, for the Opponent.

JUDGMENT.—This is a petition, under section 115 of the Civil Procedure Code, by the plaintiff in the Mamlatdar's Court at Erandol in East Khandesh who sued for possession of certain lands under the Mamlatdars' Courts Act. The Mamlatdar of Erandol after recording evidence ordered possession to be given to the applicant. An application was then preferred purporting to be in revision under section 23 of the Mamlatdars' Courts Act to the District Deputy Collector of East

Khandesh, who reversed the decision of the Mamlatdar of Erandol. The petitioner contends that the District Deputy Collector had no authority to act under the Mamlatdars' Courts Act. That Act is Bombay Act II of 1906. Section 23 provides: "(1) There shall be no appeal from any order passed by a Mamlatdar under this Act. (2) But the Collector may call for and examine the record of any suit under this Act, and if he considers that any proceeding, finding or order in such suit is illegal or improper, may, after due notice to the parties, pass such order thereon, not inconsistent with this Act, as he thinks fit."

Now unless the term "Collector" includes "District Deputy Collector" in that section, the District Deputy Collector has no authority to act under the Mamlatdars' Courts Act. The expression "Collector" is not defined in the Act itself, but it is defined in the previous Bombay General Clauses Act (Bombay Act I of 1904) for the purpose of all Bombay Acts made after the 30th May 1904. Section 3 of that Act provides that: "In this Act, and in all Bombay Acts made after the commencement of this Act, unless there is anything repugnant in the subject or context, 'Collector' shall mean, in the city of Bombay, the Collector of Bombay, and elsewhere the chief officer in charge of the revenue administration of a district." It is not contended that the District Deputy Collector is the chief officer in charge of the revenue administration of the District of East Khandesh. But it is argued that by reason of certain powers having been delegated to the District Deputy Collector by the Collector under section 10 of the Land Revenue Code, the District Deputy Collector is, a Collector within the meaning of section 23 of the Mamlatdars' Courts Act of 1906. The Land Revenue Code, section 10, provides that "Subject to the general orders of Government, a Collector may place any of his Assistants or Deputies in charge of the revenue administration of one or more of the *talukas* in his district, or may himself retain charge thereof. Any Assistant or Deputy Collector thus placed in charge shall, subject to the provisions of Chapter XIII, perform all the duties and exercise all the powers conferred upon a Collector by this Act or any other law at the time being in force, so far as regards the *taluka* or *talukas* in his charge." The powers of a Deputy Collector would, therefore, not extend beyond the *taluka* or *talukas* of the District which shall have been placed specially in his charge, and he could not be the chief revenue officer in charge of the revenue administration of a district. Chapter XIII, to which reference is made in section 10, provides that "In the absence of any express provision of this Act, or of any law for the time being in force to the contrary, an appeal shall lie from any decision or order passed by a revenue officer, under this Act or any other law for the time being in force, to that officer's immediate superior, whether such decision or order may itself have been passed on appeal from a subordinate officer's decision or order or not". If, therefore, the argument for the opponent is correct, and "any law for the time being in force" includes the Mamlatdars' Courts Act of 1906, an appeal would lie from the decision of the Deputy Collector under section 23 to the Collector, and from the Collector to the Commissioner, because there is no express provision to the contrary in the Act. The absurdity of this conclusion suggests that the words "any law for the time being in force" must relate to any law *ejusdem generis* with the Land Revenue Code and would not embrace the special law relating to Mamlatdars' Courts such as we have in the Act of 1906.

We have, however, been referred to a decision of a Bench of this Court in *Keshav Dhondi* v. *Jairam* (1) in which it was held that by virtue of the Land Revenue Code, section 10, an Assistant Collector in charge of portions of a District was entitled to exercise the revisional powers of the Collector under section 23 of the Mamlatdars' Courts Act. It is apparent from the report that the provisions of the Bombay General Clauses Act of 1904 were not brought to the notice of the Court, particularly the words "unless there is anything repugnant in the subject or context" of the Act to be construed, for Mr. Justice Beaman in his judgment states that, on a first view, it would appear that an Assistant Collector could not be authorised to exercise the revisional powers under section 23. In view of the express definition in section 3 of

(1) 12 Ind. Cas. 709; 36 B. 123; 13 Bom. L. R. 1031

General Clauses Act we feel bound to decide that the District Deputy Collector had no authority to pass any order under the Mamlatdars' Courts Act of 1906. He has, however, assumed to act judicially, and is, therefore, according to the ruling in *Collector of Thana* v. *Bhaskar Mahadev Sheth* (2), to be treated as a Court under the superintendence of the High Court whose proceedings can be revised under the extraordinary jurisdiction. The question then is, what order should be passed under section 115? We declare that the order of the District Deputy Collector is a nullity as being without jurisdiction of any kind, and direct that the application of the defendant for revision under the Mamlatdars' Courts Act be taken on the file of the Collector, and be disposed of by him according to law. Having regard to the decision in *Keshav Dhondi* v. *Jairam* (1) we think that there should be no order as to costs of this application.

Ordered accordingly.

(2) 8 B. 264 at p. 268.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3909 OF 1910.

April 28, 1913.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

UMES CHANDRA BANERJEE—PLAINTIFF—APPELLANT

versus

DINABANDHU MAHANTI AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 45—Mortgage—Several mortgagees—Payment by mortgagor to one mortgagee, if valid.

A payment of the mortgage-debt by the mortgagor to one of the several joint mortgagees is not a valid payment as against the other mortgagees. [p. 956 col. 2.]

Appeal against the decree of the Subordinate Judge of Cuttack, dated the 17th August 1910, affirming that of the Munsif, Cuttack, dated the 24th November 1909.

Babu *Haradhone Chatterjee*, for the Appellant.

Babu *Sures Chandra Chuckerbutty*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff in a suit to enforce a mortgage granted to him and Dina Nath Acharji on the 16th July 1897. The suit was commenced on the 29th July 1909 and was defended by the purchasers of the equity of redemption, who contended that the mortgage-debt had been satisfied by payments made on behalf of the mortgagor to the co-mortgagee of the plaintiff on the 27th July 1899. The question, therefore, arose, whether the payment made by the mortgagor to one of the joint mortgagees was a good payment as against the other mortgagee. The Courts below have answered this question in the affirmative on the authority of the decisions in *Barbar Maran* v. *Ramana Gounden* (1); *Bhup Singh* v. *Zain-ul-Abdin* (2) and *Kari Chengamma* v. *Jatti Kristnammah* (3). On behalf of the plaintiff, this decision has been challenged and reliance has been placed upon the cases of *Harihar Pershad* v. *Bholi Pershad* (4); *Husainara Begum* v. *Rahmannessa Begum* (5); *Peary Lal Daw* v. *Madhoji Jiban* (6); *Sitaram* v. *Shridhar* (7); *Tamman Singh* v. *Lachhmin Kunwari* (8) and *Brij Lal Singh* v. *Bhawani Singh* (9). In our opinion, the alleged payment was not a good payment as against the plaintiff. The principle of law applicable to cases of this description was fully explained in the case of *Husainara Begum* v. *Rahmannessa Begum* (5) and we see no reason to take a different view. We observe that although the contrary opinion expressed in *Barbar Maran* v. *Ramana Gounden* (1) was recently adopted by the majority of the Judges who decided the case of *Mannava Annapurnamma* v. *Uppala Akkayya* (10), there was a weighty dissent by White, C. J., which appears to us to enunciate the correct rule on the subject. We are fortified in the view we take also by the terms of the mortgage instrument before us, which states explicitly

(1) 20 M. 461; 7 M. L. J. 269.
(2) 9 A. 205; A. W. N. (1886) 279.
(3) 1 Ind. Cas. 219.
(4) 6 C. L. J. 383 at p. 394.
(5) 8 Ind. Cas. 837; 13 C. L. J. 3; 38 C. 342.
(6) 19 Ind. Cas. 865; 17 C. L. J. 372.
(7) 27 B. 292; 5 Bom. L. R. 91.
(8) 26 A. 318; A. W. N. (1904) 22.
(9) 7 Ind. Cas. 115; 32 A. 651; 7 A. L. J. 821.
(10) 19 Ind. Cas. 12; 24 M. L. J. 333; 36 M. 544; 13 M. L. T. 268; (1913) M. W. N. 328.

that the mortgagors would re-pay the loan to the two mortgagees and obtain a return of the mortgage instrument. They were thus under an obligation to tender the money to both the mortgagees. This they did not do. Consequently, the plaintiff is not bound by the alleged payment to his co-mortgagee.

The result is that this appeal is allowed, the decree of the Court below set aside and the suit decreed for half the sum claimed. The plaintiff will have his costs throughout the litigation on the amount decreed. The usual mortgage-decree will be drawn up in this Court and six months' time allowed for redemption.

Appeal allowed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEALS NOS. 63 AND 71 OF 1914.

February 26, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

IN No. 63 OF 1914

THE SOUTH INDIAN EXPORT Co., LTD., —APPELLANTS

versus

T. SUBBIER AND OTHERS—RESPONDENTS.

IN No. 71 OF 1914

T. N. P. VISWANATHA AIYAR AND ANOTHER—APPELLANTS

versus

THE SOUTH INDIAN EXPORT Co., LTD. —RESPONDENTS.

Hindu Law—Hindu widow, right of, to continue family trade—Debts incurred by her to continue such business—Legal necessity—Reversioner, right of, to question such debts—Minority—Representation as major—Consent by reversioner—Estoppel.

Where a reversioner himself was a consenting party to a fraud, put forward a minor as a major and on the faith of such representation, induced third parties to enter into a transaction, it is not open to him afterwards to impugn the transaction as invalid and avoid it on the ground that the widow was a minor on the date of the transaction. [p. 960, col. 2; p. 965, col. 1.]

Sarat Chunder Dey v. *Gopal Chunder Laha*, 20 C. 296; 19 I. A. 203 *Hari Kishen Bhagat* v. *Kashi Parshad Singh*, 27 Ind. Cas. 674; 17 M. L. T. 115; 19 C. W. N. 370; 13 A. L. J. 223; 2 L. W. 219; 21 C. L. J. 225; 28 M. L. J. 565; 17 Bom. L. R. 426; *Bijoy Gopal Mukerji* v. *Girindra Nath Mukerji*, 23 Ind. Cas. 162; 18 C. W. N. 673; 12 A. L. J. 711; 19 C. L. J. 620; 16 Bom. L. R. 425; 16 M. L. T. 68; 1 L. W. 533; 41 C. 793; 27 M. L. J. 123; (1914) M. W. N. 430, followed.

Per *Sadasiva Aiyar*, J.—A trade and its good-will are valuable property and when they are inherited by a widow, she has power to manage that particular business as heir in the same manner as she has authority to manage a *zemindari* estate inherited by her from her husband. [p. 958, col. 1.]

Vembu Iyer v. *Srinivasa Iyengar*, 17 Ind. Cas. 609; 12 M. L. T. 547; 23 M. L. J. 638; *Sakrabhai Nathubhai* v. *Maganlal Mulchand*, 26 B. 206; 3 Bom. L. R. 738, referred to.

Debts incurred on re-drafts to carry on a family business are debts of necessity binding on a reversioner. [p. 958, col. 2.]

Vembu Iyer v. *Srinivasa Iyengar*, 17 Ind. Cas. 609; 12 M. L. T. 547; 23 M. L. J. 638, followed.

Consent by a reversioner to an alienation made by a Hindu widow, by itself makes the transaction valid, and is not merely presumptive and rebuttable evidence of necessity. [p. 960, col. 1.]

Nachiappa Gounden v. *Rangasami Gounden*, 26 Ind. Cas. 757; (1915) M. W. N. 53; 28 M. L. J. 1; *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*, 30 A. 1; 3 M. L. T. 1 (P. C.); 12 C. W. N. 74; 9 Bom. L. R. 1348; 6 C. L. J. 766; 5 A. L. J. 1; 35 I. A. 1; 17 M. L. J. 605; *Hari Kishen Bhagat* v. *Kashi Parshad Singh*, 27 Ind. Cas. 674; 17 M. L. T. 115; 19 C. W. N. 370; 13 A. L. J. 223; 2 L. W. 219; 21 C. L. J. 225; 17 Bom. L. R. 426; 28 M. L. J. 565; *Rangappa Naik* v. *Kamti Naik*, 31 M. 366 at p. 378; 18 M. L. J. 309; 3 M. L. T. 355; *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*, 8 M. I. A. 529 at p. 537; 9 W. R. (P. C.) 61; 1 Suth. P. C. J. 476; 1 Sar. P. C. J. 820; 19 E. R. 631, referred to.

Appeal from the decree of the Hon'ble Sir John Wallis, Chief Justice (then the Hon'ble Mr. Justice Wallis), dated 2nd March 1914, in Civil Suit No. 90 of 1912 in the ordinary original civil jurisdiction.

IN O. S. No. 63 OF 1914.

Messrs. *Branson* and *Branson*, for the Appellants.

Mr. *A. Doraisamy Aiyar*, for the Respondents.

IN O. S. No. 71 OF 1914.

Mr. *D. Chamier*, Dr. *Pandalai*, Messrs. *Short* and *Bewes and Co.* and Mr. *C. P. Ramaswami Aiyar*, for the Appellants.

Mr. *N. Grant*, with him Messrs. *Branson* and *Branson*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—I have had the great advantage of a perusal of the judgment just now delivered by my learned brother and though I agree practically throughout both

in his conclusions and reasons, I think it not inappropriate to say a few words on one or two questions of law which were elaborately argued on both sides.

On the question whether a Hindu widow is entitled to carry on the trade business which she inherited from her husband, their Lordships of the Privy Council have made the following observations in the case of *Amarnath Sah* v. *Achan Kuar* (1): "On this point" (that is, the point whether the deceased Khairati's widow and heir was under a necessity to borrow money in order to ward off total insolvency) "their Lordships agree with the High Court in thinking the effect of Hira Lal's evidence to be that that at Khairati's death the business was solvent on paper, but that there were bad debts the losses on which were never recovered, though the business struggled on for a good many years. The view of the High Court is that the widow ought to have wound up the business at once, and that not having done so, she could not allege necessity to mortgage the inheritance in order to keep the money business going. But they do not lay down any general rule for such cases, and they feel the difficulty of a decision in the entire absence of authority. Their Lordships also feel great difficulty, and they would require to know much more about the nature of the business in question, and of the condition and fluctuations of this particular business, before venturing to endorse the opinion of the High Court." A trade and its good-will are valuable property and when they are inherited by a widow, I do not see why she should not manage that particular business as heir in the same manner as she has authority to manage, say, a *zemindari* estate which she might have inherited from her husband. In the present case, the deceased Krishna Aiyar and his elder brother, Narayana Aiyar, carried on a large skin trade as if it was their family business, though it does not appear that it was an ancestral business. It was really a business which Pattammal's husband adopted as his occupation in life. I am not aware of any law which obliges a widow inheriting her husband's trade business to wind up the business as soon as her husband dies. Hindu ladies in the south of India are not generally *ghosha* or *pardanashin*. A large proportion of Brahmin ladies are literate in the vernacular and their average business ability is not appreciably, if at all, inferior to that of the average male Hindu. The facts in this present case seem to me clearly to show that the condition in which the deceased Krishna Aiyar had left his business and his affairs at the time of his Peath in March 1909 was such that everybody connected with that business, or in a position to give valuable opinion as to the necessity or otherwise of carrying on that business, was strongly and unhesitatingly of the view that unless the business was carried on by the widow, it was impossible to save anything out of it for her as the heir or for the contingent reversioner, the 1st defendant. The debts then amounted to about Rs. 1,60,000 and the estate, if realised without forced sales, was worth about Rs. 1,40,000 (say, just sufficient to clear the debts). This is clearly established by the evidence of the plaintiff's 3rd witness. Swaminatha Aiyar. The business was no doubt subject to fluctuations, but there is nothing to show that at Pattammal's death the estate had drifted into a worse position than the position bordering between bare solvency and insolvency in which it was left by her husband, Mr. Krishna Aiyar. The mere fact that the indebtedness to the plaintiffs (one only of the numerous creditors) was about Rs. 15,000 at Krishna Aiyar, death and was Rs. 25,000 at Pattammal's death affords no criterion by which the relative positions of the estate on the two dates could be safely judged, as we do not know how far the debts to other creditors which amounted to nearly a lac of rupees at Krishna Aiyar's death had been paid off or added to during Pattammal's life-time. I further respectfully agree with the trial Judge for the reasons stated by him that a Hindu widow is entitled to carry on the business left by her husband under certain stated circumstances, and the circumstances of this case show that it was a proper thing for Pattammal to have so carried on her husband's business. As the very nature of the business requires borrowings for capital and owing to fluctuations in price results in the case of some of the transactions in the incurring of debts on re-drafts, the incurring of such business liabilities by the widow ought to be treated

(1) 14 A. 420 at p. 428; 19 I. A. 196; 6 Sar. P. C. J. 197.

as debts of necessity binding on the reversioner. When the touchstone of necessity is satisfied, the question whether the managing male member of a Hindu family carrying on a business has greater powers of charging the property in certain cases than a widow who succeeds to her husband's business, becomes a rather academical question. That the word "necessity" should be given a liberal interpretation even when a guardian acts on behalf of a minor has been decided in *Vembu Iyer* v. *Srinivasa Iyengar* (2), and a Hindu widow who is the sole owner of her husband's estate (though a qualified owner) cannot have a more restricted authority than the guardian of a minor owner, the guardian having no right at all in the property.

On my above view of the facts and the law it is perhaps unnecessary in this case to consider the other question elaborately argued in this case, namely, whether the next reversioner's consent to and concurrence in the widow's carrying on the trade and incurring the liabilities in the ordinary course of carrying on the trade prevent him, when he succeeds as reversioner at the widow's death, from questioning the validity of the debt. As, however, the question was strenuously argued I shall state my views very briefly. The case-law on this point is rather concerned with alienations by way of sale or mortgage made by the widow and consented to and concurred in by the next reversioner than with the incurring of debts with his consent. I think that the principle underlying the bar in one case must apply in the other case also. In the present suit the 1st defendant did give his consent not only to the incurring of debts, but also to the creation of the charge for these debts on the plaint properties except the Sembium tannery purchased by Pattammal after the date of Exhibit F.

The conflict of views as to the legal basis on which the consenting reversioner is held bound has been very acute. In the recent Full Bench case *Nachiappa Gounden* v. *Rangasami Gounden* (3); decided by the learned Chief Justice, Seshagiri Iyer and Kumaraswami Sastri, JJ., it cannot be said that any views common to all the members of the Full Bench have been formulated which are binding on a Division Bench. On the question of the effect of the consent and concurrence of the next reversioner, it is, no doubt, true that the view taken by me in two cases (namely, that it is conclusive as to the validity of the widow's acts done with such consent and concurrence) is not accepted by my learned brothers Seshagiri Iyer, J., and Kumaraswami Sastri, J., the majority of the Full Bench. Seshagiri Iyer, J., says that the judgment of the Privy Council in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (4) is *not* an authority for the contention that the assent of the reversioner is anything more than presumptive evidence of justifiable alienation. Kumaraswami Sastri, J., says: "The effect of the decisions of the Privy Council no doubt gives to the assent a high evidentiary value, but they do not make it conclusive proof." I need not say that out of the great respect which I naturally have for the opinions of my two learned brothers I would have hesitated to act upon the different opinion which (following the learned Chief Justice) I have long held on this question, if it were not for the latest pronouncement of their Lordships of the Privy Council which is found in *Hari Kishen Bhagat* v. *Kashi Pershad Singh* (5). This decision of their Lordships is dated 2nd December 1914 after the opinions of my learned brothers in the above case, namely, *Nachiappa Gounden* v. *Rangasami Gounden* (3), had been pronounced on the 20th November 1914. Their Lordships of the Privy Council treat the consent of the next reversioner not merely as presumptive evidence of the necessity for the alienation made by the widow, but as a "stringent equity" which "fulfils the requirements" of the law as to proof of necessity. I shall just quote the very words of their Lordships: "The requirement of the law" (as to establishing necessity) "may, however, be fulfilled by

(2) 17 Ind. Cas. 609; 23 M. L. J. 638; 12 M. L. T. 547.

(3) 26 Ind. Cas. 757; 28 M. L. J. 1; (1915) M.W. N. 63.

(4) 30 A. 1; 3 M. L. T. 1 (P. C.); 12 C. W. N. 74; 9 Bom. L. R. 1348; 6 C. L. J. 766; 5 A. L. J. 1; 35 I. A. 1; 17 M. L. J. 605.

(5) 27 Ind. Cas. 674; 17 M. L. T. 115; 19 C. W. N. 370; 13 A. L. J. 223; 2 L.W. 219; 21 C. L. J. 225; 28 M. L. J. 565; 17 Bom. L. R. 426.

proving the consent or concurrence of the reversioners to or in transactions." The phrase "stringent equity" (which can be enforced against the consenting reversioner) is taken by their Lordships from the words used by Lord Hobhouse in *Jiwan Singh* v. *Misri Lal* (6), during the course of the argument of the Counsel in that case. I think I am bound by the opinion of their Lordships that the consent and concurrence of the reversioner is not only presumptive evidence but it is further a "stringent equity" binding on the reversioners, so as to prevent them from contending that necessity has not been sufficiently proved and, therefore, that the transaction is not valid. In this connection I might be permitted to state that the same view of the Privy Council decisions as to the effect to be given to the consent of the reversioner seems to have been taken by Sankaran Nair, J., in the case in *Rangappa Naik* v. *Kamti Naik* (7). The learned Judge referring to the *dictum* of their Lordships of the Privy Council in *Collector of Masulipatam* v. *Cavaly Vencata Narainapah* (8), says: "On the other hand, an alienation *which would not otherwise be legitimate* may become so if made with the consent of the husband's kindred, or in other words, an alienation not for necessity may be valid in certain cases, if made with the consent of the husband's kindred. The consent by itself makes the alienation, not otherwise legitimate, valid." It is very difficult, therefore, in my opinion, to hold that the consent is only presumptive and rebuttable evidence of necessity, and not a thing which creates an equity against the reversioner even if necessity is negatived.

In the present case, not only did the 1st defendant who was the sole presumptive reversioner (and who became the sole actual reversioner on the death of the widow) consent to the incurring of the debts and the giving of the properties by the widow as security to the plaintiff (Company), but he it was that, took an active part in the negotiations and induced the plaintiff Company to help Pattammal to carry on the business. The facts proved in this case as showing the 1st defendant's consent and concurrence were almost the identical facts which have been proved in a similar suit brought by another creditor of Pattammal and the appeal (Appeal No. 76 of 1913), therefore, was decided by Sankaran Nair and Spencer, JJ. The same facts were also alleged in that case as regards the representation by conduct made by the 1st defendant in respect of Pattammal being a major (the present 1st defendant was the 7th defendant in that other suit). I might further add that the plaintiff in that suit has been examined as P. W. No. 2 in the present case. The learned Judges, Sankaran Nair and Spencer, JJ., in their judgment in the above appeal state as follows: 'The plaintiff swears that the 7th defendant and certain other defendants begged him hard after Krishna Aiyar's death to lend money to the widow, He says they (the present 1st defendant and others) told him that the creditors of Krishna Aiyar were threatning to attach Krishna Aiyar's properties and that they would suffer great loss if he did not help." The learned Judges further state that as the 1st defendant led the plaintiff to believe that money could be safely advanced directly to Pattammal, such representation involves also the representation that Pattammal was not a minor and that there was very little doubt that the 1st defendant must have represented to the world that Pattammal was of an age competent to enter into contracts with others, especially by his having himself taken a power-of-attorney and a sale-deed from her and by having made her execute other bonds as a major. The l arned Judges further say that it would not be open to the 1st defendant afterwards to say that Pattammal was not a minor. As on the same facts and almost the same evidence those learned Judges have held that the 1st defendant had estopped himself, against the creditors who lent only to Pattammal to carry on her business, to deny that the loans from those others were required to discharge the debts of Krishna Aiyar or to deny that Pattammal was a major, that decision and the question of estoppel seems to be a decision on a question of law and I am prepared to follow it.

In the result the Appeal No. 71 will be dismissed with plaintiff's costs. Appeal

(6) 23 I. A. 1 (P. C.); 18 A. 146; 6 M. L. J. 47; 6 Sar. P. C. J. 675.

(7) 31 M. 363 at p. 378; 18 M. L. J. 309; 3 M. L. T. 355.

(8) 8 M. I. A. 529 at p. 537; 9 W. R. (P. C.) 61; 1 Suth. P. C. J. 476; 1 Sar. P. C. J. 820; 19 E. R. 631.

No. 63 was not pressed and will also be dismissed with costs.

NAPIER, J.—These are two appeals from the judgment of the Chief Justice (then Mr. Justice Wallis) in Civil Suit No. 90 of 1912. The plaintiffs were the South Indian Export Company, who sought to have a charge declared on certain properties specified in the schedules to the plaint with consequential reliefs. The properties had been mortgaged by deposit of title-deeds by one Pattammal, the widow and heir of one T. Krishna Aiyar. The defendants Nos. 1 to 8 and Nos. 10 to 12 were persons claiming, or thought entitled to, interests in the properties, while the 9th defendant was a mortgagee of the properties from one of the reversioners, the 1st defendant, who has since been found to be the reversioner entitled. The principal appellants before us are the 1st defendant and Messrs. Shaw Wallace and Co., the 9th defendant. The learned Judge has found that the widow was in fact a minor at the time of the alienations but that the 1st defendant was estopped from setting up that defence. He also found that, if she was a major, she would have been justified in carrying on the business of tanning, it having been her husband's business. The appellants contend that as a minor and a Hindu widow she could not carry on the trade and alienate the properties. They argue that the advances were not made on the representation of the 1st defendant, even if he did represent the widow to be a major, which they also deny. They further contend that even if the 1st defendant is estopped with reference to the period of two months during which he held a power-of-attorney from the widow to manage the business, the plaintiff Company were put on notice by the proceedings which he took within six months to oppose the widow's application for succession certificate on the ground of her minority. Another contention is that even if she was entitled to carry on the trade, she was not entitled to extend it, and that loss having occurred through the extension of business the property in the hands of the 1st defendant is not liable.

We have examined the evidence as to her age minutely, and agreeing with the learned Judge, are satisfied that she was a minor. Mr. Grant for the respondents objected to two letters and an entry in an account which have been used as evidence of minority; but even if these were excluded, there remains enough evidence to make the matter clear from doubt. Indeed Mr. Grant did not press his appeal which raised this point.

The important question then arises as to whether the 1st defendant was in fact aware of her minority at the time of the agreement, Exhibit F. I do not think it necessary to refer to the evidence in detail. It has all been read to us and commented on; but I am satisfied that not only the 1st defendant but her father and the working partners of her late husband were perfectly well aware of her minority and conspired to keep their knowledge of that fact from the plaintiff's agent, Ramanjulu Naidu, when he went down to Trichinopoly on the death of T. Krishna Aiyar in March 1909 to see what arrangements could be made with reference to the deceased's business. The truth comes out in the evidence of D. W. No. 2, one Sadasiva Aiyar. This man is a broker in the employment of the 9th defendant, the holder of the mortgage from the 1st defendant. He was employed by T. Krishna Aiyar, the husband of the widow, and before him by T. Narayana Aiyar, his brother who started the business. He knew the whole business and he knew the family intimately. He proves the minority of the widow and states that he knew all along that she was a minor. He was asked: "Why did you choose to keep secret the question of Pattammal's minority? His answer was: "When all the principal people were keeping it secret, why should I publish it? This was undoubtedly the truth; and he was equally undoubtedly a party to the conspiracy. He endeavours to sheild the 1st defendant by pretending that he does not know whether Viswanatha Aiyar was aware of the fact. This is obviously false, and the statement is made in the interests of Messrs. Shaw Wallace and Company, so as to protect the mortgage given to them by the 1st defendant. Much light is thrown on the conduct of the parties by Exhibit S, a letter written on the 29th of March 1909 by the Company's agent, Ramanjulu, to his principals. After the 1st defendant and Ponnusawmy Pillai, one of the former working partners, had taken a power-of-attorney from the widow to carry on the business, the agent writes:

"The power-of-attorney is delayed in registering owing to the age question of Krishnier's widow. Doctor's certificate is required to satisfy the Registrar and it will be done to morrow."

There is no suggestion here that there was any doubt in the minds of any of them whether she was a minor or not. They could not help the fact of the difficulty coming to the knowledge of the agent, but they obviously told him that the Registrar's objections were unfounded and that the matter would be put right at once. They did in fact procure the certificate from a doctor of the name of Mr. McCau'ly who was deceived by the lady's appearance, as it appears that she was an unusually well grown woman for her age.

It is urged by the appellants that the plaintiffs relied on this representation by the Registrar. But this contention cannot be accepted. The procuring of the certificate to satisfy the Registrar was in fact the last stage in the conspiracy.

Mr. Chamier has addressed a long argument to us to establish that it was not the 1st defendant who put forward the lady as a major originally but Ramu Aiyar, her father, and Swaminatha Aiyar, the deceased Krishna Aiyar's son-in-law and one of the working partners. This argument is based on the letters written by the agent to his principals at the time of the negotiations. Those letters, it is true, lend some support to that contention. But when the oral evidence is examined it is perfectly clear that Viswanatha Aiyar, the 1st defendant, took part in the negotiations. P. W. No. 2, a merchant dealing with the deceased Krishna Aiyar, proves conclusively that the 1st defendant was at that time endeavouring to get help from others and to pacify creditors on the ground that Pattammal was going to carry on the business. It is impossible to suppose that, when it was arranged on the 22nd March that the 1st defendant should hold the power-of-attorney with Ponnusawmi Pillai, he had not been a party to the prior negotiations. Bearing in mind that he claimed to be the adopted son of Narayana Aiyar, which claim had been admitted by Krishna Aiyar in 1903 (*Vide* Exhibits B and C), it is perfectly clear that he was of all persons the most anxious that the business should be carried on, so that in the event of anything happening to the widow the business would come to him. His own letter to the Company, Exhibit JJ, written on the 28th March 1909, practically puts him out of Court. The words are: "With regard to the business of my uncle, late Mr. T. Krishna Aiyar, I beg to state that myself and Mr. Ponnusawmi Pillai have the power-of-attorney from Mrs. Krishnier....In conclusion I beg to state that you will render me your help in the affair of Mr. Krishnier, since his business has been a long standing one which I do not like to give up." On a review of the whole evidence I am satisfied that from the first he was perfectly well aware of the fact that the lady was a minor, that he deceived the Company's agent and that his action was guided by what he thought to be his own interest in the matter. After the registration of the power-of-attorney arrangements were perfected for carrying on the business and were embodied in an agreement, Exhibit F, of the 17th of May 1909 of which, of course, the 1st defendant holding the power-of-attorney was fully cognizant. I shall have to refer to this letter, Exhibit JJ, on other point.

The next stage was the cancellation by the widow of her power-of-attorney to the 1st defendant. This was on the 2nd of June 1909 (Exhibit XVI). After this date Ponnusawmi Pillai alone acted as her agent. We now come to the proceedings to obtain the succession certificate, on which the appellants rely as putting an end to the representation if there was any. It appears that on the 15th October 1909, Pattammal applied for a succession certificate, and the 1st defendant put in a counter-petition (Exhibit HH), alleging that she was a minor. Judgment was given by Mr. Pinhey, the District Judge, on the 7th of March 1910 rejecting the application on the ground of her minority. The plaintiffs' Solicitors have made an admission in this suit that they were aware of those proceedings (*Vide* Exhibit VII). The admission is that "in or shortly after the latter part of October 1909 our clients knew that there were proceedings pending between Pattammal and Viswanatha Aiyar in which he raised the question as to her age and alleged that she was a minor." It further appears that the plaintiffs produced before that

Court the agreement of the 17th of May 1909 made between them and Pattammal.

The notice is, therefore, clear, but it is to be observed that there is no admission that the plaintiffs knew of the judgment in the case and, what is most important, it is clear that the 1st defendant did not himself notify the plaintiffs of either the proceedings or the result. The learned trial Judge has taken the view that "the fact that the nearest reversioner asserted that the widow was a minor was of no probative value whatever," the plaintiff Company having no means of knowing whether she was a minor or not. And it is of importance that in proceedings taken as late as 1913 the Subordinate Judge of Trichinopoly found that she was a major. I can only attribute the failure of the 1st defendant to infrom the Company to one motive, namely, that he did not wish the business to be stopped, but desired to be in a position to do exactly what he has done, namely, to allow the business to go on in the hope that it would be remunerative but in the event of the early death of the widow, to be in a position to challenge the alienations.

The question now arises, what is the effect of this notice? Mr. Chamier contends that it is not constructive notice from outside, but a direct notice from the 1st defendant to the Company. I cannot accept this contention. The learned trial Judge has held that as the 1st defendant was not in a position to make *restitutio in integrum* he cannot claim that the notice operated to terminate the representation. Mr. Grant has invited our attention to a number of cases on this point, and relies on passages in Spencer Bower on Actionable Misrepresentation. The proposition is stated on page 202: "Moreover actual and personal knowledge must be proved. Constructive or imputed notice is entirely out of the question. There is absolutely no exception to this rule. Thus it is of no avail to show merely that the representee had the means of knowledge within his reach." The knowledge must be clearly proved to have been full and complete. Partial and fragmentary information or mere suspicion will not do. The case of *Frederick Bloomenthal* v. *James Ford* (9) is an authority very much in point. There the appellant lent money to a limited Company upon the terms that he should have as collateral security fully paid-up shares. The Company handed certificates for 10,000 shares to the appellant, the certificates stating that they were fully paid up. The Company having gone into liquidation, the appellant was placed on the list of contributories. It was held that since the Company had obtained the loan by a representation that the shares were fully paid up, which the appellant believed and acted upon, the Company and the Liquidator were estopped from alleging that the shares were not fully paid up. The Lord Chancellor deals with the argument put forward in these words: "You should have inquired. You should have observed certain circumstances; and if you had done that...you would have known that 'fully paid-up shares' did not mean what on their face they purported to mean," and declines to accept this as a defence. On page 165 his Lordship uses these words: "The evidence of the appellant goes uncontradicted that he did not know, and had no reason to know, that the representation made to him was not perfectly true." It is to be noted that the word used is "know" and it seems clear that in his Lordship's view circumstances raising a doubt as to the truth of the representation are not sufficient. Lord Herschell's judgment is also to the same effect; and the other learned Lords agree. It cannot, I think, make any difference that the representation was made not by the person who originally took the benefit. In this case the Liquidator was held bound, and it was put on the ground of estoppel. This is exactly the position here. The representation was made by the 1st defendant and it is he who is estopped by it. In *Redgrave* v. *Hurd* (10) Jessel, M. R., states the law as follows:

"If a man is induced to enter into a contract by a false representation it is not a sufficient answer to him to say: 'If you had used due diligence you would have found out that the statement was untrue. You had the means afforded you of discovering its falsity, and did not choose to avail yourself of them.'" And on page 21: "If it (the representation) is a material representation calculated to

(9) (1897) A. C. 156; 66 L. J. Ch. 253; 76 L. T. 205; 45 W. R. 449.

(10) (1881) 20 Ch. D. 1 at p. 13; 51 L. J. Ch. 113 45 L. T. 485; 30 W. R. 251.

induce a person to enter into the contract, it is an inference of law that he was induced by the representation to enter into it, and in order to take away his title to be relieved from the contract on the ground that the representation was untrue, it must be shown either that he had knowledge of the facts contrary to the representation, or that he stated in terms, or shewed clearly by his conduct, that he did not rely on the representation." It is to be noted that here again the language used is knowledge of the facts, not suspicion or reason to doubt. *Arnison* v. *Smith* (11) is a case in which certain Directors made an absolutely false statement in a prospectus which they issued, but subsequently sent a circular which, if examined carefully, showed the falsity of the statement. The Court of Appeal held that the circular did not contain an admission of the misrepresentation, nor did it inform the allottees that they could retire and get back their moneys, and that, therefore, it was of no avail to the Directors. Lord Halsbury states as follows on page 370: "I do not agree that the circular put any one in the position of knowing the true facts of the case. .....Assuming a fraud to have been committed it obviously lies on those who rely on a subsequent explanation to show that such explanation was quite clear." Cotton, L. J., uses the same language, and both he and the Lord Chancellor reserve their opinion as to what would have been the position if the persons who made the representation admitted the falsity of the representation and offered to refund the money paid. It is to be noted that in the above case notice was given directly by the person who had made the false representation, but even then it was held not sufficient as there was no specific admission of the falsity. This case supports the view taken by the learned trial Judge that there being no *restitutio in integrum* the notice is of no avail.

The appellants relied on the case of *Dunston* v. *Paterson* (12). This was an action of false imprisonment against a Sheriff. The defendant pleaded that the plaintiff at the time of the arrest represented herself to be the person against whom the warrant was issued. The plaintiff admitted that that was so, but relied on the fact that at a later stage she gave notice that she was not the person. The Court held that there were two periods of imprisonment, one commencing after the date of her notice, and that as to that second imprisonment she having given notice and it must be assumed having established that she was not the person against whom the warrant had been issued, she was not estopped by her admission. This case does not assist the appellants, as the false representation was definitely withdrawn by the person who had made it and the representee had not altered his own circumstances in consequence of the representation.

I have examined the English cases, because we have the authority of the Privy Council in *Sarat Chunder Dey* v. *Gopal Chunder Laha* (13) for the proposition that the law enacted in the Indian Evidence Act does not differ from the English Law on this subject, and it seems to me clear that if we are to find limitations to the right of the representee to claim an estoppel, we cannot go beyond what is to be found in the English cases, there being nothing in section 115 on the subject. On a strict reading of that section it can only be a question of fact whether a person has, by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief. The section says nothing about the representation only operating for one act done in consequence of it, nor does it provide that suspicion, doubt or constructive notice will terminate the representation. As long as a person is acting upon such belief, so long does the estoppel operate.

For these reasons I am unable to accept the argument of Mr. Chamier that the cases above referred to would only apply to the first advance made by the plaintiff Company. In my view the intention of the representation is the determining

(11) (1889 41 Ch. 348; 61 L. T. 62; 37 W. R. 739; 1 Meg. 388.

(12) 26 L. J. (N. S.) C. P. 267; 2 C. B. (N. S.) 495; 3 Jur. (N. S.) 982; 140 E. R. 509; 109 R. R. 771.

(13) 20 C. 296; 19 I. A. 203.

factor. The 1st defendant put forward the deceased as a major not for the purpose of getting one single advance, but with the intention that the plaintiffs should carry on business with her. He was himself engaged in a similar business; he knew that the terms of the business required a standing advance from the Company; and he also knew the terms of the agreement, Exhibit F. He intended his representation to induce the plaintiffs to carry on business with the widow with a standing advance of Rs. 45,000 and he knew at the time when he opposed her proceedings before the District Judge that her property was mortgaged to cover the standing advance, the stock and the general debit of her account. The representation was, therefore, a continuous one, and the plaintiff Company must be deemed to have made every advance and given every credit to the widow on the faith of that representation. That being so, the case falls entirely within the decisions above referred to, and their being no withdrwal of the representation and no attempt to put the plaintiffs in the position they would have been in but for the representation, the 1st defendant is estopped in respect of all advances and payments made to her.

The next objection raised is that the widow had no right to take up this trade and mortgage the properties as no necessity has been proved, and that the trade was itself of a speculative nature. With regard to the necessity the evidence establishes that at the time of her husband's death the general liabilities of his estate were little less than the assets. This is, however, what one would expect in a trade of this nature, which must be carried on with borrowed capital. The extent of the trade dealings must always be proportionate to the security available for obtaining working capital. The estate may, perhaps, not be called insolvent but if the business had been suddenly closed down, it is clear on the evidence that after realising the properties on a forced sale to pay creditors, there would practically have been nothing left for the widow. By continuing the business she could make a profit, which would of course, vary according to the value of the skins in the European market, and there is nothing to show that at the date of her death the estate was not as solvent as it was when she began business. The fact that she was able to pay off one large debt and build a new tannery points the other way. The amount of her debit with the plaintiffs at the date of her death, roughly Rs. 25,000, is less than the standing advance of Rs. 45,000 which her husband was allowed and was continued to her. It is true that a witness speaks of the business as speculative, but he means nothing more than that the value of skins is not constant but rises and falls in the European market, a condition which is common to the whole of the exports from this country. To say that a family business of this nature is not to be continued by the widow is practically to confine trade by a widow to petty shop-keeping.

Our attention has been called to a number of cases, including well-known decisions of the Privy Council, on the extent to which a widow may carry on an existing business and the meaning of the word necessity: undoubtedly there are observations in some of the older cases which would debar a widow from continuing a business of this nature. I am, however, very doubtful whether in the altered conditions of the present day, such limitations would be upheld. I have read the judgment of my learned brother sitting with the late Mr. Justice Sundara Aiyar in *Vembu Iyer* v. *Srinivasa Iyengar* (1), where all the older cases are examined and, as it seems to me, the doctrine of necessity is merged in that of benefit to the estate. If that is an extension of the law as hitherto understood, I can only say that I am in entire sympathy with it. It is practically the view taken by the Chief Justice of Bombay in the case of *Sakrabhai Nathubhai* v. *Maganlal Mulchand* (14), which was followed by the learned trial Judge. I entirely agree with him in adopting the reasoning of the Bombay case, and I see no reason why a different standard should be applied to widows in this Presidency.

A small point is taken that the widow increased the business and should not have done so. The fact is not established, the argument being due to a misunderstanding of Exhibit F and a confusion between the standing advance and the amounts credited to her on the discounting of her bills on the

(14) 26 B. 206; 3 Bom. L. R. 738.

firm in England. But even if the stricter limitations of a Hindu widow's rights were to prevail, I am of opinion that they could not avail the 1st defendant or through him the 9th defendant. Just as he is estopped from denying the minority, so also he cannot be heard to raise this latter plea. His consent is established beyond doubt. Indeed his first act on her behalf was to write and ask the Company to advance money not to be utilised in the purchase of skins, but to clear outside debts (*vide* Exhibit JJ), and the request is founded on the reason that the business was a long-standing one which he did not like to give up. In the decision of the Privy Council already referred to, *Sarat Chunder Dey* v. *Gopal Chunder Laha* (13), the widow, who held the property *benami* for her husband during his life, mortgaged the property after his death, her son representing her in the transaction. Their Lordships used the following words on page 308: "There was a distinct representation by Ahmed (that is the son) professing to act as his mother's attorney, that she was owner in possession, having a good title to create a valid mortgage affecting the lands.....And it is equally clear that the transaction was concluded on the footing of that representation, and that the creditor was thereby induced to lend the money on the security of the mortgage. In this state of the facts the terms of section 115 of the Evidence Act directly apply to the case.....and neither Ahmed nor his representative, the plaintiff, can be allowed to deny the truth of what was thereby represented, believed and acted upon." It is in my opinion impossible to distinguish that case from this, bearing in mind the knowledge of the 1st defendant that the carrying on of this business entailed the mortgaging of the properties. In this view I think it is unnecessary to decide whether consent by a reversioner is evidence of necessity or a complete answer as against another reversioner who actually becomes entitled on the death of the widow. But I would observe that the language of the latest decision of the Privy Council in *Hari Kishen Bhagat* v. *Kashi Pershad Singh* (5) seems to indicate that it is something more than evidence of necessity, that it is an equity in favour of the alienee. If so, their Lordships have gone a step further than in the case of *Bijoy Gopal Mukerji* v. *Girindra Nath Mukerji* (15).

One point remains.

The account shows that three sums of Rs. 6,000, Rs. 1,000 and Rs. 1,000 were paid to Ponnusawmi Pillai for the purposes of the trade very shortly after the death of the widow and it is urged that these amounts should be excluded from the account. It is proved, however, by Mr. Simpson that these moneys were advanced for the purpose of preparing the skins for the market (Exhibit ZZ). The account kept by Ponnusawmi Pillai from the date of the death shows that these amounts were expended on the trade, and there is a large credit given to the deceased on 31st May, more than two months after her death, of Rs. 29,420. This represents the value of skins of about Rs. 37,000 and it is a perfectly fair inference that the value of that Rs. 8,000 is to be found in that consignment of skins. No attempt was made to show that the money was misapplied and in those circumstances I am clearly of opinion that the Rs. 8,000 is properly chargeable to the mortgages. The amount of Rs. 1,521, rent of the tanneries, does not appear in the account filed in the suit. Mr. Simpson, P. W. No. 1, states that this amount was kept in a suspense account and should have been credited. That sum will, therefore, be deducted from the amount claimed. With this exception the appeal will be dismissed with costs. Appeal No. 63 will also be dimissed with costs.

Appeals dismissed.

(15) 23 Ind. Cas. 162; 27 M. L. J. 123; 18 C. W. N. 673; 12 A. L. J. 711; 19 C. L. J. 620; 16 Bom. L. R. 425; 16 M. L. T. 68; 1 L. W. 533; 41 C. 793.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL No. 490 OF 1908.

August 20, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

Mohunt GOPAL DAS—DEFENDANT SECOND PARTY—APPELLANT

versus

Maharaja RAMESWAR SINGH AND ANOTHER—DEFENDANT No. 1 AND PLAINTIFF—RESPONDENTS.

Practice—Order by a Judge—Successor of Judge, if bound by that order.

Mohunt GOPAL DAS *v.* RAMESWAR SINGH.

An order made by a Judge is binding on his successor till set aside in due course of law. [p. 967, col. 2.]

Brojo v. *Juggut Chundr*, 21 W. R. 199; *Kharag Prasad* v. *Durdhari Rai*, 14 A. 348; A. W. N. (1892) 25 and *Jammalamadaku Subbalakshmamma* v. *Jammala Venkatarayadu*, 2 Ind. Cas. 525; 32 M. 318; 5 M. L. T. 75, referred to.

Appeal against the decree of the Subordinate Judge of Darbhanga, dated the 31st August 1908.

Babus. *Joges Chunder Dey* and *Chandra Sekhar Banerjee*, for the Appellant.

Babus *Ram Charan Mitra*, *Jogendra Nath Mukherjee* and *Shoroshi Charan Mitter*, for the Respondents.

JUDGMENT.—This is an appeal by the second party defendant against the final decree in a suit for partition of joint property. According to the plaintiff, he i interested in the property to the extent of two-annas share. The first defendant, the Maharaja of Darbhanga, has ten-annas share and the second defendant four-annas share. The plaintiff prayed that a partition might be effected and separate allotments made in proportion to the shares held by the parties. The first defendant did not dispute the extent of the shares, but stated that the land might be partitioned in proportion to the ten-annas share owned by him and a separate allotment made in his favour. The second defendant also took up a similar position. In these circumstances, on the 15th July 1907 a preliminary decree was made in these terms: "There is no dispute about the shares. The defendants in their written statement allege that they have no objection to the partition being effected. It is, therefore, ordered that a Commissioner be appointed to make the partition of the estate according to the shares of the parties in the estate stated in the plaint and found above." Against the decree, no appeal was preferred by any of the parties. When the matter went to the Commissioner, on behalf of the Maharaja it was argued that in respect of the *raiyati* lands the partition should be made, not according to the shares, but according to possession. To enable one to appreciate the full effect of this contention, it is necessary to state that the total rent payable by the tenants in respect of the *raiyati* lands is approximately Rs. 1,038. The sum payable out of this amount to the Maharaja, according to his share in the estate, would be Rs. 648, that payable to the plaintiff would be Rs. 129 and to the second defendant Rs. 259. As a matter of fact, it has been proved that the Maharaja has for some time past collected more than what was payable in respect of his share, namely, Rs. 749 instead of Rs. 648. The plaintiff and the second defendant have collected less than the amount realisable in their shares. The contention before the Commissioner was that the partition of the *raiyati* lands should be effected not according to the shares, but according to possession. The Commissioner overruled this contention, on the ground amongst others that it was not open to the parties, so far as he was concerned, to take up a position inconsistent with that determined by the preliminary decree. When the matter came before the Subordinate Judge, he held that the view taken by the Commissioner was erroneous and that in respect of the *raiyati* lands the partition should be made according to the possession actually held by the parties. He, therefore, set aside the report of the Commissioner in this respect and ordered a partition according to the directions given by him. The Commissioner has submitted his final report based on these directions of the Subordinate Judge and the final decree has been made thereon. In our opinion, the view taken by the Subordinate Judge is erroneous.

It was clearly not open to the successor of the Subordinate Judge who made the preliminary decree in 1907 to set aside in substance that decree. The preliminary decree was binding on the Court at all subsequent stages of the suit, and the only question open for consideration was, whether that decree had been fairly and justly carried out by the Commissioner. If authorities are needed for the obvious position, that an order made by a Judge is binding on his successor till set aside in due course of law, reference may be made to the cases of *Lukut Pandey* v. *Byjnath Singh* (1); *Bodun Burooah* v. *Abdool Gunny* (2);

(1) 14 W. R. 285.
(2) 19 W. R. 281.

Brojo v. *Juggut Chunder* (3); *Gujraj Singh* v. *Bijai Singh* (4); *Suraj Din* v. *Chattar* (5); *Kharag Prasad* v. *Durdhari Rai* (6); *Jammalamadaku Subbalakshmamma* v. *Jammala Venkatarayadu* (7).

An attempt has finally been made to interpret, as it has been said, the preliminary decree of the 15th July 1907. But no question of construction arises. It is plain that the parties at that stage were perfectly agreed that the partition should be effected according to their shares. It was only subsequently that a new position inconsistent with the preliminary decree was taken up by one of the parties. There is thus no escape from the conclusion that the view taken by the Subordinate Judge is erroneous and his decree must be set aside.

The appeal is allowed, the decree of the Subordinate Judge discharged and the case remanded to him in order that partition may be made on the basis of the first report of the Commissioner dated the 10th May 1908. The appellant is entitled to his costs in this Court from the Maharaja respondent. We assess the hearing fee at five gold *mohurs*.

Appeal allowed; *Case remanded*.

(3) 21 W. R. 199.
(4) 6 N. W. P. H. C. R. 114.
(5) 3 A. 755; A. W. N. (1881) 55.
(6) 14 A. 348; A. W. N. (1892) 25.
(7) 2 Ind. Cas. 525; 32 M. 318; 5 M. L. T. 75.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 941 OF 1914.

July 3, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Piggott.

Mirza QASIM BEG—PLAINTIFF—APPELLANT

versus

MUHAMMAD ZIA BEG—DEFENDANT—RESPONDENT.

Limitation Act (*IX of* 1908), *Sch. I, Arts.* 91, 120—*Cancellation of document—Limitation, from when begins to run.*

The limitation for a suit for declaration that a mortgage deed executed by the plaintiff was without valid consideration and ineffectual and that the defendant had no right under it, begins to run from the date of the execution of the document. [p. 968, col. 2; p. 970, col. 1.]

Second appeal from the decision of the Additional Judge of Moradabad, dated the 28th of March 1914.

Mr. *A. Haider*, for the Appellant.

Mr. *B. E. O'Conor*, for the Respondent.

JUDGMENT.

RICHARDS, C. J.—This appeal arises out of a suit in which the plaintiff sought a declaration that a bond, dated the 5th of October 1904 and executed by him, mortgaging certain property being without valid consideration is ineffectual, and that the defendants had no right under it. The Court of first instance decreed the claim. The lower Appellate Court allowed the appeal and dismissed the suit.

The plaintiff's own case is that the bond in question was executed in favour of the defendant, who was a relation of his, for the purpose of defeating actual or possible creditors. The present suit was not instituted until the 26th of July 1913, that is to say, about nine years after the execution. The lower Appellate Court has dismissed the suit solely on the ground that it is barred by limitation.

Article 91 provides that "a suit to cancel or set aside an instrument not otherwise provided for shall be brought within three years from the time when the facts entitling the plaintiff to have the instrument cancelled or set aside became known to him." If Article 91 is appropriate, it seems to me that the facts which entitled the plaintiff to bring the present suit were that no consideration had passed and that the bond was only executed for the purpose of defeating his creditors. These facts were known to the plaintiff the day he executed the bond.

Article 120 provides that "Where no period of limitation is provided elsewhere in the Schedule, the suit must be brought within six years from the time when the right to sue accrues."

If Article 120 is appropriate, it seems to me that it is clear that what gave the plaintiff a right to bring the present suit was that there was no consideration paid or intended to be paid. His right to sue, therefore, accrued at the very time when he executed the bond and his suit had to be brought within six years. If it were necessary to decide which Article of the

Limitation Act applies, I am inclined to think Article 91 is the appropriate Article. If the bond was altogether fictitious, it ought to be cancelled and a note made of its cancellation in the Registration Office as provided by section 39 of the Specific Relief Act. Cancellation of the bond was the real relief to which the plaintiff was entitled, if he proved his case and the suit was brought within time.

There are many cases in which a party might be entitled to a declaration that a deed did not bind him, while he would not be entitled to have the deed cancelled.

It is contended that whether we apply Article 91 or Article 120 the fact which entitled the plaintiff to have the instrument cancelled or the time when his right to sue accrued, was when he apprehended a suit would be brought against him. It seems to me that though his apprehension may have been a reason for bringing the suit, it was neither the fact which entitled him to have the instrument cancelled within the meaning of Article 91, nor was it by reason of his apprehension that the right to sue accrued to him within the meaning of Article 120.

There have been a number of cases cited none of which seem to me to be very much in point, except the case of *Singarappa* v. *Talari Sanjivappa* (1). The learned Judges seem to have suggested that the right to have a document set aside was when the party had reasonable apprehension that such instrument if left outstanding would cause him serious injuries, and they referred to section 39 of the Specific Relief Act. In my opinion section 39 merely states under what circumstances a plaintiff can bring a suit for the setting aside of a document. The section is clearly subject to the provisions of the Limitation Act. In my opinion the decision of the Court below was quite correct and ought to be confirmed. I wish to say in conclusion that I am deciding the case on its own facts and circumstances.

PIGGOTT, J.—In concurring with the decision of the learned Chief Justice in this case I wish to add a few remarks, principally because of the authorities which have been quoted on the other side, and I would mention the case of *Vithai* v. *Hari* (2) in addition to the Madras case referred to by the Hon'ble Chief Justice. I mention that case as the type of a number of others in which the essential relief sought by the plaintiff was the recovery of possession, or in which at any rate a cause of action was afforded by actual interference with the plaintiff's possession. I think all cases of this sort are easily distinguishable from the one now before us. On its facts even the case reported in *Singarappa* v. *Talari Sanjivappa* (1) is distinguishable from the present, on the ground that the deed sought to be set aside was a deed of sale and that it was an essential part of the plaintiff's case that he had continued in possession in spite of the execution of that deed, and that he got his cause of action owing to an attempt on the part of the defendant to interfere with his possession. The line of reasoning, however, adopted by the learned Judges of the Madras High Court in that case is in favour of the contention of the appellant now before us. With all respect to the learned Judges, I can only say that a general application of the principles suggested in this decision, and in particular their application to the present case, would amount to something like a *reductio ad absurdum* of the relief intended to be allowed by the Legislature by means of declaratory suits. In a case like the present the plaintiff, the executant of the disputed document, was fully entitled to wait quietly at home until the defendant brought a suit to enforce the mortgage. As against such a suit all the pleas put forward in this case would have been available as a defence. The period of limitation for a suit on the mortgage-deed had barely three more years to run when the plaintiff came into Court with the present suit. The object of allowing a declaratory suit to be brought at all in such circumstances as the present is for the prepetuation of testimony, when the plaintiff is apprehensive that, if he waits for the opposite party to take action against him, evidence at present readily

(1) 28 M. 349; 15 M. L. J. 228.

(2) 25 B. 78; 2 Bom. L. R. 638.

available would become difficult or impossible to obtain. I think that is why a narrow period of limitation was prescribed for suits to which Article 91 of the Indian Limitation Act applies. There is no doubt that attempts are frequently made to secure a longer period of limitation by drafting the plaint so as to evade all reference to section 39 of the Specific Relief Act (I of 1877) and to claim a mere declaration instead of the full relief prescribed by that section. It is open to question how far litigants should be encouraged to claim the benefit of the general Article 120 of the first Schedule to the Indian Limitation Act by going out of their way to ward their plaint so as to escape the application of Article 91. Regard should undoubtedly be had to the essence of the suit rather than to the particular colouring sought to be put upon it by the plaintiff. I am content, however, to deal with this case on the assumption that Article 120 applies. If so, the test which I would suggest is, whether the present suit could or could not have been instituted prior to what the plaintiff alleges to be the origin of his cause of action, namely, the day on which the defendant, in some way not clearly specified, showed an intention to institute a suit in respect of the money apparently due on the face of this bond. In my opinion, if the plaintiff had come into Court within a year, or within a month, or within a week of the execution of this deed, alleging that he had been induced to execute it as a matter of policy, and (as his witnesses have deposed) in order to protect the property therein referred to from the attack of creditors whom the plaintiff feared, but that he had repented of his conduct and realised that, so long as the deed was in existence, the defendant might make a dishonest and improper use of it against him, he would have had a proper and valid cause of action for the very declaration which he seeks in the present case. On this ground, therefore, it seems clear to me that the right to sue for a declaration in respect of this bond accrued to the plaintiff on the day on which it was executed and that time was always running against him. I, therefore, concur in the finding that the present suit was rightly dismissed by the learned District Judge.

BY THE COURT.—The order of the Court is that we dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 135 AND 194 OF 1910.

August 17, 1914.

Present:—Sir John Wallis, Offig. Chief Justice and Mr. Justice Seshagiri Aiyar.

VAITHINATHA AIYAR—PLAINTIFF—APPELLANT

versus

VAITHINATHASAWMY AIYAR AND ANOTHER—DEFENDANTS—RESPONDANTS.

Benami *transaction—Ostensible vendee paying off debts and making ready cash payment—Burden of proof.*

Where an ostensible vendee pays off the debts due by the transferor and makes an advance of ready cash on the date of sale, there is a strong presumption that the transaction is not *benami* and the burden lies heavily on the party who alleges that the transaction is *benami*. [p. 971, cols. 1 & 2.]

Appeals against the decrees of the Court of the Subordinate Judge of Negapatam in Original Suits Nos. 2 of 1907 and 14 of 1908, respectively

Mr. *T. R. Venkatarama Sastri*, for the Appellant.

Messrs. *C. V. Ananthakrishna Aiyar* and *S. Viswanatha Aiyar*, for the Respondents.

JUDGMENT.—These two appeals and Appeal No. 134 of 1910 are against the decision of the Subordinate Judge of Negapatam in three different suits. Considerable inconvenience has been caused by their joint trial and by separate judgments not having been written in each of the cases. Original Suit No. 44 of 1906 was instituted by one Vaithinathasawmi Aiyar against his uncle, Vaithinatha Aiyar, to recover certain sums of money on two documents. The Subordinate Judge gave a decree in favour of the nephew. Appeal No. 134 of 1910 is against that decision. The uncle has appealed. Original Suit No. 2 of 1907 was by the uncle

against the nephew for a declaration that the sale-deed of certain properties in the name of the nephew was *benami* for him, and for recovery of the properties. The nephew was the first defendant in this case and the vendee from the nephew was the 2nd defendant. The Subordinate Judge dismissed this suit. Appeal No. 135 of 1910 is the appeal against it by the uncle. In Original Suit No. 14 of 1908 the nephew sued the uncle with respect to a portion of the properties covered by the alleged nominal conveyance on the ground of trespass. The Subordinate Judge dismissed this suit. Appeal No 194 of 1910 has been preferred against that decision.

Thus, in all these three appeals, the uncle Vaithinatha Aiyar is the appellant. The nephew, Vaithinathasamwy Aiyar, is the sole respondent in Appeals Nos. 134 of 1910 and 194 of 1910. He is the first respondent in Appeal No. 135 of 1910, the second being the vendee.

I shall deal with Appeals Nos. 135 and 194 of 1910 first. The facts are these :— The uncle had a divided brother who died leaving behind him his widow and a daughter, named Nagalakshmi Ammal. During the life-time of the widow some of the properties now in dispute were conveyed to the father-in-law of Nagalakshmi Ammal. After the death of the widow, on the 27th September 1900 the father-in-law and Nagalakshmi Ammal sold the plaint properties by Exhibits A and B respectively to the nephew, Vaithinathasawmy Aiyar. In 1904 there were original proceedings under section 145 in the Magistrates's Court between the uncle and the nephew regarding possession. The order of the Magistrate in these proceedings led to the two suits from which these appeals have been preferred.

The burden lies heavily upon the uncle to establish that the sale to his nephew was *benami* for him. The circumstances relied upon by Mr. Venkatarama Sastri are these :—

(1) the nephew has no properties at the village ;

(2) the nephew admits that he did not make any inquiries regarding the necessity for the sale nor about the existence of the debts ;

(3) the sale-deed was executed in the house of the uncle;

(4) the uncle looked after the cultivation ;

(5) the properties were sold for a very low price; and

(6) the uncle was the nearest reversioner to Nagalakshmi Ammal.

From these circumstances we are asked to infer that it was never intended to confer any rights of property upon the nephew by the sale to him and that the uncle out of confidence allowed the property to be conveyed to the nephew, as he was then the nearest reversioner and did not desire it to be known that he had himself purchased the property. There is positive evidence in this case, which I see no reason to disbelieve, that the nephew paid Rs. 4,000 to the vendee at the time of the conveyances. The balance of the purchase-money had to be paid to the creditors mentioned in the sale-deeds. The evidence shows that in the majority of cases the nephew discharged these debts, although some were paid by the uncle. That is explained on the ground that the uncle had the income of the property to account for. I see no reason to doubt that at the time of the sale the uncle and the nephew were friendly towards each other. It is also proved that the uncle was indebted to the nephew to a large extent, although a suit to recover the amount would have been time-barred. Further the uncle had no children. I conclude from these facts that the uncle intended the nephew to be the real purchaser of the property in order that his own indebtedness may be wiped off by this transaction. It is only when the nephew claimed payment of the barred debt in 1903, that the uncle thought of setting up a rival claim to the properties covered by Exhibits A and B. The circumstance to which the learned Vakil for the appellant has drawn our attention cannot, in the face of the positive facts proved in this case, lead to the inference that the sale was *benami* for the uncle. I agree with the Subordinate Judge in the conclusion at which he has arrived. The appeals will be dismissed with costs.

Appeals dismissed.

GAYA PRASAD *v.* SARFARAZ CHAUDHRI.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 982 OF 1914.
June 12, 1915.
Present:—Mr. Justice Piggott.
GAYA PRASAD—PLAINTIFF—APPELLANT
versus
SARFARAZ CHAUDHRI—DEFENDANT—RESPONDENT.

Specific Relief Act (I of 1877), s. 41—Discretion—Minor's mortgage, cancellation of, suit for—Decree—Consideration paid, if to be allowed.

The discretion conferred upon the Court by section 41 of the Specific Relief Act must be so interpreted and exercised as only to impose upon a plaintiff seeking relief by way of cancellation of an instrument such conditions as the law would impose upon him if the position of the parties were reversed and he were the defendant in a suit brought to enforce the instrument according to its terms. [p. 974, col. 1.]

Where the plaintiff brought a suit for setting aside a mortgage-deed executed by him while he was a minor and his mother, who was his certificated guardian, and a decree was passed conditional on his paying the full consideration of the deed in suit:

Held, that as a minor's contract was void the plaintiff's suit should have been decreed as brought. [p. 974, col. 2.]

Second appeal from the decision of the District Judge of Gorakhpur, dated the 5th February 1914.

FACTS of the case appear fully from the judgment.

Mr. *Parmeshwor Dayal*, for Mr. *Iswar Saran*, for the Appellant:—A person who was a minor when he made a mortgage is not estopped from pleading minority simply because he represented himself to be of full age.

I rely on *Kanhaya Lal* v. *Girdhari Lal* (1). A mortgage by a minor is void to all intents and purposes and nothing can make the contract binding in law.

No mutuality arises in a contract of this kind.

I rely on *Mir Sarwarjan* v. *Fakhruddin Mahomed* (2) and *Mohori Bibi* v. *Dharmodas Ghose* (3).

He then discussed about the finding as regards consideration.

Mr. *Aga Haidar*, for the Respondent:—The facts of this case are peculiar. The plaintiff's case was that the defendant knowing him to be a minor fraudulently got the mortgage executed. Defendant denied this. The Courts below have found the allegation of the plaintiff to be false.

The learned Judge has also found that plaintiff was over 18 years but was a minor because a certificate of guardianship was obtained.

The case in *Mohori Bibi* v. *Dharmodas Ghose* (3) is a leading case.

I submit that a Court of Justice and Equity should make an order, as the lower Court did, in view of the circumstances of the case.

The Courts have exercised a discretion in a particular manner and this discretion should not be disturbed in second appeal. *Kamta Prasad* v. *Sheo Gopal Lal* (4).

This was also the case in *Mohori Bibi* v. *Dharmodas Ghose* (3). Courts had exercised a discretion and the discretion was not interfered with.

The minor must pay the benefit which he had received. Section 41, Specefic Relief Act, applies when discretion is being exercised to cancel an instrument.

JUDGMENT.—On the 25th of February 1909 the plaintiff, Gaya Prasad, being at that time just over 18 years of age, executed in favour of the defendant, Sarfaraz Chaudhri, a mortgage-deed for Rs. 349-13-6, hypothecating a 6-pie *zemindari* share of his own in village Lohraula. Out of the consideration only Rs. 56 was paid in cash at registration, and the balance was said to represent principal and interest on two older bonds executed by Gaya Prasad. As a matter of fact the two older bonds in question, one for Rs. 99 and the other for Rs. 81, were produced and apparently purported to have been executed jointly by Gaya Prasad and his mother. It has been found that Gaya Prasad's mother had obtained a certificate of guardianship under the Guardians and Wards Act prior to the date of the execution of the mortgage-deed in suit. Under the law, therefore, Ga a Prasad was a minor on the 25th of February 1909. He brought the present suit for a declaration that the document in question is null and void and not binding on the plaintiff and of no effect as regards the property therein hypothecated. The first Court decreed the claim; but, acting under the discretion conferred by section 41 of the Specific Relief Act I of 1877, made this decree subject to

(1) 13 Ind. Cas. 956; 9 A. L. J. 103.
(2) 13 Ind. Cas 331; 9 A. L. J. 33; 21 M. L. J. 1156; 16 C. W. N. 74; (1912) M. W. N. 22; 15 C. L. J. 69; 14 Bom. L. R. 5; 39 C. 232; 29 I. A. 1.
(3) 30 C. 539; 5 Bom. L. R. 421; 7 C. W. N. 441; 30 I. A. 114.
(4) 26 A. 342; A. W. N. (1904) 41.

payment by the plaintiff of the sum of Rs. 56, found to have been paid at the time of registration. Both parties appealed to the District Judge. There had been allegations of fraud on both sides. The plaintiff on the one hand denied that any consideration had passed, and over and above pleading his minority alleged that he had been induced to execute the mortgage-deed in suit by fraud; while the defendant alleged that he had been deceived by the plaintiff and that he knew nothing about the certificate of guardianship but believed the plaintiff to be of full age, as in fact he would have been but for the existence of that certificate. The learned District Judge has found that there was constructive fraud on the part of the plaintiff, in that he was bound to have informed the defendant, Sarfaraz Chaudhri, of the fact of his minority but did not do so. He has not found that there was any actual false representation on the part of the plaintiff in regard to his age, nor does he purport in any way to apply the principle of estoppel so as to debar the plaintiff from asserting that he was in fact a minor on the date of the execution of the mortgage-deed. He has nevertheless passed a decree to the effect that the plaintiff do pay Rs. 349-13-6, the full consideration for the deed in suit, with Rs. 108-2 interest, and the costs incurred by the defendant in both Courts. The decree does not provide for the event of this payment being made, unless such provision is considered to be implied from the words: "The decree of lower Court be modified and a conditional decree be passed." No doubt the learned District Judge had sufficient reason for feeling certain that the plaintiff will in no case make the payment in question. In the event of payment not being made, the suit for cancellation of the mortgage-deed was to stand dismissed with costs in both Courts. Against this decree the plaintiff appeals.

He contends that there is no legal basis for a finding that the consideration for the mortgage-deed in suit had been paid in full, and further that the suit should in any case be decreed. The case-law on the subject seems to me in a somewhat unsatisfactory condition. The later law on the subject is all based on the decision of their Lordships of the Privy Council in *Mohori Bibi* v. *Dharmodas Ghose* (3). It was there laid down in the plainest terms that a mortgage made by a minor is void. The head-note* represents their Lordships as further deciding that a money-lender who has advanced money to a minor on the security of a mortgage is not entitled to re-payment of the money on a decree being made declaring the mortgage invalid. As a matter of fact their Lordships refer to the discretion vested in the Courts by section 41 of the Specific Relief Act, without definitely deciding whether or not it would be a reasonable exercise of that discretion to refuse to declare a document void, which was really void in law, unless and until some payment were first made by the plaintiff. They content themselves with holding that on the facts of the case before them the Courts below had exercised a wise discretion in refusing to direct any such payment to be made. In *Kamta Prasad* v. *Sheo Gopal Lal* (4), a suit very similar to the present, in which the cancellation of a mortgage-deed executed by a minor had been unconditionally decreed by the Court below in spite of a finding that a sum of over Rs. 500 had been received by the plaintiff, the decision of the Court below was affirmed by a Bench of this Court. According to the head-note the case would be absolutely decisive on the question now before me; but it would seem from the body of the judgment that the learned Judges did not desire to commit themselves to any positive decision as to the limits of the discretion exercisable under section 41 of the Specific Relief Act, in cases where cancellation of a deed is sought on the ground of minority. In *Jagar Nath Singh* v. *Lalta Prasad* (5) the question was as to the recovery of possession over land which had been conveyed by a deed of sale executed by a minor. The two learned Judges who heard that case differed as to the facts; but the learned Judge who was of opinion that the equities of the case were in favour of the vendees was prepared to make a decree in favour of the plaintiff subject to re-payment of the sale price. There seems to me in any case a distinction between a case for recovery of possession

(5) 1 Ind. Cas. 562; 31 A. 21; 5 A. L. J. 674; A. W. N. (1908) 267.

*See 30 C. 539—*Ed.*

and a suit like the present, which is in reality a mere suit that a document which is void in law may be declared to be so. I was also referred to the case of *Kanhai Lal* v. *Babu Ram* (6), in which a suit upon a p omissory note executed by a minor was dismissed. The question of the possible application of section 41 of the Specific Relief Act was referred to in the judgment but did not require to be determined. On the authorities it appears beyond question that, if the defendant were suing to enforce this mortgage-deed, his suit would be dismissed. Even supposing I were to dismiss this appeal and leave the decree of the lower Appellate Court as it stands, and that decree were to result in the dismissal of the plaintiff's suit for a declaration, there would still remain on record the finding between the parties that the plaintiff was a minor when he executed this mortgage. No suit could, therefore, be brought by Sarfaraz Chaudhri on this deed with any hope of success. It appears to me, therefore, that to refuse the plaintiff a declaration that this deed is void in law, except on condition of his paying to the defendant, Sarfaraz, the mortgage-money, is logically equivalent to trying to compel the plaintiff to pay what he is not bound in law to pay. There might be something to be said for such a decree as was passed in this case by the Court of first instance; but the lower Appellate Court has in effect held that the plaintiff is not entitled to a declaration that this mortgage-deed is void unless he first pays into Court the entire amount due under it including interest up to date and the whole costs of the defendant, that is, everything which the defendant could possibly claim in a suit brought by him as plaintiff to enforce the provisions of this void contract. I incline to the opinion that the discretion conferred upon the Courts by section 41 of the Specific Relief Act must be so interpreted and exercised as only to impose upon a plaintiff seeking relief by way of cancellation of an instrument such conditions as the law would impose upon him if the position of the parties were reversed and he were the defendant in a suit brought to enforce the instrument according to its terms. It seems to me impossible in any case to affirm the decree of the learned District Judge, and my own view of the law as at present advised is that the plaintiff's suit should have been decreed as brought I set aside the decrees of both the Courts below and decree the plaintiff's suit for a declaration as brought with costs through out.

Appeal allowed

(6) 8 Ind. Cas. 888; 8 A. L. J. 1058.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 37 OF 1913.

December 2, 1914.

Present: - Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

VISALAKSHI AMMAL—PLAINTIFF—APPELLANT

versus

DORASINGA PILLAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Dancing sisters living together—Property standing in name of one of them—Presumption of jointness—Statements by deceased mortgagor in mortgage-deed as to ownership of property—Evidence Act (I of 1872), s. 32 (7).

The ordinary presumption, that property standing in the name of one member of a Hindu co-parcenary is the property of all, does not apply to dancing sisters living together, as their mode of acquisition of property and life, are entirely distinct and different [p. 975, col. 1.]

Statements in mortgage-deeds made by a deceased mortgagor as to the ownership of the property comprised in the mortgage are admissible in evidence under section 32 (7) of the Indian Evidence Act and can be acted on if corroborated by other oral evidence in the case. [p. 975, col. 1.]

Quære.—Whether an adoption by a dancing girl is valid? [p. 975, col. 2.]

Guddati Reddi Obala v. *Ganapati Kandanna*, 17 Ind. Cas. 422; 12 M. L. T. 467; 23 M. L. J. 493; (1912) M.W. N. 1138, followed.

Appeal from the judgment of the Hon'ble Mr. Justice Wallis, dated the 3rd March 1913, in the Ordinary Original Civil Jurisdiction of this Court, in Civil Suit No. 118 of 1911.

Messrs. *Venkatasubba Rao* and *Radhakrishnayya*, for the Appellant.

Messrs. *M. A. Tirunarayanachari* and *P. V. Doraisamy Mudaliar*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The contentions argued in this appeal are

(*a*) that the learned Judge below ought to have held that the statements in the mortgage-deed, Exhibit I, about one of the properties having been purchased by Rangammal and the other property by Sundar Grammani, Rangammal and their sons were unreliable (7th ground of the appeal memorandam):

(*b*) that the learned Judge did not give due weight to the legal presumption that properties in the name of one of two dancing-girl sisters are the common property of both and

(*c*) that he did not give sufficient weight to the oral evidence on the plaintiff's side.

I think that the statements in the mortgage-deed, Exhibit I, which are admissible in evidence under section 32, clause 7, read with section 13 of the Evidence Act (Rangammal being dead) were rightly treated as reliable by the learned Judge, as they are corroborated by the oral evidence of the defendants' side showing that Rangammal and her sons solely received the rents of one of the properties and by the evidence of one of the witnesses on plaintiff's side, who says that the Grammani who kept Rangammal for several years was a rich man. As regards the legal presumption, though these dancing girls have been held to be governed by the Hindu Law relating to co-parcenary, as if there were made members of a Hindu co-parcenary, the analogy should not, in my opinion, be pushed too far as we know that from the nature of their profession, it could not be expected that sisters would ordinarily live together long and club their separate earnings or that their property would usually consist of what they got ancestrally (from their female ancestors) with the addition made by the natural increase of those properties through the receipt of interest on investment or receipt of mesne profits.

I am not prepared to dissent from the learned Judge's appreciation of the oral evidence, on the plaintiff's side having regard to the probabilities of the case.

It is unnecessary for me to express an opinion in this case on the question of the fact of plaintiff's adoption or on the question of its validity (if it was a fact) or on the question whether any presumption at all exists that the properties in the name of a dancing girl belong to her and her sisters and her mother and to all such female agnates (so to say). I need only say that having read the judgment of the learned Judge with the greatest respect, I do not see sufficient reason to go back from the view I expressed in *Guddati ReddiObala* v. *Ganapati Kandanna* (1) as to the validity of an adoption by a dancing girl.

In the result I would dismiss the appeal with costs.

NAPIER, J.—I concur with my learned brother that the plaintiff has not made out her case even if she is entitled to call in aid the presumption, a point on which I express no opinion.

Appeal dismissed.

(1) 17 Ind. Cas. 422; 12 M.L. T. 467; 23 M. L. J. 493; (1912) M. W. N. 1138.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 165 OF 1914.

March 22, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

JANKI PRASAD—PLAINTIFF—APPLICANT

versus

PARMESHWAR DIN PANDEY—DEFENDANT—OPPOSITE PARTY.

Ex parte *decree, setting aside of—Application made after five years—Procedure—Jurisdiction—Revision—Limitation Act (IX of 1908), Sch. I, Art. 164—Civil Procedure Code (Act V of 1908), s. 115, O IX, r. 13.*

An *ex parte* decree was passed in 1909 when the defendant was in jail. An application to set aside the decree was made in 1913 when the defendant was released from the jail. The Munsif without considering whether the application was barred by limitation granted it on the ground that the defendant being in jail at the time of the hearing of the suit had been prevented from attending the Court and defending it properly:

Held, that the proceedings of the Munsif were irregular and without jurisdiction. [p. 976, col. 1.]

That the Munsif ought to have considered whether the application before him, treated as an application under Order IX, rule 13, of the Civil Procedure Code, had been made within time, or if he treated the application as one for review of judgment, he should have considered whether the applicant had established sufficient cause for not applying till after five years had expired since the passing of the decree. [p. 976, cols. 1. & 2.]

Civil revision from an order of the Munsif of Basti.

HASSAN AMMAL BIBI *v.* ISMAIL MOIDEEN.

Mr. *Pearey Lal Banerji*, for the Applicant.

Mr. *Girdhari Lal Agarwa'a*, for the Opposite Party.

JUDGMENT.—This is an application for revision of an order of the Munsif of Basti setting aside a decree passed *ex parte* against the respondent and restoring the case to the pending file. It appears that the *ex parte* decree against the respondent was passed as long ago as 1909 when the respondent was in jail. Two applications to set aside the decree were presented by his wife acting on a power-of-attorney from her husband. Both applications were rejected. The respondent was released from jail in September 1913, and on March the 18th, 1914, he presented a third application, which has resulted in the order against which this application for revision is directed. It is quite clear that as an application to set aside a decree passed *ex parte* it was barred by limitation under Article 164, Schedule I, to the Limitation Act. Possibly, however, it might have been treated as an application by the respondent for review of judgment. In that case it was *prima facie* barred by limitation; but it was open to the Court to hold that the respondent had established sufficient cause for not preferring the application sooner. The Munsif did not consider whether the application was barred by limitation; but he set aside the decree on the ground that the respondent being in jail at the time of the hearing of the suit had been prevented from attending the Court and defending the suit properly. After saying this he added: "Therefore for the ends of justice I am of opinion that the *ex parte* decree should be set aside and the defendant be given an opportunity of defending the suit." It appears to us that the proceedings of the Munsif were irregular and possibly also without jurisdiction. He ought to have considered whether the application before him treated as an application under Order IX, rule 13, of the Civil Procedure Code, had been made within time, or if he treated the application as one for review of judgment he should have considered whether the applicant had established sufficient cause for not applying till March 1914. He took neither of these courses and he assumed that he had jurisdiction to set aside a decree five years after it was passed, simply because in his opinion the applica t had not had a fair chance of defending the suit. If he had taken up the question of limitation and decided it wrongly we could not have interfered. But he did not apply his mind to the case which he had to decide. As it is, it seems to us impossible to allow his order to stand. We set aside the order and direct that the Munsif do take up the application of the respondent and dispose of it according to law. Costs of this application will be costs in the cause.

Order set aside.

MADRAS HIGH COURT.

CIVIL APPEAL No. 173 OF 1913.

March 30, 1915.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

HASSAN AMMAL BIBI, DECEASED, AND OTHERS—PLAINTIFFS Nos. 1 TO 8 AND 14 TO 16—APPELLANTS

versus

ISMAIL MOIDEEN ROWTHAR AND OTHERS—DEFENDANTS Nos. 1 TO 13 AND PLAINTIFFS Nos. 10 TO 12—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 47, 65, O. XXI, r. 94—Execution sale—Co-owner's interest—Auction-purchaser, assignee of—Title, acquisition of—Partition, right of—Limitation Act (IX of 1908), Sch. I, Art. 144, applicability of—Adverse possession—Co-owner's possession.

An assignee of the interest of a decree-holder-purchaser of his judgment-debtor's right in a joint property, acquires title under section 65 and Order XXI, rule 94 of the Civil Procedure Code and as such is entitled to bring a suit for partition against the judgment debtor and his other co-owners without obtaining any formal delivery of possession and his suit is not barred by section 47 of the Civil Procedure Code. [p. 978, col. 1.]

A purchaser at a Court sale in order to obtain possession of the property purchased may seek for such possession as he can obtain under the Civil Procedure Code or may ignore the provisions of the Code and stand upon his general rights of prosecuting his claim by instituting a suit. [p. 979, col. 1.]

Article 144 of Schedule I of the Limitation Act applies to a suit for partition between tenants-in-common, although a tenant has acquired his rights by purchase at a Court auction. [p. 980, col. 1.]

HASSAN AMMAIL BIBI *v.* ISMAIL MOIDEEN.

In such a suit there can be no question of adverse possession, because the possession of one co-tenant is the possession of all persons entitled as tenants-in-common. [p. 980, col. 1.]

Appeal against the decree of the Court of the Temporary Subordinate Judge of Trichinopoly, in Original Suit No. 4 of 1912.

FACTS.—This is an appeal against the decree of the Temporary Subordinate Judge of Trichinopoly passed in a suit brought by the heirs of one Peer Mohideen Rowther against Ismail Rowther and another for partition and possession of a moiety of certain properties which belonged to the two defendants as tenants-in-common. The plaintiffs, who were the prior mortgagees, purchased the equity of redemption in the moiety belonging to the first defendant at a Court auction, and they brought the suit within 12 years of the confirmation of the sale. The question for decision was as to the applicability of section 47, Civil Procedure Code, and Article 137 of the Limitation Act. The Subordinate Judge held that the suit was barred under both those sections and dismissed it. Hence this first appeal against the decree of the Subordinate Judge of Trichinopoly.

Mr. *T. Rangachariar*, for the Appellant:—It is not necessary for a Court purchaser to obtain symbolical possession before he can sue for partition. Section 65 of the Code of Civil Procedure is clear; it clearly vests the property in the purchaser on the date of sale. It nowhere says that in order that title should vest possession should be taken.

[WALLIS, C. J.—Suppose he does not want possession at all?]

Mr. *T. Rangachariar*:—That is only an additional remedy; it may be useless to him, it is an unnecessary formality. *Lutchmiput Singh* v. *The Land Mortgage Bank of India Ltd.* (1).

Mr. *S. T. Srinivasagopalachary*, for the Respondent:—*Latchmiput Singh* v. *The Land Mortgage Bank of India Ltd.* (1) is the case of a stranger purchaser.

Mr. *T. Rangachariar*:—A stranger purchaser may avail himself of rule 95 or 96 but he is not bound to do so; that is the reason why Article 137 or 138 gives 12 years to bring a suit from the date of sale. You can sue for sale from the date of confirmation.

[WALLIS, C. J.—But he must have a right of suit.]

Mr. *T. Rangachariar*:—If section 47 bars him, he cannot bring a suit.

[WALLIS, C. J.—Here it is a decree-holder purchaser.]

Mr. *T. Rangachariar*.—But he wants only the more effective remedy which he cannot get. In *Yelumalai Chetty* v. *Srinivasa Chetty* (2), the purchaser actually applied for possession under section 318, which was actually dismissed; the remedy he now seeks he cannot have and that is not necessary to complete his title. The whole question is how the title is extinguished, that is, the right of a suit is barred. In a suit for partition all members must be made parties.

Then as to limitation. Article 137 is the Article applied by the lower Court.

[WALLIS, C. J.—The Judge has not found there was an ouster.]

Articles 137 does not apply. Article 138 does not apply, except when the defendant is the judgment-debtor. In *Khiroda Kanta Roy* v. *Krishna Das Laha* (3), it is laid down that Article 138 has no application to a case where the person did not derive title from the judgment-debtor: *Lakshman Vinayak Kulkarni* v. *Bisan Singh* (4); *Lakshman* v. *Moru* (5); *Namdev* v. *Ramachandra Gomaji Murwadi* (6); *Gopal* v. *Krishna Rao* (7); *Bhagwant Singh* v. *Bhola Singh* (8).

Articles 141, 142 will not apply; Article 144, too, will not; it must be shown that possession was adverse.

The whole contention before the lower Court was, which Article applied, Article 137 or Article 144.

Mr. *S. T. Sreenivasagopalachari*, for the Respondent.—The whole question is whether a separate suit will lie. Section 47 of the Code of Civil Procedure bars the present suit.

Article 138 of the Limitation Act clearly says that he must be in possession. It is clear that he must be deemed to be in posses-

(1) 14 C. 464.

(2) 29 M. 294.
(3) 6 Ind. Cas. 467; 12 C. L. J. 378.
(4) 15 B. 261.
(5) 16 B. 722.
(6) 18 B. 37.
(7) 25 B. 275; 2 Bom. L. R. 1021.
(8) 18 Ind. Cas. 465; 35 A. 432; 11 A. L. J. 642.

sion when he could have applied for possession.

Mr. *T. Rangachariar*, in reply.

JUDGMENT.

WALLIS, C. J.—The plaintiffs in this case claim under an assignment from the auction-purchaser at an execution sale of the 1st defendant's interest in certain property, which was in the enjoyment of the 1st and 2nd defendants as tenants-in-common. The sale took place on the 16th March 1898 and was confirmed on the 21st April 1898, and the sale certificate issued on the 22nd April 1898. The present suit was brought on the 15th April 1910, but it was only when it was amended on the 15th October 1910, that it became a suit to enforce the plaintiff's rights as representatives of the auction-purchaser to partition the property to which they were entitled as tenants-in-common with the 2nd defendant. This date, therefore, must be regarded as the date of instituting the suit. The Subordinate Judge has dismissed the suit, as barred under section 47 of the Code of Civil Procedure, on the ground that possession was never obtained under Order XXI, rule 96 of the Civil Procedure Code, 1908 (section 318 of the old Code). It is unnecessary to consider whether the section is applicable to a case where the judgment-debtor whose interest was purchased was in joint possession with a third party, because I think that the title having vested in the plaintiffs' assignor under section 65 and Order XXI, rule 94, they were entitled to bring the present suit without obtaining any formal delivery of possession. The decision in *Yelumalai Chetty* v. *Srinivasa Chetty* (2) was to this effect and it was the duty of the Subordinate Judge to follow it instead of indulging in idle speculations as to section 318 not having been present to the mind of the learned Judges who decided that case. That decision is also in accordance with *Khiroda Kanta Roy* v. *Krishna Das Laha* (3), *Ramlakhan Rai* v. *Gajadhar Rai* (*Gajadhar Rai* v. *Ramlakhan Rai*) (9) and *Bhagwant Singh* v. *Bhola Singh* (8). The Subordinate Judge has also held that the suit is barred under Article 137 of the Limitation Act, here again disregarding the recent ruling of this Court in *Durrada Hari Kristna Chowdhary* v. *Sripada Venkata Lakshmi Narayana* (10) that Article 144 was the Article applicable, a decision which it was his duty to follow. It has not been attempted to support the Subordinate Judge's decision that the suit was barred under Article 137, as clearly at the date of the sale the judgment-debtor was not out of possession within the meaning of the Article. It has, however, been contended that as he was then in possession with the 2nd defendant as tenant-in-common, he was in possession at the date of the sale with him within the meaning of Article 138 and that that Article applies.

Now apart from *Yelumalai Chetty* v. *Srinivasa Chetty* (2), there is authority for holding that Article 138 will not apply when the defendant does not claim through or under the judgment-debtor. *Khiroda Kanta Roy* v. *Krishna Das Laha* (3), *Bhagwant Singh* v. *Bhola Singh* (8). Here the 2nd defendant is not a person claiming through the judgment-debtor, the 1st defendant, and, therefore Article 144 and not Article 138 would be the Article applicable. I am, therefore, not prepared to differ from the decision in *Yelumalai Chetty* v. *Srinivasa Chetty* (2) and would allow the appeal, reverse the decree, give the plaintiffs a preliminary decree for partition and remand the case to the lower Court for disposal according to law.

SESHAGIRI AIYAR, J.—One Ramaswami Iyengar obtained a decree against the 1st defendant and brought the plaint properties to sale and purchased them himself. Peer Mohideen, from whom the plaintiffs in this suit derive title, purchased the properties from the said Ramaswami Iyengar under Exhibit B on the 11th July 1898. Ramaswami Iyengar obtained his sale certificate under the Court sale on the 22nd April 1898 (Exhibit A). The 2nd defendant is the brother of the 1st defendant and the other defendants claim under the 2nd defendant. The plaintiffs sue for a partition of the properties and for the allotment of a half share to them. The defendants raised various pleas on the merits; they were all found against them by the Subordinate

(9) 5 Ind. Cas. 273; 33 A. 224.

(10) 5 Ind. Cas. 491; 34 M. 402; 7 M. L. T. 155; 20 M. L. J. 323; (1910) M. W. N. 555.

Judge. but he dismissed the plaintiff's suit on two grounds, namely, that the suit was not maintainable by reason of section 47 of the Code of Civil Procedure, and that it was barred by limitation under Article 137 of the Limitation Act. In appeal Mr. Rangachariar contends that the lower Court is wrong on both the points.

I wish at the outset to point out that both the questions are covered by the decisions of this Court. In *Yelumalai Chetty* v. *Srinivasa Chetty* (2) Subramania Aiyar and Benson, JJ., held under similar circumstances that the suit was not affected by section 244 of the old Code, which corresponds to section 47 of the new Code. As regards the question of limitation, Sir Arnold White, C. J., and Munro, J., held that the proper Article applicable to suits of this nature is Article 144. The Subordinate Judge before whom these two cases were quoted, instead of following them, indulges in some criticism regarding their correctness. As I shall show presently the two decisions of this Court are perfectly sound. Even if it were otherwise, it was the duty of the Subordinate Judge to have followed them.

Now upon the first question as to whether section 47 bars the suit, Mr. Srinivasagopalachariar contended that, as the purchaser in the Court sale and his successor-in-title did not take steps under Order XXI, rule 96 of the Code of Civil Procedure, the plaintiffs were not entitled to maintain the suit. The contention of the learned Counsel amounts to this: that before the title under the sale certificate could be perfected, it was necessary to have applied for delivery of such possession as the Civil Procedure Code contemplates. I am unable to agree with this contention. Two courses are open to a purchaser at a Court sale. He may choose to avail himself of the remedy given to him by the Code of Civil Procedure and seek for such possession as he can obtain under the Code; or he may ignore the provisions of the Code and stand upon his general rights of prosecuting his claim by instituting a suit. It is conceded that under Order XXI, rule 96, partition cannot be obtained. It is also conceded that the 2nd defendant cannot be compelled by proceedings in execution to give one-half of the property to the auction-purchaser. But it is argued that as the 1st defendant, the judgment-debtor, is a party to the present suit, section 47 stands in the way of the plaintiffs obtaining their rights. I feel no hesitation in holding that that section does not apply to cases where the effectual remedy is to be obtained against persons who were not parties to the previous litigation That was the view taken by this Court in *Yelumalai Chetty* v. *Srinivasa Chetty* (2). The decisions reported as *Kattayat Pathumayi* v. *Raman Menon* (11) and *Sandhu Taraganar* v. *Hussain Sahib* (12) are not against this conclusion. In these cases the only person against whom relief was sought was the judgment-debtor himself; section 244 was rightly held applicable to such cases. *Kishori Mohun Roy Chowdhry* v. *Chunder Nath Pal* (13) is in accordance with this Court's decision. As was pointed out by Petheram, C. J., in that case, "though there may be a remedy under section 318 (corresponding to rule 96) which the auction-purchaser may put in force, still the ordinary remedies are open to him notwithstanding, and the remedies are concurrent." I entirely agree with this statement of the law. It is not necessary in this case to consider whether the auction purchaser, when he happens to be the decree-holder, can be said to be a party to the suit. Different Courts have taken different views upon that point. In Madras there has been a long course of decisions which establishes that, where property is purchased at a Court sale by the decree-holder, he does not lose his status as a party to the suit. Even on that view the present contention cannot be said to arise between parties to the suit, because, as I have said before, the real remedy is sought against the 2nd defendant, the 1st defendant being only *pro forma*; as the 2nd defendant was not impleaded in the former litigation, section 47 is not a bar to the maintainability of this suit. Moreover, I am of opinion, although it is not necessary to express any definite conclusion on the point, that rule 96 has no application to cases of co-tenants. The rule itself speaks of the possession of *tenants* and others entitled to possession. These latter words would *prima facie* apply only to persons who claim possession in their own

(11) 26 M. 740; 13 M. L. J 237.
(12) 28 M 87; '4 M. L. J. 474.
(13) '4 C. 644.

right, and not to those who are entitled to hold possession for themselves and for others.

Upon the second question all the Courts are agreed that Article 144 of the Limitation Act applies to a suit for partition between tenants-in-common, although the tenant has acquired his right by purchase at a Court auction. At first sight, I was impressed by the argument of Mr. Srinivasagopalachariar that the language of the Article 138 does not support the construction that in order to attract its provisions, the suit must be only against the judgment-debtor. But it has been considered in *Lakshman Vinayak Kulkarni* v. *Bisan Singh* (4), that unless the party resisting possession is either the judgment-debtor or somebody deriving title from him, the proper Article applicable will be 144.

The language of the latter Article is more comprehensive and would cover all cases where adverse possession is set up. Although it is true that Article 144 being the residuary Article should only be resorted to where there is no specific provision in the other Articles of the Act, it seems to me that the two Articles would overlap each other unless the earlier one is confined in its operation to suits against judgment-debtors alone, and the latter made to apply to other cases of adverse possession. There is the authority of Mookerjee, J., in *Khiroda Kanta Roy* v. *Krishna Das Laha* (3), in support of this proposition. *Gopal* v. *Krishna Rao* (7) is also to the same effect. The latest case upon the point is *Bhagwant Singh* v. *Bhola Singh* (8). The decision in *Duvvada Hari Kristna Chowdhary* v. *Sripada Venkata Lakshmi Narayana* (10) must be taken to have adopted this series of decisions in the other Courts. I am, therefore, of opinion that Article 144 applies to this suit. If it does, there can be no question of adverse possession, because the possession of one co-tenant is the possession of all persons entitled as tenants-in-common; and unless and until the co-tenant in possession sets up notoriously a right adverse to the other claimants there can be no adverse possession. Even if Article 138 applies, I am of opinion that having regard to the acknowledgment of right made by the 1st defendant in Exhibits F and K in 1898 and 1902 respectively the suits will not be barred by limitation. It is necessary to point out that the Subordinate Judge's view that Article 137 applies was not sought to be supported in this Court. Mr. Srinivasagopalachariar based his argument on Article 138.

The decree of the Subordinate Judge must be reversed and a preliminary decree for partition must be passed in this Court. The case will be remanded to the lower Court for passing a final decree. The costs will abide the result.

Decree reversed; Case remanded.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 348 OF 1913.

April 7, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

DWARKA PRASAD—DEFENDANT—APPELLANT

versus

RAJA RAM AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Limitation Act (*IX of* 1908), *s.* 25—*Instalment bond*—Hindi *date mentioned in bond*—*True test as to when limitation begins to run.*

A mortgage bond executed on the 24th of July 1892 provided that the money due under it should be paid in eight yearly instalments. Each instalment had to be paid on *Magh Sudi Puranmashi* of each year. The last payment was to be made on *Magh Sudi Puranmashi*, 1956 corresponding to 14th of February 1900:

Held, that a suit on the bond brought on the 19th of July 1912 was barred by limitation and that section 25 of the Limitation Act did not apply to the case. [p. 981, cols. 1 & 2.]

Latifun-nissa v. *Dhan Kunwar*, 24 C. 382, referred to.

The true test in a case of this kind is on what date was the plaintiff entitled to demand his money, if payment was not made of any instalment fixed in the bond [p. 981, col. 1.]

First appeal from the decision of the Subordinate Judge of Allahabad, dated 24th April 1914.

The Hon'ble Dr. *Sundar Lal*, for the Appellant.

Mr. *M. L. Agarwala*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs to enforce payment of money due upon a mortgage executed on the 24th of July 1892. The question to be considered is whether the claim of the plaintiffs, which was instituted on the 19th of July 1912, is or is not

time-barred. The bond provides that the amount secured by it should be paid in eight years "in this way that we shall pay interest on the whole amount aforesaid at the rate of twelve annas per cent. per mensem and also Rs. 500 out of the principal on *Puranmashi of Magh Sudi* of each year. The first instalment of interest and that of principal shall be payable on *Puranmashi* of *Magh Sudi* 1949 *Sambat*. Similarly the instalment of principal and interest shall be payable each year on *Puranmashi* of *Magh Sudi*. We the debtors shall pay without objection interest on the whole of the remaining amount and Rs. 500 out of the principal year by year." There is a further clause in the bond that in case of default in the payment of three instalments, the creditors would be entitled to realise the whole amount secured by the bond without waiting for the other instalments.

Two contentions have been raised before us. The first is that default having been made in the payment of instalments, the whole of the amount of the bond became due when default was made in the payment of the third instalment, and accordingly calculating limitation from the date of that default the claim is time-barred. The second contention is that in any event the whole amount of the bond was re-payable on *Magh Sudi Puranmashi* 1956, corresponding to the 14th of February 1900, and as the suit was brought after twelve years from that date, it is equally barred by limitation.

Holding the view that we do on the second point, it is unnecessary to refer to the first point. We are of opinion that having regard to the terms of the bond the amount of it became payable at the latest on *Magh Sudi Puranmashi* of 1956, that is to say, the date on which the eighth instalment was payable. It is true that in the earlier part of the bond it is said that the debt was to be re-paid in eight years but this is qualified by the clause which follows, namely, the clause stating how the eight years were to be calculated. The true test in a case of this kind is on what date were the plaintiffs entitled to demand their money if payment was not made of the eight instalments fixed in the bond. If default was made on *Magh Sudi Puranmashi* 1956, corresponding to the 14th of February 1900, there can be no doubt that the creditors would be entitled to demand their money on the expiry of that date, and it would be no answer to their demand for the money to say that they were bound to wait till the expiry of eight years calculated from the date of the bond according to the English Calendar. The whole question turns upon the intention of the parties and it seems to us that in this case the intention clearly was that payment of the instalments was to be made on the *Hindi* dates mentioned in the bond, and that the last payment was to be made on the date on which the eighth instalment was payable, namely, on *Magh Sudi Puranmashi* 1956, corresponding to the 14th of February 1900. In this view section 25 of the Limitation Act has no application to a case of this kind.

The learned Counsel for the respondents relied on the case of *Latif-un-nissa* v. *Dhan Kunwar* (1) and the cases referred to therein.

The provisions of the bond in that case are not identical with those of the bond before us, and even in that case Mr. Justice Ameer Ali was of opinion that section 25 of the Limitation Act did not apply. He concurred with his learned colleague as there were doubts as to what the intention of the parties was under the document in that case.

In our opinion the suit of the plaintiffs is time-barred and ought to have been dismissed. We accordingly allow the appeal, set aside the decree of the Court below and dismiss the suit with costs in both Courts.

Appeal allowed.

(1) 24 C. 382.

ELICHI USSACK *v.* RAMASWAMI IYER.

MADRAS HIGH COURT.

APPEAL SUIT NO. 57 OF 1912.

February 23, 1915.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

ELICHI USSACK AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAMASWAMI IYER AND OTHERS—PLAINTIFFS—RESPONDENTS.

Merger—Mortgage—Hypothecation bonds—Account settled—Agreement to sell certain portion—Suit on bonds, maintainability of—Remedy of plaintiff.

The defendants mortgaged certain properties to the plaintiffs and also hypothecated the same for certain sums on different dates. On a suit on the hypothecation bonds it was found that a settlement of accounts between the parties had been arrived at and it had been agreed that a certain portion of the property should be sold for the amount due to the plaintiffs. The defendants were still ready to perform the agreement:

Held, that the suit was not maintainable as under the circumstances the only course open to the plaintiff was to sue for specific performance of the contract to sell. [p.983, col. 1.]

Appeal against the decree of the Sub-Judge of South Malabar, at Calicut, in Original Suit No. 36 of 1910.

FACTS.—A suit was brought on three hypothecation. bonds Prior to this there was an usufructuary mortgage for Rs. 30,000. The parties subsequently entered into an agreement by which the whole amount due to the mortgagees was fixed at Rs. 60,500. The mortgagees brought a suit upon the hypothecation bonds alone, ignoring the agreement. It was contended for the mortgagors that the suit would not lie upon the hypothecation bonds alone, since the debt had been merged in the subsequent agreement. The Subordinate Judge of South Malabar decreed the plaintiffs' suit, subject to the usufructuary mortgage. Hence this appeal by the defendants.

Mr. *K. Govinda Marar*, for the Appellants.

Messrs. *T. R. Ramachandra Aiyar*, *T. R. Krishnaswami Aiyar* and *T. S. Narayana Aiyar*, for the Respondents.

JUDGMEMT.—This is an appeal against the decree of the Sub-Judge of Calicut directing the defendants to pay the plaintiffs a sum of Rs. 51,801-3-2 and in default directing the mortgaged properties to be sold. The representatives of the family of defendants Nos. 1 to 8 mortgaged certain properties to the deceased Sankunani Iyer, the predecessor-in-title of the plaintiffs for a sum of Rs. 30,000 on the 24th July 1882. They subsequently hypothecated the same properties to the same creditor for Rs. 5,000 on the same date (Exhibit A), for another sum of Rs. 5,000 on 11th April 1882 (Exhibit B) and for Rs. 7,000 on 22nd September 1882 (Exhibit C.) They acknowledge the receipt of Rs. 4,154-10-0 and sue to recover the money due under these three instruments of mortgage, Exhibits A, B and C. The main defence is that the plaintiffs are not entitled to sue on these hypothecation bonds, because in July 1886 there was a settlement of accounts between the parties and it was agreed that the amount of Rs. 60,000 was payable under Exhibits A, B and C under the usufructuary mortgage-deed and in settlement of certain other transactions which are not in question in this suit. It was also agreed that the defendants were to sell to the plaintiffs a portion of the properties included in these instruments. The defendants say that they are still willing to carry out the agreement and that the suit is, therefore, not maintainable.

The Sub-Judge found that so far as the settlement of accounts is concerned, it is binding on the parties and the plaintiffs are, therefore, entitled to recover only the amounts then agreed upon. But he was of opinion that the agreement for sale cannot now be carried out, as certain arbitrators who were appointed by that agreement to carry out some of the terms of that agreement are now dead. He was, therefore, of opinion that the plaintiffs are precluded from suing for the entire sums payable under Exhibits A, B and C, that they have, however, a right to sue for the sale of the plaint properties for the sums fixed by Exhibit D and the original of Exhibit T, the agreement of 1886, and the interest on the principal at Rs. 5 per. cent per annum. He, therefore, passed a preliminary mortgage-decree directing the sale of the properties for Rs. 53,841-10-8, the amount due under Exhibits A, B and C, subject to the usufructuary mortgage of Rs. 30,000.

The lower Court's decree is clearly unsustainable and is not in accordance with the judgment. On the finding that plaintiffs are precluded from suing to recover the amounts due under Exhibits A, B and C and that they have a right only to recover the

amount due under Exhibits D and T, that is, in accordance with the agreement subsequently entered into between the parties settling the amount payable by the defendants, no decree should have been based on Exhibits A, B and C. If the subsequent agreement settling the amounts due by the defendants not only under these hypothecation instruments but also under the prior usufructuary mortgage, is valid, then the plaintiffs are only entitled to recover the amount of money then settled. The amount cannot be apportioned as between the hypothecation instruments and usufructuary mortgage-deed. Apparently realising this difficulty, the learned Pleader for the respondents attempts to support the decree on the ground that the entire agreement is incapable of specific performance and, therefore, inoperative and, therefore, he is entitled to fall back on the three instruments of mortgage now sued upon. The defendants retained possession of the properties after the usufructuary mortgage for Rs. 30,000 on executing a lease promising to pay to the plaintiffs (mortgagees) an annual rent of Rs. 4,000. They failed to pay the rent due. Accordingly the mortgagees obtained a decree for possession in Original Suit No. 24 of 1893 with arrears of rent. There were apparently certain disputes between the parties and it was under the circumstances that the agreement now in question was entered into. See Exhibit T, dated 19th July 1886. It recites that the parties have settled all disputes between them including the amounts payable under the lease, that the defendants withdrew all their claims and disputes regarding the properties and that the amount due to the mortgagee was fixed at Rs. 60,000. An additional sum of Rs. 500 was then borrowed from the creditor and for this sum of Rs. 60,500 the defendants agreed to sell to him so much of the plaint properties as will, in the estimation of three arbitrators therein named, yield him an interest at Rs. 5 per cent. on the amount then found due. Subsequently another agreement was entered into on 18th August 1887, confirming the prior agreement and it recited that as one of the arbitrators mentioned in Exhibit T was found to be an incompetent man, the defendants would find another man as arbitrator in his place. They borrowed an additional sum of Rs. 2,000 subject to the same conditions as were mentioned in the 1st agreement D. In 1889 when a member of defendants' family, who was a minor at the time of the execution of these documents, Exhibits D and T, attempted to set it aside the plaintiff maintained their validity, see Exhibit IV, and in 1904 in a partition-deed executed amongst the members themselves the amount due from the defendants was stated to be Rs. 62,500, that is, the amounts payable under Exhibits D and T. The plaintiffs have obtained the full benefit of the agreement for sale. They are in possession of all the properties, whereas what was sold to them was only a portion of such properties. They could not in any event get any property under Exhibits D and T in addition to what is included in these agreements for the amount that is payable to them; whereas if they got a decree now for the amounts that might be found to be due on the bonds as prayed for by them, the result will be that they will get not only the properties in these instruments of mortgage, Exhibits D and T, but will also be entitled to sell other properties of the defendants. For the amount as settled no interest is payable, as the mortgagee is in possession of the land and the plaintiffs are now entitled to recover only the principal amount under Exhibits D and T in substitution of the sums under the usufructuary mortgage and the hypothecation bonds and the other liabilities then dealt with. There is no evidence that the plaintiffs ever repudiated the agreement; whereas they acknowledged the binding character even in 1904. The defendants now accept that agreement and are willing to abide by it. It is doubtful whether the only question that remains to be settled between the parties for the specific performance of the contract, that is, the ascertainment of the properties which would yield interest at 5 per cent. for the amount payable, is not a matter that should be settled by the Court if any dispute arose between the parties themselves. We are not, therefore, prepared to assume for this reason the agreement is now incapable of specific performance. We think the proper course for the plaintiffs to follow in the circumstances of the case is to sue for specific performance, or in the alternative for a decree for the recovery of Rs. 62,500 due under Exhibits D and T. The suit now brought is only upon the three instruments of mortgage; that the entire agreement is

incapable of specific performance is not a question that is in issue and tried by the Court below. Whether the entire agreement is incapable of specific performance or not, it is not now open to the plaintiffs to re-open the accounts which have been settled. It will be difficult at this distance of time to ascertain the amount which was payable at that time by the parties respectively. The defendants gave up at the time of the settlement, as cited in Exhibit T, the questions that they had raised with reference to the lands in the suit They cannot be restored to their old position and the plaintiffs are estopped from re-opening the accounts so settled; and if that settlement of accounts is binding, the plaintiffs are not entitled to maintain a suit for the recovery of the amounts due under Exhibits A, B and C. In either view, therefore, the plaintiffs' suit fails. We, therefore, reverse the decree of the lower Court and dismiss the plaintiffs' suit. As the defendants did not take any steps for the ascertainment of the value of the lands, we direct each party to bear his own costs.

Appeal allowed; Suit dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 293 OF 1913.

April 6, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji. KT.,

ROBERT WILLIAM ANDERSON—DEFENDANT—APPELLANT.

versus

THE BANK OF UPPER INDIA, LTD.—PLAINTIFF—RESPONDENT.

Mortgage—Construction—Good-will and stock-in-trade mortgaged—Stock acquired after mortgage, if effected.

A certain person mortgaged the good-will and the stock-in-trade of his business. A list of the stock-intrade was scheduled to the mortgage-deed. There was a clause in the deed that the stock-in-trade would not be transferred. The scheduled stock was as a matter of fact, subsequently, sold and was re-placed by another:

Held, that the stock-in-trade which was acquired after the mortgage was not affected by the mortgage. [p. 986, col. 2.]

Topfield v. *Hillman*, (1843) 134 E. R. 883; 6 Man. & G. 245; 6 Scott (N. R.) 967; 12 L. J. C. P. 311; 7 Jur. 771, followed.

Coltman v. *Chamberlain*, (1890) 59 L. J. Q. B. 563; 39 W. R. 12; 25 Q. B. D. 328, referred to.

First appeal from a decree of the Subordinate Judge of Bareilly.

The Hon'ble Dr. *Sundar Lal*, for the Appellant.

Messrs. *B. E. O'Conor* and *P. N. Banerji*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the Bank of Upper India claiming that they might be put into possession of the chattels, goods, stock-in-trade, book-debts, securities and moneys and the business belonging to a firm of merchants carrying on business under the style of Burton & Co. at Bareilly, or in the alternative that the Bank should have a decree for the sum of Rs. 18,839-5-6 against the defendants jointly and severally and that in default of payment the business should be sold for the realisation of their debt.

The Court below has given the plaintiff Bank a decree directing the defendants to pay the sum of Rs. 18,839-5-6 together with interest and costs, and further that in the event of the amount in the hands of the Receiver (who had already been appointed) not being sufficient to pay the plaintiff's decree, the Receiver should call for tenders and sell the business of Messrs. Burton & Co. with the "good-will". etc., as a going concern.

We are informed that in execution of this decree the business has been sold as a going concern.

The defendant Robert William Anderson has appealed. The Bank's claim is based on a deed, dated the 11th of August 1911, executed by the defendant Graham in favour of the Bank of Upper India. The document commences by reciting that the said Graham was indebted to the Bank and other persons and required a loan of Rs. 11,000. Then follows a covenant to re-pay the Rs. 11,000 by instalments. There is a clause which provides "if for the preservation of the security hereby created it be necessary for the said Bank to make any advance or to incur any other charge, such advance or charge shall form part of this loan and be subject to the same stipulation about interest." The document then proceeds as follows: "and this indentu e further witnesseth that for the due re-payment of the money due under these presents and other charges as above specified and interest or botlr as above stated and agreed upon, the said mortgagor doth here-

by mortgage unto the said Bank, its executors and administrators and assigns all and singular the several chattels, goods, stock-in-trade and things specially described in the schedule hereto annexed. by way of security for the re-payment of the loan and interest and charges thereon as stipulated above. Further he, the mortgagor, as beneficial owner doth hereby mortgage unto the said Bank, its executors, administrators or assigns all the beneficial interest of the said business of Messrs. Burton & Co. with the fixtures appertaining thereto and also all the book-debts and other debts now due and owing to the said Percy Huburt Graham or Messrs. Burton & Co. upon account or in respect of the said trade or business and all securities for the same, to hold the same unto the said Bank, its executors, administrators or assigns for securing payment of the loan and interest thereon as stipulated." There is a further clause authorising the Bank in the event of default to take over the property mortgaged. (This power was admittedly never exercised). There was a further clause mortgaging or charging a certain policy of insurance of the life of the said Percy Huburt Graham and finally a clause (hopelessly inconsistent with the entire object of the deed) that the mortgagor would not alienate any of the property mortgaged during the continuance of the security. Attached to this deed is a schedule of the goods which formed the stock-in-trade of Graham's business at the time of the mortgage.

The appellant, Anderson, who was connected by marriage with Graham, got a deed from the latter on the 31st of August 1912. This document recites that Graham was indebted to Anderson in the sum of Rs. 22,854. This sum was made up of Rs. 15,000 advanced at the time in cash, Rs. 3,750, promissory notes executed in favour of Anderson by Graham, Rs. 1,654, a decree against Graham by a creditor, and Rs. 2,450 a debt due by Graham to another firm. This document provided for interest on the Rs. 15,000 at seven per cent. It gave Anderson power to take possession of all the stock-in-trade in the business. It provided that the stock-in-trade should be kept fully replenished and all new stock which was brought in should be regarded and treated as being pawned to secure the debt. This document was followed by another document, dated the 31st of August 1912, which provided for the carrying on of the business by Graham as a manager at a salary of Rs. 200 per month, and a man of the name of Norton (who also was connected with both Anderson and Graham by marriage) should be an assistant at a salary. The deed finally provided that as soon as all debts and incumbrances had been discharged, the business should belong to Graham, Anderson and to two Nortons in certain specified shares.

There was considerable controversy in the Court below as to whether Anderson had notice of the Bank's mortgage when he made the further advance of Rs. 15,000 and got the documents of the 31st of August 1912 executed in his favour. The Court below has found that he had notice but having regard to the view we take of the case, it is quite unnecessary for us to come to any decision on the question of notice. It is contended on behalf of the appellant that all that was mortgaged by the Bank's mortgage of the 11th of August 1911 were (1) the articles which are specified and set forth in the schedule to the deed; (2) the good-will and (3) the book-debts actually due at the time, that at the time of the mortgage, and certainly at the time the Receiver took possession of the property, all the goods which were mentioned in the schedule had long before been sold in the ordinary course of business and that the plaintiff's security did not attach to any goods that might have been subsequently purchased. (The appellant makes no claim to the policy of insurance.) The appellant contends that under the terms of his indenture he was entitled to enter into possession of the business and to carry it on, that all profits made during that time, or subsequently by the Receiver, belong to him, and that the proceeds of the sale, which is said to have taken place in execution of the decree, also belonged to him. He finally contends that in no event ought there to have been a personal decree against him.

On behalf of the respondent it is contended that on the true construction of

the indenture of the 11th of August 1911, any stock in-trade which was purchased to re-place the articles specified in the schedule must be regarded as part of the Bank's security, and that accordingly they are entitled to all profits in the hands of the Receiver as well as to the entire proceeds of the sale.

In our opinion it is absolutely clear that the goods and chattels described in the schedule alone were mortgaged. We think that the good-will of the business was also mortgaged. Mr. O'Conor on behalf of the respondent has cited the case of *Coltman* v. *Chamberlain* (1). That was a case of mortgage of a "ship and in her boats, guns, ammunitions, small arms and appurtenances." The question arose as to whether sundry articles of ship's furniture purchased after the date of the mortgage were included in the security. It was held on the construction of the mortgage in that case that all these articles passed under the mortgage of the "ship" or as "appurtenant" thereto.

A case much more like the present is the case of *Tapfield* v. *Hillman* (2). In that case there was a mortgage of an inn together with "the furniture, stock-in-trade in, about, upon or belonging to the Inn," with a power on non-payment to the mortgagee to enter into possession of the in nand "to take, possess, hold and enjoy all the goods, chattels, effects and premises." The question arose as to whether or not stock-in-trade and goods acquired after the date of the mortgage were covered by the deed. Pattison, J., at the trial held that on the true construction of the deed only the stock-in-trade existing at the date of the mortgage was pledged. Tindal, C. J., Coltman, J., Maule, J., and Cresswell, J., all concurred in holding that the after-acquired stock- n-trade was not subject to the mortgage. Coltman, J., s ys "It is not improbable that the parties intended that the security of the mortgagees should extend to the stock and effects brought upon the premises from time to time to re-place that which was disposed of and consumed by the plaintiff in the course of his business. We can, however, only look to the language of the deed, which clearly is not sufficient to include property not on the premises at the time the deed was executed."

If then the plaintiff's mortgage in the present case did not attach to the subsequently acquired stock, the Bank had no right to bring anything but the "good-will" to sale, and the question whether or not Anderson had notice of their mortgage became quite immaterial. In our opinion the plaintiff Bank are not entitled to the profits in the hands of the Receiver, nor are they entitled to any portion of the proceeds of the sale, save so far as the same are attributable to or represent the "good-will" of the business. In our opinion, also, the Bank are not entitled to a personal decree against the appellant.

It is unnecessary to decide the question of the amount to realise which the Bank were entitled to bring the mortgaged property to sale. It seems to us more than doubtful that they were entitled to add to their debt any sum that was not strictly paid or advanced for the purpose of preserving their security. *e. g.*, premium paid to keep up the policy of insurance.

Before passing a final order in the case we think it desirable to refer an issue to the Court below, namely, "what portion, if any, of the proceeds of the sale represents the value of the good-will."

Issue referred.

(1) (1890) 59 L. J. Q. B. 463; 25 Q. B. D. 328; 39 W. R. 12.

(2) (1843) 6 Man. & G. 245; 6 Scott (N. R.) 967; 12 L. J. C. P. 311; 7 Jur. 771; 134 E. R. 883.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 206 OF 1914.

April 12, 1915.

Present: Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerjee, KT.

HANSRAJ—DEFENDANT—APPELLANT

versus

RATNI—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 62—Principal and agent—Receipt of money after termination of agency—Money had and received.

Where an agent receives money due to the principal after the termination of his agency, a suit to recover the same must be brought within three years from the time of the receipt as money had and received. [p. 987, col. 1.]

KHESHTRAPAL SHARMA *v.* PANCHAM SINGH VARMA.

Second appeal from the decree of the District Judge of Saharanpur.

Dr. *Surendra Nath Sen*, for the Appellant.

Mr. *Jawahar Lal Nehru*, for Mr. *Moti Lal Nehru*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit in which the plaintiff prayed for an account of certain income which the defendant is alleged to have received as her agent and for a decree for the amount of such income when ascertained, and also for the recovery of papers and books containing the names of *jajmans*. The plaintiff's case was that her husband was a Ganga-*purohit* at Hardwar, that on his death she handed over the books, etc., to the defendant, who undertook to make use of them as her agent and to pay her over the income which was derived from pilgrims. There had been previous litigation between the parties commencing in the year 1905 and finally decided by the High Court in 1910. The decision was altogether favourable to the plaintiff, who was held to be entitled to the books and to the amount received by the defendant. The present suit was instituted on the 10th of February 1911. The relief claimed is substantially the same as that claimed in the previous suit, the difference being that an account was claimed for the period between the institution of the previous suit and the commencing of the present.

Both Courts have hell in favour of the plaintiff. On the general merits we entirely agree with the decision of the Court below. As to the decree, however, we feel that it must be modified. The plaintiff had determined any agency which existed between her and the defendant in the year 1905. From that time on the defendant in no way collected the ncome as the agent of the plaintiff. He did not hold himself out as her agent; on the contrary he was insisting upon collecting the income on his own behalf, wrongly making use of the books which contained the names of the pilgrims. In our opinion the only form of the suit in which the plaintiff is entitled to relief is for money had and received by the defendant for her use. Article 62 of the Limitation Act provides that such a suit must be brought within three years from the time of the receipt of the money. We must accordingly modify the decree of the Court below by directing that the accounts shall be limited to an acount of the income received three years before the institution of the present suit. In all other respects we affirm the decree of the Court below. As the appeal has substantially failed, the appellant must pay the costs of the respondent.

Decree modified.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION NO. 148 OF 1914.

May 7, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

KHESHTRAPAL SHARMA—PLAINTIFF—APPLICANT

versus

PANCHAM SINGH VARMA—DEFENDANT RESPONDENT.

Trade-mark, infringement of—Advertisement—Publication of advertisements—Cause of action—Jurisdiction.

A trade-mark can be infringed by means of advertisement. The cause of action for such infringement arises partly where the advertisement is published and distributed [p. 988, col. 1.]

Civil revision from an order of the District Judge of Agra.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Mr. *Moti Lal Nehru*), for the Applicant.

The Hon'ble Dr. *Sundar Lal*, for the Respondent.

JUDGMENT.—This is an application for revision of an order of the District Judge of Agra, confirming an order of the Subordinate Judge of Muttra directing that the plaint be returned to the plaintiff for presentation to the proper Court. The suit was one by the applicant for damages on account of alleged infringement by the defendant of the applicant's trade-mark. The applicant has for a considerable time been selling a medicine under the name of *Sudha Sindhu* which, we understand, means 'Ocean of nectar' in the course of his business at Muttra. He sells chiefly on V.-P. P. orders received in response to advertisements which he puts in the papers. The respondent, who is a resident of Gaya, sells a medicine which he calls *Asli Sudha Sindhu* in the same way. The applicant's case is that his trade-mark which h s been

duly registered has been infringed by the respondents. The alleged infringement is an advertisement of the respondent's medicine in papers published in Muttra and in circulars and hand-bills distributed in the same place. The Courts below have held that the suit should have been brought in Gaya. They have treated it as a question of convenience rather than as a question of law. But if the applicant can show that the cause of action arose wholly or in part within the limits of the jurisdiction of the Subordinate Judge of Muttra, he is entitled to maintain his suit in Muttra. The question is whether the publication of the advertisement by the respondent of his medicine, *Asli Sudha Sindhu*, in papers, hand-bills and circulars published in Muttra is an infringement of the applicant's trade-mark. For the purpose of this application we must, of course, assume that the applicant is entitled to the trade-mark which he claims and that the respondent's advertisement is calculated to induce people to believe that they will get from him the applicant's evidence. No authority has been produced in support of the argument that such an advertisement cannot be an infringement of the trade-mark. On the other hand several English cases have been cited which show that it has been held for some years past that a trade-mark may be infringed by means of an advertisement. We think it is sufficient to refer to decisions in *Jay* v. *Ladler* (1), *Bourne* v. *Swan and Edgar Limited* (2), and to the injunction which was issued by the House of Lords in the case of *Reddaway* v. *Banham* (3). On the authorities we must hold that if the facts are as alleged by the applicant, his trade-mark has been infringed within the jurisdiction of the Subordinate Judge of Muttra. We, therefore, allow this application, set aside the orders of the Courts below and direct that the record be returned to the Court of first instance and the suit restored to the pending file to be disposed of according to law. Costs here and hereto will be costs in the cause.

Application allowed.

(1) (1888) 40 Ch. D. 649; 60 L. T. 27; 37 W. R. 505.

(2) (1903) 1 Ch. 211; 72 L. J. Ch. 168; 51 W. R. 213; 87 L. T. 589; 19 T. L. R. 59; 20 R. P. C. 105.

(3) (1896) A. C. 199; 65 L. J. Q. B. 381; 74 L. T. 289; 44 W. R. 638.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 24 OF 1915.

April 23, 1915.

Present:—Mr. Justice Piggott.

DORI LAL—PLAINTIFF—APPLLICANT

versus

SEWAK RAM AND-ANOTHER—DEFENDANTS—RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881), s. 78—Promissory note—Suit by beneficial owner, whether maintainable.

A person who is entitled to the possession of a promissory note in his own name is alone entitled to sue upon it whether the instrument be negotiable or not. [p. 988, col. 2.]

Ramanuja Ayyangar v. *Sadagopa Ayyangar*, 28 M. 205; 15 M. L. J. 249; *Subramanya Tevan* v. *Arunachela Tevan*, 18 M. L. J. 186, referred to.

Civil revision from an order of the Subordinate Judge of Pilibhit.

Mr. *Gulzari Lal*, for the Appellant.

Mr. *Sarat Chandra Chaudhri*, for the Repondents.

JUDGMENT.—This suit was brought upon a promissory note executed in favour of one Ram Narain. The plaintiff claims to be the true owner of the instrument from the time of its execution, and alleges Ram Narain to have been a *benamidar* for himself. He has also impleaded as defendants the heirs of the ostensible payee. After the suit had been decreed by the first Court, it was dismissed by the learned Subordinate Judge of Pilibhit, on the ground that only the ostensible payee can maintain a suit upon a promissory note. The Subordinate Judge has supported himself by authority of a Madras case, in respect of which it is contended here that the learned Judges who decided that case were referring specifically to a negotiable instrument as defined in section 13 of the Negotiable Instruments Act (XXVI of 1881). I find, however, that there is clear authority of the same Court on the same point in *Ramanuja Ayyangar* v. *Sadagopa Ayyangar* (1) and in *Subramanya Tevan* v. *Arunachela Tevan* (2). According to section 78 of the Negotiable Instruments Act, only the holder of a promissory note can receive payment of the same so as to discharge the maker, and this section applies whether the promissory note in question was negotiable or not. The "holder" of a

(1) 28 M. 205; 25 M. L. J. 249.

(2) 18 M. L. J. 186.

promissory note is defined in section 8 of the same Act, and means a person entitled *in his own name* to the possession thereof. In the absence of any ruling to the contrary, I am certainly not prepared to hold that the learned Subordinate Judge acted with material irregularity in the exercise of his jurisdiction in applying to the decision of the question of law raised by the pleadings before him a principle which has been specifically laid down by one at any rate of the High Courts in India, and not dissented from by the Court to which he is subordinate. I dismiss the application with costs.

Application dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 98 OF 1913.

May 19, 1915.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Roe.

NILKANTA ROY CHOWDHURY AND OTHERS—DEFENDANTS—APPELLANTS

versus

LALIT MOHAN BANERJEE AND ANOTHER —PLAINTIFFS—RESPONDENTS.

Specific performance—One contract alleged and different contract proved—Damages.

Where a plaintiff has alleged a contract of which he seeks specific performance but fails to establish it, the Court will not make a decree for specific performance of a different contract. [p. 989, col. 2.]

Hawkins v. *Maltby*, (1867) 3 Ch. App. 188 at p. 194; 37 L. J. Ch. 58; 17 L. T. 397; 16 W. R. 209; *Lindsay* v. *Lynch*, 2 Sch. & Lef. 1; 9 R. R. 54 and *Mortimer* v. *Orchard*, 2 Ves. 243; 30 E. R. 615, referred to.

Where there is a contract of which specific performance would not be decreed by the Court of Equity the plaintiff is entitled, owing to the wrongful repudiation of that contract by the defendant, to treat the contract itself as at an end and to recover damages for the loss of it, in addition to damages in respect of those breaches of it which may have been committed before repudiation. [p. 990, col. 1.]

Dominion Coal Company v. *Dominion Iron and Steel Company*, (1909) App. Cas. 293 at p. 311; 78 L. J. P. C. 115; 100 L. T. 245; 25 T. L. R. 309.

To make a decree for damages for the breach of a contract which is not the subject-matter of the litigation, would be to assume that there has been a breach of that contract which has never been attempted to be specifically enforced. [p 990, col. 1.]

The principle upon which the Court refuses specific performance of a contract not the subject-matter of the suit, is equally applicable to the claim for damages for breach of that contract. [p. 990, col. 1.]

Appeal against the decree of the Subordinate Judge, Faridpur, dated 26th September 1912, reversing that of the Munsif, Madaripur, dated 31st July 1911.

Babu *Brojolal Chakravarti*, for the Appellants.

Babu *Upendra Lal Roy*, for the Respondents.

JUDGMENT.—This is an appeal by the defendants in a suit framed, in the alternative, for specific performance of a contract to grant a lease of land specified in the schedule to the plaint, or for the award of damages for wrongful breach of that contract. The Courts below have concurrently found against the plaintiffs that there was no contract to grant a lease of the land specified in the plaint; and in this view, they have dismissed the claim for specific performance. But while the primary Court dismissed the claim for damages as well, the Subordinate Judge has awarded the plaintiffs damages to the extent of Rs. 500. On the present appeal the controversy has centred round the question, whether it was competent to the Subordinate Judge to award damages. In our opinion there is no room for serious argument that the decree of the Subordinate Judge cannot be supported.

It is well settled that when a plaintiff has alleged a contract of which he seeks specific performance and fails to establish it, the Court will not make a decree for specific performance of a different contract. If any authority is needed for this elementary proposition, reference may be made to the judgment of Lord Chelmsford in the case of *Hawkins* v. *Maltby* (1) where the bill for specific performance was dismissed as one contract was alleged and another was proved. [See also *Lindsay* v. *Lynch* (2) and *Mortimer* v. *Orchard* (3).] This view has not been assailed on behalf of the respondents. But they have argued that this doctrine is not applicable in respect of the claim for damages for breach of contract; this contention, however, is manifestly unfounded. On what

(1) (1867) 3 Ch. App. 188 at p. 194; 37 L. J. Ch. 58; 17 L. T. 397; 16 W. R. 209.
(2) 2 Sch. & Lef. 1; 9 R. R. 54.
(3) 2 Ves. 243; 30 E. R. 615.

footing a decree for damages is made in a suit for specific performance of contract was explained by Lord Atkinson in the case of *Dominion Coal Company* v. *Dominion Iron and Steel Company* (4). Where there is a contract of which specific performance would not be decreed by a Court of Equity, the plaintiffs are entitled, owing to the wrongful repudiation of that contract by the defendants, to treat the contract itself as at an end and to recover damages for the loss of it, in addition to damages in respect of those breaches of it which may have been committed before repudiation. The expression of the same idea may be attempted in somewhat different terms: from every contract, there immediately and directly results an obligation on each of the contracting parties towards the other of them to perform such of the terms of the contract as he has undertaken to perform; and if the person on whom this obligation rests fail to discharge it, there results to the other party a right, at his election, either to insist on the actual performance of the contract or to obtain satisfaction for the non-performance of it [*Mackay* v. *Dick* (5)]. Consequently, damages can be decreed for breach of a contract which might, but for exceptional circumstances, have been specifically enforced. In the case before us, the suit has not been instituted on the real contract; specific performance has accordingly been rightly refused. How, then, can damages be decreed for breach of the real contract, which has not been investigated by the Court and for the breach whereof the suit has not been instituted? For ought we know, the defendant may still be willing to perform the real contract, only if the plaintiffs were disposed to accept performance thereof. To make a decree for damages for the breach of a contract which is not the subject-matter of the litigation, would be to assume that there has been a breach of that contract which has never been attempted to be specifically enforced. The principle upon which the Court refuses specific performance of a contract not the subject-matter of the suit, is equally applicable to the claim for damages for breach of that contract.

(4) (1909) App. Cas. 293 at p. 311; 78 L. J. P. C. 115; 100 L. T. 245; 25 T. L. R. 309.
(5) (1881) 6 App. Cas. 251; 29 W. R. 541.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the suit dismissed with costs in all the Courts.

Appeal allowed.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 34 OF 1915.

May 10, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

KASHI NATH AND ANOTHER—DECREE-HOLDERS—APPELLANTS

versus

KANHAIYA LAL SHARMA—RECEIVER—RESPONDENT.

Provincial Insolvency Act (III of 1907), s. 34—Property attached but not sold before adjudication, effect of—Receiver, powers of.

Section 34 of the Provincial Insolvency Act was intended to put creditors of an insolvent, who have not actually attached the property before the date of the order of adjudication in at least as good a position as creditors of the insolvent who, but for his insolvency, would have been entitled to claim a rateable distribution of the assets received on an execution sale. [p. 991, col. 2.]

A creditor instituted a suit against his debtor and attached his property before judgment. Subsequently the debtor was adjudicated insolvent. After the order of adjudication, the creditor who had attached the property proceeded to sell the property in execution of his decree. The Receiver objected and claimed the property for the general body of creditors:

Held, that the property not having been sold before adjudication was still the property of his insolvents and as such was available to the general body of creditors. [p. 991, col. 2.]

First appeal from an order of the Second Additional Judge of Aligarh.

The Hon'ble Mr. *Abdul Rauf*, for the Appellants.

Mr. *Pearey Lal Banerji*, for the Respondent.

JUDGMENT.—This is an appeal against an order of the Second Additional Judge of Aligarh, passed under the Provincial Insolvency Act. In June 1909, the appellants filed a suit against Keshab Deo and others and they caused certain immoveable property of Keshab Deo to be attached under Order XXXVIII of the Code of Civil Procedure before judgment. The appellants obtained a decree in that suit on June 12th, 1913. In the meantime Keshab Deo

had transferred portions of the property by four sale-deeds, dated November 15th and 16th and December 6th and 9th, 1909, and part of the property which had been attached had been sold in 1909 in execution of a decree passed by the Bombay High Court. Keshab Deo had, in 1911, been declared insolvent and the respondent, Pandit Kanhaiya Lal Sharma, had been appointed Receiver of his property. The Receiver has claimed the property in question as property which is available for the creditors of the insolvent, and the learned Judge has decided that it is property available for the creditors, and has directed the Subordinate Judge who placed the property under attachment to release it from the attachment and make it over to the Receiver. It appears that execution of the decree obtained by the appellants was taken out by them in 1914, the property was proclaimed for sale and the sale was to have taken place on January 22nd last. It was at this point that the Receiver claimed the property on behalf of the general body of creditors. Under section 64 of the Code of Civil Procedure neither private alienations made by Keshab Deo nor the execution sale of the property could affect the rights of the appellants to bring the property to sale in execution of their decree. The appellants' case is that the property has under the private alienations and the execution sale ceased to be the property of Keshab Deo, and that all that the appellants have is the special right conferred upon them by section 64 of the Code of Civil Procedure to execute their decree against the property, notwithstanding the private alienations and the execution sale. They contend that the property is no longer the property of Keshab Deo and, therefore, section 34 of the Provincial Insolvency Act does not apply so as to entitle the Receiver to claim it. It may be that the private alienations and also the execution sale of the property are void as against the Receiver, and if so, there can, of course, be no doubt that the property is the property of Keshab Deo and section 34 must be held to be applicable. Assuming, however, that the private alienations and the execution sale are not voidable or void as against the Receiver, we think that the property must still be regarded as the property of the debtor, Keshab Deo. The decree-holders are entitled to bring the property to sale as the property of Keshab Deo because the private alienations and execution sale are void as against them. Section 34 of the Provincial Insolvency Act provides that where execution of a decree is issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the Receiver except in respect of assets realized in the course of execution by sale or otherwise before the date of the order of adjudication. The sale has not yet taken place, but execution of the appellant's decree has issued against the property. In our opinion the property must still be regarded as the property of the debtor, and it is as property of the debtor that it is liable to answer the decree held by the appellants. It seems to us quite clear that section 34 of the Provincial Insolvency Act was intended to put creditors of an insolvent who have not actually attached the property before the date of the order of adjudication in at least as good a position as creditors of the insolvent who, but for his insolvency, would have been entitled to claim a rateable distribution of the assets received on an execution sale. In our opinion the learned Judge was right in holding that the property was available for the general body of creditors. But we express no opinion as to the rights of the alienees or of the purchasers at the execution sale, as they are not before us. The appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 264 OF 1913.

April 16, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

S. RATNA NAIDU—PLAINTIFF—APPELLANT

versus

P. R. AIYANACHARIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 59—Mortgage-deed not attested by two witnesses—Invalidity of mortgage—Pleas raised in course of trial but not in pleadings—Court, duty of—Procedure.

RATNA NAIDU *v.* AIYANACHARIAR.

Where in the course of the trial and not in the pleadings a defendant raises the plea that the mortgage is invalid because the signature of the mortgagor was not attested by two witnesses as required by section 59 of the Transfer of Property Act, the Court should not dismiss the suit for that reason. It is only upon a distinct and supplemental issue framed on the point and after giving both the parties an opportunity to adduce fresh evidence on it, that a Court should find for or against the invalidity of the document for that reason. [p. 992, col. 1.]

Shamu Patter v. *Abdul Kadir Rowthan*, 16 Ind. Cas. 250; 35 M. 607; 16 C. W. N. 1009; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034; 16 C. L. J. 596; 39 I. A. 220, followed.

Second appeal against the decree of the District Court of Trichinopoly, in Appeal Suit No. 489 of 1911, preferred against that of the Court of the District Munsif of Srirangam, in Original Suit No. 373 of 1910.

Mr. *M. O. Parthasaradhi Aiyangar*, for the Appellant.

Messrs. *S. Gopalaswami Aiyangar* and *C. Padmanabha Aiyangar*, for the Respondents.

This appeal coming on for hearing on the 5th October 1914, the Court delivered the following

JUDGMENT:—We think that, on the pleadings, the question was not raised whether the document Exhibit B was invalid as a mortgage, on the ground that it was not attested by two persons who saw the executant sign the document. Taking it that it was raised by the defendants during the trial, the District Munsif ought to have framed a supplemental issue on this new question, given an opportunity to the parties to adduce evidence thereon and then decided it.

In the case of *Shamu Patter* v. *Abdul Kadir Rowthan* (1), a supplemental issue was raised by the Court (though at a late stage) and there was no contention that the plaintiff had not been given sufficient opportunity to let in evidence on the supplemental issue.

We request the lower Appellate Court to frame the necessary issue and to give a finding thereon allowing both sides to adduce fresh evidence. [We might remark that neither of the lower Courts has definitely pronounced whether it believes the 1st defendant, the plaintiff's witness No. 2 and defendant's witness No. 1 when they deny that they (plaintiff's witness No. 2 and defendant's witness No. 1) saw the 1st defendant sign the mortgage-deed.

The finding will be returned in six weeks from the date of receipt of records in the lower Appellate Court and ten days will be allowed for filing objections.

In compliance with the order contained in the above judgment, the District Judge of Trichinopoly submitted the following

FINDING.—I am asked for a finding "whether Exhibit B is invalid as a mortgage on the ground that it was not attested by two persons who saw the executant sign the document?" No fresh evidence is adduced.

2. Exhibit B is a mortgage-deed by 1st defendant to Arayar Rangachariar for Rs. 950. It is attested by three persons. Only one of them says he saw 1st defendant sign it. The other two say 1st defendant said he signed it, so they attested but they did not see him sign. The Munsif, therefore, found the mortgage was not proved and plaintiff could claim no charge thereunder. It is argued now that P. W. No. 2 and P. W. No. 1 really lie when they say they did not see 1st defendant sign the document.

3. The document purports to be for Rs. 950 made up of moneys due on three prior bonds. No consideration was paid at the time. P. W. No. 3 saw 1st defendant sign it. P. W. No. 2 says he attested the document and 1st defendant executed it. But in cross-examination he says he did not see this execution by 1st defendant and says the money was borrowed in cash for a present to a dancing girl—thus contradicting the terms of the document.

4. P. W. No. 1 also attested the document, but did not see it signed by 1st defendant. He says Rs. 700 were paid in cash to 1st defendant and plaintiff lost Rs. 250 as discount. He also contradicts the terms of the document. This man was twice summoned by plaintiff and did not appear. He was finally summoned and examined by defendant, a circumstance that suggests that

(1) 16 Ind. Cas. 250; 35 M. 607; 16 C. W. N. 1009; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034; 16 C. L. J. 596; 39 I. A. 220.

he really did see the signature of 1st defendant and was brought over.

5. The written statement never raised this plea that the mortgage was invalid for want of attestation and I reject it as a subsequent plea to support which the two attestors were brought over. I find that Exhibit B was duly attested and is not invalid for want of attestation by two persons who saw the executant sign it.

This case coming on for final hearing after receipt of the finding of the lower Appellate Court on the issue referred to it for trial, the Court delivered the following

JUDGMENT.—The evidence of plaintiff's witness No. 2 in chief examination, though contradicted by him in cross-examination, must be taken to have been believed by the District Judge who finds that all three witnesses (including plaintiff's witness No. 2) were present at and saw the execution of the document.

We accept the finding and setting aside the decrees of the lower Courts, remand the suit to the District Judge for disposal of the appeal on the other questions in the case. Costs hitherto will be costs in the cause.

Case remanded.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 10 OF 1914.
May 20, 1915.
Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.
ZAMIR AHMAD AND ANOTHER—DEFENDANTS —APPELLANTS
versus
ABDUL RAZZAK AND OTHERS—PLAINTIFFS —RESPONDENTS.

Pre-emption—Right of pre-emption mentioned in Wajib-ul-arz—*No incidents given—Muhammadan Law.*

Where a *wajib-ul-arz* provided that a right of pre-emption existed among the owners of the *khalsa* separately and among the owners of the *milak* separately but gave no incidents of the custom of pre-emption:

Held, that the right was co-extensive with that given by the Muhammadan Law. [p. 994, col. 1.]

First appeal from an order of the Additional Judge of Moradabad.

Dr. *Surendro Nath Sen*, for the Appellants.

Mr. *B. E. O'Conor*, for the Respondents.

JUDGMENT.—This is an appeal arising out of a suit for pre-emption in respect of a certain *zemindari* situate in the village of Katra. Originally this village consisted of two *mahals*, one of $11\frac{3}{4}$ *biswas* and one $8\frac{1}{4}$ *biswas*. The $8\frac{1}{4}$ *biswas mahal* was subsequently divided into two *mahals*, one of $3\frac{1}{4}$ *biswas* and one of 5 *biswas*. The 5 *biswas mahal* (which is now a 20 *biswas mahal*) belonged one-half to the vendors and one-half to the pre-emptors. The vendors have sold their half share to a stranger. The pre-emptors brought their suit to enforce their right, alleging (*a*) in paragraph 3 of their plaint, that the "custom of pre-emption prevailed among proprietors of the *khalsa*" as entered in the *wajib-ul-arz* of the village and also (*b*) (as set out in paragraph 6 of the plaint) that directly he "got the news of the sale he fulfilled the conditions by the Muhammadan Law for pre emption" and called upon the defendant to transfer the pre-empted property to him for the price entered in the sale-deed. The defendants met the case first of all by denial that there was any custom of pre-emption in the village at all, or that the plaintiffs had a right of pre-emption on the basis of the *wajib-ul-arz* to which the provisions of the Muhammadan Law applied, that the plaintiffs had not in any way fulfilled the necessary demands. It was alleged that the plaintiffs had actually refused to purchase the property after full notice and, therefore, if they had had any right they had lost it. Five issues were framed, the *first*:—Does the custom of pre-emption prevail in *Mauza* Katra? This the Court below decided in favour of the plaintiffs and the decision is not seriously contested here. The *second* issue was:—"If so, what are the incidents of the custom, whether those arising under the Muhammadan Law or not?" On this issue the Court held that the rules of Muhammadan Law did not apply. Issue *three* was:—"Under the custom (if any) found to prevail is the plaintiff entitled to pre-empt?" This issue was found in the affirmative. The *fourth* issue:—"Have the plaintiffs performed the preliminaries necessary to pre-emption under the Muhammadan Law?" This issue was left undecided

as being unnecessary in view of the finding on the second issue, and consequently evidence on this issue was not taken. The *fifth* issue was:—"Did the sale take place with the plaintiffs' knowledge and after their refusal to purchase. If so, is their right of pre-emption lost." On this point the Court below held in favour of the plaintiffs.

The sole point which has been argued before us is, whether or not the rule of Muhammadan Law applied in the present case. It is pointed out that in the *wajib-ul-arz* the custom as set forth is laid down in the following words:—"among the owners of the *khalsa* separately and among the owners of the *milak* separately the custom of pre-emption is in vogue," that no incidents of the custom are set forth and that, therefore, the principle that has been laid down in a long series of rulings of this Court should be applied and in such cases the rule of Muhammadan Law must be followed. The latest decision on the point is to be found in *Jagdam Sahai* v. *Mahabir Prasad* (1). The judgment therein refers to *Ram Prasad* v. *Abdul Karim* (2), and it is an admitted fact that those rulings have been consistently followed in this Court. The lower Appellate Court has tried to distinguish the present case from those quoted, on the ground that the *wajib-ul-arz* stated that the right of pre-emption exists among the owners of each class of property as such, but if the *wajib-ul-arz* had merely stated that the custom existed, the learned Additional Judge would have felt bound by the rulings cited and would have applied the Muhammadan Law in the case. We do not think that the language of the present *wajib-ul-arz* is such as to enable us to distinguish it from those in the cases quoted. The meaning of the document is simply this, that among the co-sharers of the *khalsa* the custom of pre-emption prevailed. None of the incidents are set forth and it seems to us clearly a case in which the right is co-extensive with that given by the Muhammadan Law. We, therefore, before deciding the case, must have a decision by the Court below on the fourth issue framed by it. The parties will be allowed to give fresh evidence on that point relevant to the issue. Ten days will be allowed on receipt of the finding for objection.

Issue remitted.

(1) 2 A. L. J. 482; A. W. N. (1905) 190; 28 A. 60.
(2) 9 A. 513; A. W. N. (1887) 146.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 27 OF 1915.

May 6, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

BINDA PRASAD—OPPOSITE PARTY—APPELLANT

versus

RAGHUBIR SARAN AND OTHERS—APPLICANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 1—Review, sufficient ground for.

An application for review was made on the sole ground that if the Court allowed the applicants another opportunity of producing evidence, they might persuade the Judge that the view taken by him on the previous occasion was erroneous:

Held, that this was not a sufficient ground for review under Order XLVII, rule 1, of the Civil Procedure Code. [p. 995, col. 2.]

First appeal from an order of the District Judge of Meerut.

Mr. *Harendra Krishna Mukerji* (with him Mr. *A. H. C. Hamilton*), for the Appellant.

Mr. *Sital Prasad Ghosh*, for the Respondents.

JUDGMENT.—This is an appeal by leave of the Court under section 46, sub-section (3), of the Provincial Insolvency Act, against an order of the District Judge of Meerut, allowing an application presented by the respondents for review of a previous order, whereby the appellant's half-share in a brick-kiln had been released from attachment and declared not to be available as assets for the payment of the debts of one Abdul Haq, who had been declared an insolvent. On June 27th, 1914, Abdul Haq applied to be declared an insolvent and named eleven creditors, among whom were the two respondents, Raghubir Saran and Badr-ud-din. On August 27th, he was adjudicated an insolvent and on September 24th, the Deputy Nazir of the Court was appointed Receiver. The Receiver attached or took possession of the brick-kiln, whereupon the appellant objected, saying that the brick-kiln was his property. He explained that it had been

the property of himself and his partner Abdul Haq, and that Abdul Haq had on March 26th, 1914, transferred to him his half-share in the brick-kiln for valuable consideration. Thereupon the District Judge directed that the sale of the brick-kiln which had been ordered should be postponed. The appellant had brought a suit in the Subordinate Judge's Court for a declaration of his title as owner of the brick-kiln against Ram Chander and the insolvent. The District Judge accepted the appellant's admitted half-share in the brick-kiln as sufficient security for any loss which might result from the postponement of the sale and thereupon the respondents, Raghubir Saran and Badr-ud-din, presented a petition objecting to the acceptance of Binda Prasad's half-share as security and alleging that the transfer of the insolvent's half-share to him was voidable and should be set aside under sections 36 and 37 of the Insolvency Act. January 19th was fixed for hearing and ultimately the case was taken up on the 21st, when the District Judge rejected the petition of Raghubir Saran and Badr-ud-din and released the whole of the brick-kiln from attachment, finding that the sale by the insolvent of his half share in the brick-kiln to Binda Prasad was valid and could not be set aside. Six days later Raghubir Saran and Badr-ud-din presented a petition to the District Judge for review of the order just mentioned. Notice was issued and the District Judge on February 10th, 1915, granted the application for review, set aside his order of January 21st and fixed a date for the further hearing of the case, noting that the parties should produce evidence regarding the good faith of the transaction which had been impugned. The District Judge ordered the re-attachment of the brick-kiln and directed the Receiver to sell the bricks as soon as possible and deposit the proceeds in Court. It is against this order that the present appeal was filed. On the application of the appellant the sale of the bricks was postponed pending the disposal of this appeal.

On behalf of the appellant it is contended that the respondents, Raghubir Saran and Badr-ud din, showed no sufficient cause for a review of the order of January 21st, 1915. It was not suggested in their petition, and it is not suggested now, that they discovered any new and important matter or evidence which was not within their knowledge or could not have been produced by them before the order of January 21st was passed. Nor was it suggested that there was any mistake or error apparent on the face of the record. When the respondent's learned Pleader was asked by this Court to state the ground on which the application for review was based, he said that a review had been asked for "for other sufficient reason" within the meaning of Order XLVII, rule 1 of the Civil Procedure Code. From the application it appears to us that the ground for review, if there was a ground at all, was that if the District Judge allowed the applicants another opportunity of producing evidence they might persuade him that the view taken by him on January 21st was erroneous. The District Judge in granting the application for review and setting aside his previous order does not say that he is satisfied that his previous order was wrong, and does not in any way indicate his reason for allowing the application beyond this, that he thought that there was a case for further inquiry. It seems to us that no sufficient ground was made out for a review of the previous order. An attempt was made on behalf of the respondents to show that the question of the validity of the transfer of half of the brick-kiln was not considered by the District Judge before passing his first order; but an examination of the order shows that the District Judge did apply his mind to that very question. He refers at the beginning of his order to the application of November 19th, 1914, and says that the question is whether the transfer to Binda Prasad should be cancelled under section 36 of the Insolvency Act. It is, therefore, quite clear that the question was before the Court and was decided upon such materials as were available. Under the circumstances we do not think that the application for review should have been allowed. We, therefore, allow the appeal and set aside the order of the District Judge dated February 10th, 1915, with costs. It appears to us that the appeal has been overvalued. We fix the Vakil's fee in this Court at Rs. 50, fifty rupees, only.

Appeal allowed.

SARJU PRASAD v. MAHADEO PANDÉ.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 139 OF 1914.

May 7, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

SARJU PRASAD—PLAINTIFF—APPLICANT

versus

MAHADEO PANDE AND OTHERS—DEFENDANTS—RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887), s. 37—Small Cause suit—Transfer of case to regular side—Decision—Appeal, maintainability of.

A suit of a Small Cause Court nature was filed before a Munsif, who had the powers of a Small Cause Court Judge, and was registered as a Small Cause Court suit. Subsequently the Munsif was succeeded by an officer who had no Small Cause Court powers. The latter officer ordered the case to be transferred to the regular side and tried it as a regular suit. An appeal against his decision was dismissed on the ground that no appeal lay:

Held, that an appeal did lie [p. 937, col. 1.]

Shiam Behari Lal v. *Kali*, 22 Ind. Cas. 909; 12 A. L. J. 109, approved of.

Mangal Sen v. *Rup Chand*, 13 A. 324; A. W. N. (1891) 96, not followed.

Kamta Parshad v. *Mahabal Singh*; 6 O. C. 81, *Dulal Chandra* v. *Ram Narain Deb*, 31 C. 1057, *Ramchandra* v. *Ganesh*, 23 B 382, referred to.

Civil revision from an order of the Additional Subordinate Judge of Gorakhpur.

The application came on for hearing before Mr: Justice Chamier, sitting singly, who passed the following

ORDER OF REFERENCE.

This is an application for revision of an order of the Additional Subordinate Judge of Gorakhpur, rejecting an appeal on the ground that the suit out of which it arose was a Small Cause Court suit and, therefore, no appeal lay. The facts are that the suit was instituted in the Court of an officer who had been invested with the power of a Judge of a Small Cause Court up to a certain pecuniary limit. The suit was registered on the Small Cause Court side. Sometime after the written statement had been filed the Munsif went on leave and was succeeded by an officer who had not been invested with the powers of a Small Cause Court. The latter officer passed an order transferring to the regular side all Small Cause Court suits which he then found pending in the Court and he tried out those cases as regular suits. The Subordinate Judge purports to follow the decision of this Court in *Mangal Sen* v. *Rup Chand* (1), in holding that no appeal lay. In the case of *Kamta Parshad* v. *Mahabal Singh* (2), Mr. Scott and I were unable to accept the construction placed upon section 35 of the Provincial Small Cause Courts Act by this Court in the case cited, and it appears to me that a further recent decision of Mr. Justice Knox in *Shiam Behari Lal* v. *Kali* (3) is inconsistent with the decision in that case. I am of opinion that the recent decision of Mr. Justice Knox is correct and I explained my reasons for the view which I have taken of section 35 in the case of *Kamta Parshad* v. *Mahabal Singh* (2); but sitting alone I do not feel justified in deciding contrary to the decision of a Bench of two Judges of this Court. I, therefore, refer this application for revision to a Bench of two Judges.

(1) 13 A. 324; A. W. N. (1891) 96.

Mr. *Jogendra Nath Mukerji*, for the Applicant.

Mr. *Sital Prasad Ghose*, for the Respondents.

JUDGMENT.—This is an application for revision of an order of the Additional Subordinate Judge of Gorakhpur, rejecting an appeal by the appellant on the ground that the suit out of which it arose was a Small Cause Court suit and, therefore, no appeal lay. The facts are that the suit was instituted in the Court of a Munsif who had been invested under section 25 of the Bengal, North-Western Provinces and Assam Civil Courts Act, XII of 1887, with the jurisdiction of a Judge of a Court of Small Causes up to a certain pecuniary limit. The suit was registered on the Small Cause Court side. Sometime after the written statement had been filed the Munsif went on leave and was succeeded by an officer who had not been invested with the jurisdiction of a Judge of a Court of Small Causes. The latter officer passed an order transferring to the regular side all Small Cause Court suits which he found pending in the Court and tried them out as regular suits. One of those suits was the suit out of which this application has arisen. The Munsif dismissed it and the plaintiff appealed. The Subordinate Judge purporting to follow the decision of this Court in *Mangal Sen* v. *Rup Chand* (1) has held that no appeal lay. The facts of that case are

(2) 6 O. C. 81.

(3) 22 Ind. Cas. 909; 12 A. L. J. 109.

not on all fours with those of the present case, for in that case an order had been passed under section 25 of the Code of Civil Procedure of 1882, and the Court was of opinion that under the last paragraph of that section the Court to which a Small Cause Court suit is transferred must, for the purposes of the suit, be deemed to be a Court of Small Causes. It is true that the learned Judges referred also to section 35 of the Provincial Small Cause Courts Act and indicated that their opinion would have been the same whether the case were transferred under section 25 of the Code of Civil Procedure or section 35 of the Provincial Small Cause Courts Act. The decision referred to has been dissented from by the Calcutta High Court in *Dulal Chandra Deb* v. *Ram Narain Deb* (4), and also by the Bombay High Court in *Ramchandra* v. *Ganesh* (5). In Oudh the view taken for several years past has been that which has been adopted by the Calcutta and Bombay High Courts, Vide *Kamta Parshad* v. *Mahabal Singh* (2). In a very recent case, *Shiam Behari Lal* v. *Kali* (3), Mr. Justice, Knox, who was one of the Judges, who took part in the decision of the case of *Mangal Sen* v. *Rup Chand* (1), held that in a case of this kind the officer who succeeded the officer before whom the suit was filed was bound to try such a suit as this as a regular suit. A decree had been passed in the form of Small Cause Courts decree. Mr. Justice Knox held that the unsuccessful party had been prejudiced by the procedure adopted inasmuch as he had been deprived of the right of appeal, and he set aside the decree. The view taken in the case of *Shiam Behari Lal* v. *Kali* (3) is in argreement with the view taken by the Calcutta, Bombay and Oudh Courts and is, we think, correct. It seems to us that under section 35 of Act IX of 1887 the Munsif who tried the suit, not having been invested with the jurisdiction of a Court of Small Causes, was bound to try out the suit as a regular suit, and that there was a right of appeal against his decision. We allow this application, set aside the order of the Subordinate Judge; return the record to his Court and direct that the appeal be restored to the pending file and disposed of according to law. Costs of this application will be costs in the cause.

Application allowed;
Order set aside.

(4) 31 C. 1057.
(5) 23 B. 382.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 227 OF 1913.

January 20, 1915.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Hannay.

T. V. RAJARAM ROW AND OTHERS—DEFENDANTS—APPELLANTS

versus

A. B. VENKATACHELA CHETTIAR—PLAINTIFF—RESPONDENT.

Trusts Act (II of 1882), ss. 20, 23—Agreement by lessee to deposit one year's rent with lessor—Lessor, whether trustee — Deposit of money by lessor in Bank at lessee's request — Failure of Bank—Lessor, whether liable for loss.

Where a lessee deposited an amount equivalent to one year's rent with his lessor till the expiry of the lease or its cancellation and at his request the lessor deposited the money in a certain Bank and paid its interest to the lessee, but the Bank failed and the lessor's assignee sued the lessee for rent:

Held, that even if the lessor be assumed to be in the position of a trustee, he was not liable for the loss of the money and his assignee was entitled to sue for the rent. [p. 997, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge of Tanjore, in Original Suit No. 30 of 1911.

Messrs. T. *Rangachariar* and *T. V. Muthukrishna Aiyar*, for the Appellants.

Messrs. *C. V. Anantha Krishna Aiyar* and *K. R. Rangaswami Aiyangar*, for the Respondent.

JUDGMENT.—In this case under Exhibit B the appellant, the lessee, was to deposit an amount equivalent to one year's rent with the lessor till the expiry of the lease or its cancellation. It was to be applied at the expiry of the lease towards the rent of the last year, if nothing was due for previous years. At the request of the lessee evidenced by Exhibits A and C, the lessor deposited the money with Arbuthnot and Company and paid the interest to the lessee. At first the deposit was in their joint names but afterwards in the name of the lessor alone. Assuming the lessor to have been in the

position of a trustee, this was not a breach of trust as there was no stipulation that the money should be deposited in their joint names. While the fund was in this state of investment, Arbuthnot and Company failed and the greater part of the deposit was lost. The lessor's assignee now sues to recover the rent for the last *fasli*. It has already been held in *T. V. Rajaram Rao* v. *Sundaram Aiyar* (1) and Letters Patent Appeal No. 65 of 1910 on similar facts there was no answer to claims and we agree with these decisions. The money was lessee's money and was deposited by the lessor with Arbuthnot and Company at his request. Even if the lessor, as argued, was under the obligations of a trustee in regard to it, and the investment was in contravention of the provisions of section 20 of the Trusts Act, the case is fully covered by section 23 and the lessor is not liable. The last year's rent has not been paid and the above facts disclose no answer to a claim for it either by the lessor or his assignee.

The appeal is dismissed with costs.

Appeal dismissed.

(1) 8 Ind. Cas. 299; (1910) 1 M. W. N. 566; 8 M. L. T. 350.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 13 OF 1915.

April 26, 1915.

Present:—Mr. Justice Piggott.

NAND KISHORE—PETITIONER

versus

SURAJ MAL AND OTHERS—OPPOSITE PARTIES.

Provincial Insolvency Act (III of 1907), s. 43—Receiver's report as to fraud of insolvent, admissibility of, in evidence.

The report of a Receiver of an insolvent's property to the effect that the insolvent had fraudulently transferred his property to his wife before declaration of insolvency, is not admissible in evidence to convict the insolvent under section 43 of the Insolvency Act. [p. 998, col. 2.]

Chiranji Lal v. *Emperor*, 25 Ind. Cas. 986; 12 A. L. J. 1105; 15 Cr. L. J. 658; 36 A. 576; *Nathumal* v. *District Judge of Benares*, 6 Ind. Cas. 870; 32 A. 547, 7 A. L. J. 602; *Campbell, Ex parte, Wallace, In re*; (1885) 15 Q. B. D. 213; 54 L. J. Q. B. 382; 53 L. T. 208; 2 Morrell, 167, referred to.

Civil revision against an order of the District Judge of Cawnpore.

Mr. *W. Wallach* (with him Mr. *A. P. Dube*), for the Petitioner.

Mr. *B. E. O'Conor*, for the Opposite Party.

JUDGMENT.—In this case an appellate order by the District Judge of Cawnpore has been called up by this Court in the exercise of the general powers of superintendence and revision conferred upon it by section 46, clause (1), of the Provincial Insolvency Act, III of 1907. The order is one sentencing an insolvent named Nand Kishore to undergo simple imprisonment for a period of six months under section 43 of the said Act. The allegations held to be proved against him are :—

(1) That in the year 1908 at a time when the business which he was conducting was beginning to fail, he fraudulently transferred certain property by way of gift to his wife and other members of his family, (2) that in the schedule of assets submitted by him along with his application to be declared an insolvent he fraudulently concealed the existence of the property nominally transferred by him and also the fact that he was the owner of a shop in what is known as the Kuli Bazar at Cawnpore. Nand Kishore's case was that the transfer by way of gift was made in good faith, and that the shop in the Kuli Bazar has never been his property. The finding against Nand Kishore, both in the Court of first instance and in the District Court, has been mainly based upon certain reports submitted by the Receiver. I hold that those reports do not constitute legal evidence for the purpose for which they have been used and should not have been taken into account against Nand Kishore. The learned District Judge has referred to the decision of a Full Bench of this Court, in a case reported under the heading *Chiranji Lal* v. *Emperor* (1). Somewhat more in point was the earlier decision of a Bench of this Court in *Nathumal* v. *District Judge of Benares* (2). Neither of these precisely touch the question which has been argued before me, but there can be no doubt that an order sentencing an insolvent to undergo imprisonment must be based upon legal evidence and the depositions of witnesses whom he had an opportunity of cross-

(1) 25 Ind. Cas. 986; 36 A. 576; 12 A. L. J. 1105; 15 Cr. L. J. 658.

(2) 6 Ind. Cas. 807; 32 A. 547; 7 A. L. J. 602.

examining. The report of a Receiver may be evidence for the special purpose of determining whether an insolvent is or is not entitled to an order of discharge, *vide* section 44 of the Act. It may also be taken into consideration by a Court for certain other purposes, as for instance when considering the admissibility of a proposal for composition under section 27 of the same Act. It is not evidence for the purpose of all possible proceedings under the Act. I have examined the facts of the present case, and I am quite satisfied that there are a number of points on which the Receiver might well have been corss-examined, and on which Nand Kishore was fully entitled to an opportunity of corss-examining, before the statements of fact embodied in his report could be accepted and acted upon as they have been done in the Courts below. I do not gather from the record that either the property purporting to be transferred under the deed of gift of 1908 or the shop in the Kuli Bazar has been taken possession of by the Receiver as part of the assets of the insolvent, or made available for the satisfaction of the creditors. The learned Judge of the Small Cause Court who heard this case in the first instance would not, I am confident, have dispossessed any person whom he found in possession of this shop on the strength of the evidence which, in his opinion, justified the infliction upon Nand Kishore of a sentence of imprisonment. Yet it is a more serious matter to sentence a man to undergo imprisonment than to deprive another of his possession over a building. In the argument addressed to me in support of the order of the District Judge, reference was made to an English case *Campbell, Ex-parte, Wallace, In re* (3). That case really bears out the view which I take of the present case. Certain reports submitted by a Receiver were allowed to be taken into consideration in that case precisely as they could have been under section 27 of the Provincial Insolvency Act, III of 1907. But the case is no authority for the proposition that such reports could have been treated as evidence in a proceeding the object of which was to subject an insolvent to the penal provisions of the Insolvency Act. I am unable to sustain the order of the District Court in this matter, and the only question that I have to consider is what order I should substitute for it. On a review of the entire facts of the case, I am not prepared to direct that further proceedings should be taken in this matter. I have already affirmed an order of the Court below refusing Nand Kishore his discharge, and it is possible that proceedings involving further inquiry into the matters litigated in connection with the order now before me may yet have to be taken. If it be found hereafter that evidence is forthcoming such as to justify the Insolvency Court in taking possession either of the shop in the Kuli Bazar or of the property purporting to be dealt with by the deed of gift of 1908, as assests belonging to Nand Kishore at the time when he was declared insolvent, and, therefore, available for the satisfaction of his creditors, it may be that the question of subjecting Nand Kishore to punishment for his dealings in this connection may require further consideration. Unless and until something of the sort occurs, I am not of opinion that the facts which were before the Courts below were such as to justify the application of section 43 of the Provincial Insolvency Act in this case. My order is that the order of the Court below is set aside and that the security which I understand Nand Kishore has furnished for his attendance, if required, is hereby discharged. I make no order as to costs.

Conviction set asi

(3) (1885) 15 Q. B. D. 213; 54 L. J. Q. B. 332; 53 L. T. 208; 2 Morrell, 167.

SAHODRA BIBI *v.* BAGESHRI SINGH.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 821 OF 1914.
May 27, 1915.
Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.
Musammat SAHODRA BIBI—PLAINTIFF—APPELLANT
versus
BAGESHRI SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pre-emption, suit for, maintainability of—Vendor's title—Whole property not pre-empted, effect of.

A pre-emptor is not entitled in a pre-emption suit to put the vendor on proof of his title to the property which he purports to sell. The principle of pre-emption is substitution. A pre-emptor is bound to take the title which the vendee was ready to take.

A suit for pre-emption is not maintainable where the pre-emptor does not seek to preempt the entire property.

Second appeal from a decree of the Subordinate Judge of Jaunpur, dated the 2nd March 1914.

Mr. *Haribans Sahai*, for the Appellant.

Mr. *Lalit Mohan Banerji*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption. Portion of the property was situate in one *mahal* and portion in another. The plaintiff claimed pre-emption of the whole of the property in Harballampur but only portion of the property in Mirganj. He said that the vendor was only entitled to a much smaller share in Mirganj than that which he purported to sell. He added to his plaint a statement that if the Court found that the vendor was really entitled to all the property in Mirganj which he purported to sell, then he was willing to pre-empt that also. Both the Courts below have dismissed the plaintiff's suit on the ground that he did not seek pre-emption of the entire property. In our opinion this decision was correct. A pre-emptor is not entitled in a pre-emption suit to put the vendor on proof of his title to the property which he purports to sell. The principle of pre-emption is substitution. A pre-emptor is, therefore, bound to take the title which the vendee was ready to take. He is not entitled to say to the vendor, "I will take all the property to which you prove you have a title, but I will not take property which you fail to prove belongs to yourself." We need hardly say that we

KHAYALI RAM *v.* KALI CHARAN.

do not decide that a vendor is entitled fraudulently to insert property, to which he has no title, in the sale-deed for the purpose of inflating the price or otherwise fraudulently to defeat pre-emption. In the present case it is perfectly clear from what took place in the Court below that the vendor has (or *bona fide* thinks he has) some title, not necessarily a perfect title, to the property which the plaintiff in the present suit claims belongs to his son. We dismiss the appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 1284 OF 1914.
May 28, 1915.
Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.
KHAYALI RAM AND ANOTHER—DEFENDANTS—APPELLANTS
versus
KALI CHARAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Pre-emption—Wajib-ul-arz—*Partition after preparation of* Wajib-ul-arz—*Co-sharer in one* mahal, *whether can pre-empt property in another* mahal.

A *wajib-ul-arz* gave right of pre emption first to own brothers and nephews, and then to cousins who were co-sharers, then to co-sharers in the *patti* and then to co-sharers in the village. At the time the *wajib-ul-arz* was prepared the village was not partitioned into several *mahals*, but subsequently it was so partitioned. A co-sharer in one *mahal* sued to pre-empt property in another *mahal* where he was not a co-sharer:

Held, that he had no right to pre-empt. [p. 1001, col. 1.]

Second appeal from a decree of the District Judge of Mainpuri confirming that of the Subordinate Judge of that place.

Mr. *Girdharilal Agarwala*, for the Appellants.

The Hon'ble Dr. *Satish Chandra Banerji*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption. The plaintiff is not a co-sharer in the *mahal*, although he is a proprietor in the village. The vendees also are not co-sharers in the same *mahal*. They are stated to be grove-holders in another *mahal*. The plaintiff adduced in evidence an entry in the *wajib-ul-arz* of 1873. This records that there is a right of pre-emption first with own brothers and

nephews, then with cousins who are co-sharers, then with co-sharers in the *patti* and then with co-sharers in the village. At that time the village consisted of one *mahal*, which was sub-divided into two *pattis*. We may point out here that the Court below has made a very important mistake. It states that the village was then divided into two *mahals*. The other evidence in support of the existence of the custom consisted of the *waj.b-ul-arz* which was framed at the last Settlement. By this time the village had been divided into a number of different *mahals* and at the time of the Settlement a new *wajib-ul-arz* was drawn up for each of the new *mahals* in similar terms. In each of these *wajb-ul-araiz* it is recorded th t the old custom should remain in force. The question is whether the plaintiff has proved by these two entries the existence of a custom which gave him a right to pre-empt this property against the defendants, he not being a co-sharer in the same *mahal*. We agree that whatever the custom was prior to the partition it still continued. We have to see what that custom was. The only evidence being the entry in the *wajib-ul-arz*, we must look to this document in order to find out what the custom (if any) was. It is not contended in the present case that either parties are related to the vendor. Therefore that part of the *wajib-ul-arz* which refers to relationship may be left out of consideration. It is quite clear that the remaining part refers entirely to a custom existing between co-sharers, because at that time all the proprietors in the village were *co-sharers with each other*. In the events which have happened *the plaintiff is no longer a co-sharer with the vendor*. He has ceased to have any community of interest with him. In this view it seems perfectly clear that there was no evidence of the existence of a custom *between persons who are not co-sharers*. After partition has taken place the owner in one *mahal*, is no longer able to bring himself within the custom where the property sold is situate in the other *mahal*. We allow the appeal, set aside the decrees of both the Courts below and dismiss the plaintiffs' suit with costs in all Courts.

Appeal decreed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 205 OF 1914.

May 25, 1915

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

Lala BARU MAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

TANSUKH RAI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pre-emption—Finding of fact on evidence—Saharanpur District—Language of wajib-ul-arz—*Second appeal.*

The entries in a *wajib-ul-arz* are *prima facie* to be regarded as referring to customs rather than to agreements. But this does not preclude the Court from taking into consideration, when considering the evidence as a whole, the language which is used in the *wajib-ul-arz* along with other evidence. If on a consideration of the entire evidence the Court is not satisfied that a custom exists, the finding is a finding of fact and the High Court cannot interfere in second appeal. [p. 1002, cols. 1 & 2.]

The High Court has never decided that a custom of pre emption cannot exist in the Saharanpur District or that the *wajib-ul-araiz* in Saharanpur are not evidence of a custom. [p. 1002, col. 1.]

Dhian Kuar v. *Diwan Singh*, 10 Ind Cas. 558; 8 A. L. J. 786, referred to.

Second appeal from the decision of the District Judge of Saharanpur, dated the 17th of December 1913.

Mr. *Surendro Nath Sen*, for the Appellants.

Mr. *Jogendra Nath Mukerji* for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption. The plaintiff is a co-sharer. The vendee is a stranger. The plaintiff adduced in evidence in support of the existence of the alleged custom an extract from the *wajib-ul-arz* of 1867. No earlier *wajib-ul-arz* was produced. He also adduced in evidence two decrees, one based on a compromise and the other a decree in which the question of custom was not decided. There were some oral evidence but on cross-examination these witnesses had to admit that there had been sales to strangers and no pre emption claimed. Lastly he produced an extract from the *wajib-ul-arz* for the current Settlement, which refers to the *wajib-ul-arz* of 1867 for the "customs" which were not specified in the document itself. The entry in the *wajib-ul-arz* of 1867 no doubt refers to a righ of pre-emption. In the very same clause, however, there are references to a number of other matters which it is extremely

improbable were existing customs. In fact the *wajib-ul-arz* appears to be almost, if not quite identical with the *wajib-ul-arz* referred to in the case of *Dhian Kuar* v. *Diwan Singh* (1). It seems to us that the Court considering the proper issue in the case, namely, does or does not the custom exist, was justified in saying that he was not satisfied that the custom existed on the evidence produced, bearing in mind that the onus lay on the plaintiff. This would be a finding of fact binding on this Court in second appeal. No doubt it has been decided by a Full Bench of this Court that entries in the *wajib-ul-arz* are *prima facie* to be regarded as referring to customs rather than to agreements. But this does not preclude the Court from taking into consideration, when considering the evidence as a whole, the language which is used in the *wajib-ul-arz*. The learned District Judge commences his judgment with the following words: "As regards the entry in the *wajib-ul-arz* relating to pre-emption, it seems to be settled as the result of a series of rulings of the Hon'ble High Court that in the Saharanpur District the *wajib-ul-arz* is evidence of contract which lasts only during the Settlement to which it relates and is not proof of custom." We do not think that these remarks are correct. This Court has never decided that a custom of pre-emption cannot exist in the Saharanpur District, or that the *wajib-ul-araiz* in Saharanpur are not evidence of a custom. Each case should be decided on its own facts and circumstances. In the case of *Dhian Kuar* v. *Diwan Singh* (1) to which we have already referred, the lower Appellate Court held *on the evidence* that the custom of pre-emption was not proved. This Court in second appeal referred to the evidence that had been produced on behalf of the plaintiff. It consisted of an entry from the *wajib-ul-arz* of 1867 and nothing more. The earlier *wajib-ul-araiz* were not produced. This Court held that the Court below was entitled to consider the language of the *wajib-ul-arz*, the fact that the earlier *wajib-ul-araiz* had not been produced and that if it came to the conclusion that the plaintiff by merely producing the extract from the *wajib-ul-arz* of 1867 had failed to prove the existence of the custom, the Court was justified in its conclusion. To all intents and purposes the present case stands on exactly the same basis. We, therefore, accept the finding of the Court below as a finding of fact binding on this Court in second appeal. We dismiss the appeal with costs.

Appeal dismissed.

(1) 10 Ind. Cas. 558; 8 A. L. J. 786.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 900 OF 1914.
April 23, 1915.
Present:—Justice Sir P. C. Banerji, KT.
BISHUNATH SHUKUL—DEFENDANT—APPELLANT
versus
GANESH DATT SHUKUL—PLAINTIFF—RESPONDENT.

Easement—Water channel blocked—Power of Court to direct opening of another passage without demolition of construction.

Where the defendant had blocked a water channel of the plaintiff by building a wall:

Held, that the Court had power to direct the opening of another channel through the defendant's land without demolishing the wall. [p. 1003, col. 1.]

Second appeal from a decree of the Additional Judge of Gorakhpur, reversing that of the Munsif of Bansgaon.

Mr. *Muhammad Ishaq Khan*, for the Appellant.

Mr. *Narmadeshwar Upadhyaya*, for Mr. *Kalindi Prasad*, for the Respondent.

JUDGMENT.—This and the connected Appeal No. 620 of 1914 arise out of two suits brought one by Ganesh Datt Shukul and the other by Jadunandan Shukul for establishment of the right of each of them to carry water into their fields by means of a channel which runs through the defendant's field No. 32/1. The field of Ganesh is No. 31 and that of Jadunandan is No. 32/2. It was alleged that the plaintiffs had a right to irrigate their fields with water flowing through the channel and that the defendant had blocked this passage by building a wall. The defence was that the fields of the two plaintiffs were irrigated with water flowing through the fields Nos. 40 and 41, and 29 and 33. This has been found against the defendant and the Court below has

held that as a matter of fact the fields of the two plaintiffs were irrigated with water flowing through the channel which existed in the defendant's field No. 32/1. This is a finding of fact and must be accepted in second appeal. The learned Judge, instead of directing the house built by the defendant to be demolished or that the channel should flow through the house, has directed that from the point G noted on the map the defendant should open a passage for the flow of water through his field to enable the plaintiffs to irrigate their fields. This, it seems to me, is a very reasonable veiw to take of the case. The appellant, however, contends that the right of easement claimed by the plaintiffs had not been used for more than two years before the institution of the suit and that their right had thus become extinct. It was alleged in the plaint that the obstructions made by the defendant which blocked the passage of water were made in *Asarh* and *Kartick* 1319, that is in 1912. Both the Courts below have found that the constructions are new. The defendant himself did not assert that they were more than two years old. So that I must take the Court below to find that the right of easement had been enjoyed within two years prior to the institution of the suit. The appeal fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2728 OF 1913.

December 9, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Sadasiva Aiyar.

GOVINDA REDDI AND ANOTHER—DEFENDANTS NOS. 6 AND 7—APPELLANTS

versus

RAVI KESAVAL NAIDU AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 1, 5, 9 AND 10—RESPONDENTS.

Inam *land—Presumption as to whether land or land revenue is granted, applicability of, to Civil Courts.*

It is not the Revenue Courts alone but the Civil Courts should also presume that an *inam* grant is of and revenue only and not of land, until the contrary is proved.

Yeddamapudi Lakshmi Narasimha Row v. *Repalli Sitaramaswami*, 19 Ind. Cas. 440; 24 M. L. J. 288; (1913) M. W. N. 282, followed.

Second appeal against the decree of the District Court of Chingleput, in Appeal Suit No. 63 of 1912, preferred against that of the Court of the District Munsif of Tiruvellore, in Original Suit No. 511 of 1910.

Mr. *N. A. Vaidyanatha Aiyar*, for Mr. *C. V. Ananthakrishna Aiyar*, for the Appellants.

Mr. *T. R. Venkatarama Sastri*, for the Respondents.

JUDGMENT.—The learned District Judge erred in holding that the presumption as to the constitution of the *inam* applies only in Revenue Courts. Civil Courts also should presume that it consits in the revenue, not the land, until the contrary is proved. *Yeddamapudi Lakshmi Narasimha Row* v. *Repalli Sitaramaswami* (1).

But it does not appear that this mistake influenced his treatment of the evidence materially; and there was clear evidence on which his decision could be founded. In these circumstances we are not prepared to interfere. The second appeal is dismissed with costs.

Appeal dismissed.

(1) 19 Ind. Cas. 440; 24 M. L. J. 288; (1913) M. W. N. 282.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 102 OF 1914.

May 12, 1915.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

GATI—PLAINTIFF—APPELLANT

versus

RACHLA KUNWAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908) O. XLIV—Appeal in forma pauperis*—Limitation Act (IX of 1908), Sch. I, Art. 170—Limitation.*

An appeal was filed in the High Court long after 30 days had expired from the decision of the Court below. On the report of the office as to the deficiency of the Court-fees, the appellant expressed his inability to pay the Court-fee and asked the Court to take the appeal *in forma pauperis*:

Held, that the appeal having been filed beyond 30 days of the decision of the Court below could not be treated as an application for leave to appeal *in forma pauperis* and was barred by limitation. [p. 1004, col. 1.]

AJODHYA PERSHAD v. CHHABILA KOER.

First appeal from a decree of the Officiating Subordinate Judge of Ghazipur.

Mr. *Gridharilal Agarwala*, for the Appellant.

The Hon'ble Mr. *Abdul Raoof*, for the Respondents.

JUDGMENT.—The decision of the Court below, against which the present appeal has been preferred, was passed on the 29th of March 1913. On the 30th June 1913 the present appeal was filed. The appellant put upon his petition of appeal a Court-fee of Rs. 10. The office reported that there was a considerable deficiency in Court-fees, that the proper fee ought to have been Rs. 475 and that there was a corresponding deficiency in the Court below. The appellant asked for time to make good the deficiency. Time was given to him on several occasions, but he failed to make good the deficiency. Finally on the 17th of January 1914 he filed a petition alleging that he was a pauper, that he was unable to make good the deficiency, that his regular appeal, which was presented within time *as such*, might be continued as a pauper appeal under Order XLIV of the Code of Civil Procedure and might be proceeded with according to law His petition was granted by an *ex parte* order of the 24th March 1914. Now it is clear that if the petition of appeal be treated as a petition for leave to appeal *in forma pauperis*, it ought to have been filed within 30 days of the decision of the Court below under Article 170 of the Limitation Act. The order of this Court passed on the 24th March 1914, being an *ex parte* order, is open to objection at the hearing of the appeal and this objection has now been raised, that the appeal as an appeal *in forma pauperis* is barred by time. There can be no doubt that it is barred, it having been presented more than three months after the decision of the Court below. On behalf of the appellant we are assured that he cannot pay the deficiency in Court-fees. It is impossible to treat the appeal as an ordinary appeal. Time was repeatedly allowed to the appellant to make good the deficiency but he has failed to make it good. As an appeal in *forma pauperis* the present appeal is barred by time. We, therefore, dismiss it with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 44 OF 1915.

May 20, 1915.

Present:—Mr. Justice Piggott.

AJODHYA PERSHAD AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat CHHABILA KOER—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115, O. IX, r. 9—Ex parte *decree, order setting aside—Revision, maintainability of.*

A revision lies against an order re-admitting a suit which has been dismissed for default. [p. 1005, col. 1.]

Janki Prasad v. *Parmeswar Din Pandey*, 29 Ind. Cas. 975; 13 A. L. J. 482; *Tasadduq Husain* v. *Hayat-un-nissa*, 25 A. 280; A. W. N. (1903) 39; *Gulab Kunwar* v. *Thakur Das*, 24 A. 464; A. W. N. (1902) 136; *Nand Ram* v. *Bhopal Singh*, 16 Ind Cas. 1; 10 A. L. J. 130; 34 A. 592; *Gopala Chetti* v. *Subbier*, 26 M. 604; 13 M. L. J. 308, referred to.

Revision against an order of the Munsif of Fatehpur, dated the 27th February 1915.

The Hon'ble Dr. *S. C. Banerji*, for the Appellants.

Mr. *J. M. Banerji*, for the Respondent.

JUDGMENT.—This is an application in revision by the defendants in a certain suit against an order passed by the Munsif of Fatehpur, whereby a previous order of the same Court dismissing the plaintiff's suit for non-appearance was set aside. The suit had originally been filed in the Court of the Subordinate Judge, but the plaint was returned with directions that it be filed in the Court of the Munsif of Fatehpur. It was dismissed for default of plaintiff's appearance on the 11th January 1915. An application for re-hearing was made on the 27th January 1915. A notice having gone to the defendants the question came up for orders on the 20th February 1915. It was then pointed out to the Munsif that the plaintiff's application for re-admission of his suit had been presented by one Rameshar under a special power-of-attorney. That power-of-attorney being examined, it appeared that it was so worded as to authorize Rameshar to present the plaint and to do all acts that might be necessary for the prosecution of the suit in the Court of the Subordinate Judge, but that it did not authorize Rameshar to take any action on behalf of the plaintiff in

the Court of the Munsif of Fatehpur. The learned Munsif thereupon gave the plaintiff a week's time to put in a fresh power-of-attorney in favour of the same Rameshar. This was done on the 27th February 1915, and the plaintiff's application for the re-admission of his suit was thereupon allowed on the merits.

With reference to the present application, an objection is taken on behalf of the plaintiff-opposite party to the effect that an application for revision will not lie against an order re-admitting a suit which has been dismissed for default. The reason suggested is that, if the order re-admitting the suit is an improper one, it can be challenged in appeal under the provisions of section 105 of the Civil Procedure Code. In a case which recently came before me as a single Judge I accepted this contention. The matter was subsequently argued before a Bench of two Judges of which I was a member. The case was that of *Janki Prasad* v. *Parmeswar Din Pandey* (1). The question whether an application for revision was admissible at all against an order setting aside an *ex parte* decree is not discussed in the reported judgment. As a matter of fact it was raised, but we passed it over on the authority of *Tasadduq Husain* v. *Hayat-un-nissa* (2). This followed a decision of the Calcutta High Court, *Chintamony Dassi* v. *Raghoonath Sahoo* (3), and a previous case of this Court, *Gulab Kunwar* v. *Thakur Das* (4). There is, however, a more recent reported case of this Court in the opposite sense, *viz.*, *Nand Ram* v. *Bhopal Singh* (5). That was a two Judges' case, but it would not appear from the report that the second Judge was of opinion that the application for revision was not maintainable. The learned Judge who took that view does not refer to the older decisions of this Court which I have already discussed, but supports himself principally by the case of *Gopala Chetti* v. *Subbier* (6). If I were to decide the point independently of all authorities, I should, as at present advised, be much inclined to adhere to the view I first took when sitting as a single Judge. Section 105 of the Code of Civil Procedure allows any order affecting the decision of the case to be challenged in an appeal from the final decree. There is certainly force in the contention that the words "affecting the decision of the case" are perfectly general and that their sense should not be limited by judicial decisions. The preponderance of authority in this Court, however, seems to be in favour of the view that the propriety of an order setting aside an *ex parte* decree cannot be challenged in an appeal from such decree as may eventually be passed in the suit. If this view is correct, the only remedy open to a litigant aggrieved by such an order is by way of application in revision.

However this may be, on the facts of the particular case before me, I am not disposed to interfere. The power-of-attorney in favour of Rameshar which was produced before the learned Munsif on the 27th February 1915 either had retrospective effect, or it had not. If it had, there is no force in this application. If it had not, then the plaint itself was never properly before the Munsif, for it was presented through a Pleader appointed by this very Rameshar. The matter is one in which it would be well for the parties to reconsider their position; but undoubtedly, if the learned Munsif has taken cognizance of a plaint which had never been legally presented in his Court, this is a point which it is still open to the defendants to raise. I decline to interfere at this stage and reject the application.

Application rejected.

(1) 29 Ind. Cas. 575; 13 A. L. J. 482.
(2) 25 A. 280; A. W. N. (1903) 39.
(3) 22 C. 981.
(4) 24 A. 464; A. W. N. (1902) 136.
(5) 16 Ind. Cas. 1; 34 A. 592; 10 A. L. J. 130.
(6) 26 M. 604; 13 M. L. J. 368.

PRIVY COUNCIL.

APPEAL FROM THE PUNJAB CHIEF COURT.

June 24, 1915.

Present:—Viscount Haldane, Lord Shaw, Sir George Farwell, Sir John Edge and Mr. Ameer Ali.

BAGGA AND OTHERS—APPELLANTS

versus

SALEH AND OTHERS—RESPONDENTS.

Partition—Common land—Tirni or grazing dues, payment of, by person not proprietor paying land revenue—Proprietary right, if conferred.

BAGGA *v.* SALEH.

The payment of *tirni* (grazing dues) by a person who is not a proprietor paying land revenue does not confer upon him any right to share in the *shamilat* or common land of a *patti*. [p. 1007, col. 2; p. 1008, col. 1.]

Appeal heard *ex parte* from a judgment and decree of the Punjab Chief Court, dated June 20th, 1907, confirming those of the Collector and Colonising Officer, Jhelum Canal Colony, Sargodha, exercising the powers of a Civil Judge, dated June 30th, 1905.

FACTS.—The village Lak arose out of the foundation of various scattered hamlets in the jungle by men mainly of the Lak tribe. The settlers had by the time of the Regular Settlement in 1863 formed themselvs into *tarafs* or sub-divisions. The Lak *taraf* was mainly held by Laks, the inhabitants of Mari Lak and Ajuala hamlets. In the Sikh times the system of collection of revenue was at a quarter share of the grains, produce being taken by division, and the balance of the revenue was levied in the shape of grazing dues. At the Summary Settlement under British rule the revenue was fixed at Rs. 300 and apportioned on cattle only and at the Regular Settlement (1863) it was fixed at Rs. 325 on the cultivated land of the several *tarafs* and Rs. 850 on the jungle. In addition to the proprietors who contributed to the revenue by payment of grazing rights, there were also a certain number of non-proprietor who were charged grazing rights by the proprietors and whose contributions were used in reduction of the Government revenue or otherwise for the proprietors' benefit. These persons also claimed a share in the common land on partition, but their claims were disposed of by the Courts in India. According to the original agreement with the proprietors the village common land when, if ever, partitioned, was to be first divided according to the *tarafs* and then the land so attached to each *taraf* was to be divided among its proprietors according to *khewat* shares *i. e.*, the shares of persons entered in the *khewat* or register of proprietors' holdings. In 1882 the proprietors of Lak applied for partition. The Assistant Collector ordered division on the basis of the entire *jama* of Rs. 1,175. This order was reversed by the Collector, with whom the Commissioner agreed on appeal in holding that Rs. 325 were alone to be taken into account for the purpose of partition; but the Financial Commissioner finally upheld the order of the Assistant Collector.

In 1890 a petition was filed in the Settlement Department for partition of the waste land in accordance with the order of the Financial Commissioner and was sent for disposal to an Extra Assisstant Commissioner. In 1894 he decided to carry out partition only among the *tarafs* and deferred partition *inter se* among the owners within the *tarafs*, the partition being made on the basis of the entire *jama* of Rs. 1,175. In 1901 proceedings were set on foot for partition of the *shamilat* of *Taraf* Lak among the proprietors of that *taraf*. Objections were taken that the division should be made according to the *jama* of the cultivated land assessed at Settlement and not on that fixed on the jungle land. According to the *wajib-ul arz* the Colonization Officer and Collector tried the case as Revenue Officers and held that the *jama* on the cultivated area and that portion of the *jama* on the jungle land which had been paid by the proprietors should be the basis of division. On appeal the Settlement Commissioner reversed the decision, on the ground that a question of title having been raised the Collector was bound to follow the procedure laid down by section 117 of the Punjab Land Revenue Act XVII of 1887. He also pointed out the impropriety of excluding from consideration that portion of the *jama* on jungle land which had been paid by non-proprietors. The Collector then tried the case as a Civil Court and ruled that partition should take place on the basis of the entire *jama*, the portion of the *jama* on jungle land paid by non-proprietors being distributed over all the proprietors according to their *khewat* on the cultivated area, the measure of each being (*a*) his own *khewat* inside the cultivated area, (*b*) his proportionate share according to that *khewat* of the *jama* on the jungle land paid by non-proprietors and (*c*) the amount he himself paid on account of the latter *jama*. On appeal to the Chief Court the judgment of the lower Court was confirmed. A petition for review on the ground that the appeal of the appellants had not been considered or decided by the Bench was rejected. The appellants then appealed to the Privy Council in due course

Mr. *Arthur Grey*, for the Appellants, contended that the appellants and their ancestors had

been throughout the Settlements from 1857 up to the present time recorded as proprietors of the village in possession of certain waste sites upon which no land revenue had been ass ssed, but in respect of which they had paid *tirni* (grazing dues) to the Government. The appellants were recorded as proprietors in the *khewat* and according to the decision of the Collector sitting as a Civil Judge, they would be entitled to share in proportion to their contribution to the revenue, whether by way of direct assessment on land or by assessment in respect of *tirni* charged upon the jungle of which they were recorded as in possession. The Collector in deciding the case in 1905 thought that the proper *khewatdars* with claims in the *shamilat* held claims on the strength of having undertaken a responsibility for the demand, which did not fall on, and was not taken by, those whose land was entered as *kharaj az patti*. He was wrong in holding this view, as the responsibility for the Government demand did fall on and was taken by the appellants. The Chief Court in dismissing the appeal had held that payment of *tirni* as a non-proprietor ought not to create a right in the *shamilat*, that the claims of those non-owners who had acquired rights in Lak to ownership by virtue of payment of *tirni* in other *tarafs* seemed to be absurd and that similarly those who paid neither *khewat* nor grazing dues had no claim to a share. None of those findings were relevant to appellants' case as that of proprietors who paid grazing dues but no revenue on cultivated land, and their appeal was dismissed without ever having been considered. Mr. Justice Johnstone agreed in the order without any reference to appellants' case. The petition for review on the ground that the appellants' appeal had not been considered or decided by the Bench was presented on August 8th, 1907, and Chatterji, J., recorded: "Appellant says he has all along been paying *tirni*. If so, he may be entitled to a share as he is a recorded owner though his original holding is *kharaj az parta*." The review was heard, when the appellants were not represented by Counsel, by Johnstone and Rattigan, JJ., who decided that the petition for review was based on a misunderstanding of the principles on which the case was decided, that is to say, that only persons paying land revenue upon cultivation could share at all in *shamilat* but that those persons *inter se* would share in *shamilat* in proportion not to such revenue alone, but in proportion to revenue plus *tirni* paid by each. No such principle was in fact laid down by the Bench who heard the case. Chatterji, J.'s order on the petition for review seemed to contradict it, while Johnstone, J., in his order under review himself laid down that the idea seemed to have crystallised that payment of so much *tirni* created a proportionate right

The respondents did not appear.

JUDGMENT.

SIR JOHN EDGE.—This is an appeal by the plaintiffs in the suit from a decree of the Chief Court of the Punjab, which had dismissed their appeal from a decree of the trial Judge by which their suit had been dismissed. The respondents to this appeal have not appeared.

In their plaint, dated the 3rd May 1905, the plaintiffs alleged that they "like the land-owners, are the proprietors" of houses and vacant sites in *Patti Lak* and had paid *tirni* (grazing dues) in respect of village *shamilat* land (common land) of Lak and they claimed a declaration that they, "like proprietors, may be declared co-sharers in 30,838 *bighas* $1\frac{3}{4}$ *kanals* of the village *shamilat* land of *Patti Lak* in proportion to Rs. 29-15-7, the *tirni* paid by the plaintiffs, and a share (may be) awarded to them in the said village *shamilat* of *Patti Lak* on the said *tirni* amount according to the *khewat*."

It is to be observed that in their plaint the plaintiffs did not base their claim to share on the partition of the common lands of *Patti Lak* upon any right as proprietors of any lands assessed to the revenue in *Patti Lak*. The plaintiffs were not recorded in the *khewat* as persons paying land revenue in respect of land held by them in *Patti Lak*. They did not, in fact, hold any lands in *Patti Lak* which were assessed to the land revenue. What they claimed was that as they had paid grazing dues, they should be treated in the partition of the common land of the village as if they were proprietors of the village, holding lands which had been assessed to the revenue. The trial Judge rightly held that the plaintiffs had not proved any right to participate in the partition of the common lands and dismissed their claim. On appeal the Chief Court held that the payment of *tirni* by a

person who was not a proprietor paying land revenue did not confer upon him any right to share in the *shamilat of Patti Lak*. The plaintiffs have failed to prove that they have any right to participate in the partition of the *shamilat* of *Patti Lak*.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed.

Appeal dismissed.

Solicitors for the Appellants: Messrs. *T. L. Wilson & Co.*

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 34 OF 1915.

May 20, 1915.

Present:—Mr. Justice Piggott.

MAKHDUM BAKHSH AND OTHERS—DEFENDANTS—APPLICANTS

versus

SHAUKAT ALI—PLAINTIFF—OPPOSITE PARTY.

Negotiable Instruments Act (XXVI of 1881), ss. 13, 87—Material alteration—Promissory note—Finding—Revision.

In a suit on a promissory-note one of the defences was that the document had been materially altered and as such could not be the basis of a suit. The Small Cause Court Judge did not record any definite finding as to the note being materially altered and decreed the plaintiff's suit on the ground that even if the note was executed on the date alleged, the suit was within time by reason of the payment of interest within time:

Held, that as the promissory note was not payable to the plaintiff or his order, it was not a negotiable instrument within the meaning of section 87 of the Negotiable Instruments Act and justice having been done between the parties, it was not proper for the High Court to interfere in revision and remand the case for a finding as to material alteration.

Civil revision from an order of the Judge of the Court of Small Causes of Allahabad

Mr. *Parmeshwor Dayal*, for the Applicants.

Mr. *Satya Chandra Mukerji*, for the Opposite Party.

JUDGMENT.—This was a suit before the Court of Small Causes at Allahabad. The claim was on a promissory note which, as brought into Court, purported to be dated November the 28th, 1911. The defendants alleged that the real date was the 28th of November 1910 and that the last figure of the year had been dishonestly altered in order to bring the suit within limitation. They also pleaded payment in full. The learned Judge of the Court below observed that from the appearance of the paper it did seem as if the last figure of the date at the foot of the pro-note in suit had been originally written as a cipher and changed to the figure 1. He came to no finding as to whether this had been done dishonestly, or indeed as to whether it had been done after the execution of the note or as to the date on which the note was actually executed. He held it proved that there had been a payment on account of interest made one year subsequent to the execution of the note, so that the suit was within time whether the pro-note in question was in fact executed on November the 28th, 19.0, or 1911. He found against the defendants that no payment was proved over and above the one payment of Rs. 17 already referred to. Upon these findings he decreed the plaintiff's claim.

The defendants have brought the matter before this Court in revision. They contend that the pro-note in suit, having been materially altered, is void as against them and no suit is maintainable in respect of the same.

The real question is whether I ought to set aside the decree passed by the Court below and remand the case for enquiry as to whether there has or has not been any material alteration in the terms of the pro-note in suit since its execution. If the point was one clearly covered by Statute Law, I should feel it my duty to interfere; but the provisions of section 87 of the Negotiable Instruments Act (XXVI of 1881) are expressly limited to "negotiable instruments" as defined in section 13 of the same Act. The pro-note in suit was not payable to the plaintiff or his order, and was, therefore, not a "negotiable instrument." It has been contended before me that the principle embodied in section 87 of the Negotiable Instruments Act has been applied, on the authority of English cases and, on principles of justice, equity and good conscience, to mortgage-deeds, simple bonds and other documents which are not negotiable instruments. The authorities in this Court on the point seems to be *Ganga Ram* v. *Chandan Singh* (1) and *Mangal Sen* v. *Shankar Sahai* (2). I do not think the point so clear as to justify my interference in revision in a case in which, on the findings of fact recorded by the Court below, justice has been done between the parties. I dismiss this application.

Appeal dismissed.

(1) 4 A. 62.
(2) 15 A. 580; A. W. N. (1903) 122.

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———*Settlement obtained under improper circumstances—Intention merely to ascertain amount actually due—Right of debtor to re-open accounts—Creditor entitled to appropriate payment to interest first in case of debtor failing to specify.*

A Court will not hold a party to a settlement which has been obtained from him under improper circumstances and it will allow him to surcharge and falsify items which have been inserted erroneously and which are not really due, when what the parties contemplated was merely to ascertain what was actually due as distinct from a case in which they agreed to accept a lump sum in settlement of their differences.

Where the creditors and a servant of the debtor drew up a settlement of accounts in the absence of the debtor, and the debtor on return signed the settlement without carefully scrutinizing the accounts:

Held, that the debtor could not be bound by the settlement and that the accounts should be re-opened.

Where a debtor has failed to exercise his right of appropriating a payment himself it is open to a creditor to do so up to the very last date, and even in the course of the trial, unless something has happened which renders it inequitable to allow him to do so and it is always a question of the intention of the creditor to be gathered from the circumstance of the case.

An account of the creditor in which he pays in full the interest due to him on the date of settlement and applies the balance towards the principal, is a clear indication of an intention to make the appropriation towards interest in the first place. M. KRUPASINDHU SAHU *v.* RAJA OF KALLIKOTA **718**

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Where plaintiffs' predecessors were originally lessees of *shamilat* lands, but on the termination of their lease in 1865 continued to be in possession and were shown in the Revenue Records as non-occupancy tenants and in 1881 claimed without success to be recorded as proprietors:

Held, (1) that the mere fact of their never paying any rent except the land revenue and cesses did not of itself constitute them proprietors;

(2) that their adverse possession could not be said to have begun in 1881, as after their failure to get themselves recorded as proprietors they continued to cultivate the lands and pay the land revenue and cesses as before. **P.** DALIP SINGH *v.* RANNIA, 25 P. R. 1915 **348**

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——— ——— ——— **s. 4 (12)**—*Grove—Improvement—Land—Plaint once admitted, whether can be rejected subsequently.*

The planting of trees in holding is an improvement within the meaning of section 4 (12) of the Agra Tenancy Act.

Therefore, a grove is land within the meaning of the Tenancy Act.

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A plaint once admitted cannot be afterwards rejected on the ground of any defect subsequently discovered in it. **U. P. B. R.** BHAWAN *v.* ZAHUR ALI **410**

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——— **S. 11**—Math, *whether can acquire occupancy rights*—Mahant—Chela—*Succession.*

An association like a *math* cannot be treated as an occupancy tenant under section 11 of the Tenancy Act.

Per *Campbell, J. M.*—A *chela* cannot inherit the occupancy rights of his *guru*. **U. P. B. R.** KESHO PRASAD SINGH *v.* RAMANAND GIR **407**

——— **S. 11**—*Non-occupancy tenant*—Theka *of proprietary share taken by him*—*Tenancy, right of, if in suspense*—*Fresh period necessary.*

Where a year to year tenant remained in occupation for a number of years but before the acquisition of occupancy rights, took a *theka* of the proprietary rights:

Held, that to acquire occupancy rights he could not count the period before the *theka*, but that he must complete fresh twelve years after the cessation of the *theka*. **U. P. B. R.** LEKHRAJ MAL *v.* NATHU **474**

——— **S. 11**—*Occupancy right, acquisition of*—*Sub-letting, meaning of*—*Allowing brother to cultivate, if sub-letting*—*Period, if counted in continuous possession.*

Sub-letting implies the leasing of land at a fixed rent to a sub-tenant.

Therefore, if a tenant allows his brother to cultivate a part of the land or associates him with himself in cultivation, there is no sub-letting and this period cannot be deducted under section 11 of Act II of 1901 from the period of acquisition of occupancy rights. **U. P. B. R.** PYARE LAL *v.* RAM BHAROSE **36**

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A *kabuliyat* for one year is intended to regulate rent, not length of occupation and it is not a lease for a fixed period, which cannot count for acquisition of occupancy rights. **U. P. B. R.** MURLI DHAR *v.* MOHAMED MUNIR **391**

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——— **S. 22**—Jat *widow succeeding to her husband's holding*—*Re-marriage when new Rent Act in force*—*Life-interest in holding, effect on*—*Hindu Widows' Re-marriage Act* (*XV of* 1856), *s.* 2, *applicability of.*

The Hindu Widows' Re-marriage Act, XV of 1856, applies to the widows of those castes only among whom re-marriage was illegal before the passing of the above Act, and the widows of those castes in which re-marriage was prevalent at the time of the passing of the Act do not lose their interest in the property of their former husbands.

Therefore, a *Jat* widow who succeeded to the holding of her husband while the Rent Act of 1881 was in force, does not lose by re-marriage her life-interest in the holding. **U. P. B. R.** SOHANIA *v.* JAGJIT SINGH **399**

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——— **S. 22**—*Occupancy tenancy*—*Distant collateral relative sharer in cultivation with the deceased occupancy tenant*—*Nearer collateral relative alive but not sharer in cultivation*—*Succession.*

A distant collateral who shared in cultivation with a deceased occupancy tenant cannot claim occupancy rights in succession to the deceased when a nearer collateral relative is alive but cannot succeed because he did not share in cultivation. **U. P. B. R.** BALDEO *v.* JAMBU PRASAD **417**

——— **S. 22**—'*Sharing in cultivation,*' *interpretation of*—*Member of joint family away from home, whether shares in cultivation.*

Where a member of an agriculturist's family attempts to eke out the resources of the family by some extra work away from home which is not connected with agriculture, he does not cease to share in the cultivation within the meaning of the Tenancy Act.

Where cultivation is personal, the sharing must be personal; but where it is not personal, it need amount to no more than taking part in whatever arrangements are made by the tenant-in-chief. **U. P. B. R.** KEDAR NATH *v.* HAR PRASAD **22**

——— **S. 22**—*Succession*—*Collateral sharing in cultivation in part of holding, right of, to inherit whole holding.*

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——— **S. 22**—*Succession*—*Uncle sharing in cultivation with nephew.*

An uncle, if he shared in cultivation with his nephew at the latter's death, can succeed to the latter's holding.

Where a nephew died and was succeeded by his widow, who re-married and thus ceased to have an interest in the husband's holding but remained in possession, and the uncle thereupon claimed the holding:

Held, that the uncle should be recorded as an occupancy tenant.

Per *Campbell, J. M.*—An uncle is no heir to his nephew under section 22 of Act II of 1901. **U. P. B. R.** MOHAMMAD YUSUF KHAN *v.* NANHI **409**

——— **S. 22**—*Succession*—*Uncle, whether can succeed to nephew's holding*—*Cultivation, sharing in.*

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——— **S. 22**—Zemindar's *right to create subordinate rights*—Thekadar, *meaning of.*

The word "*thekadar*" in section 22 of the Tenancy Act is intended to apply not only to a lessee of proprietary rights but to any person who holds a tenure created by the act of the *zemindar.*

Obiter dicta.—A *zemindar* has a right to create subordinate rights of any character he chooses, *e. g.*, to fix a rent in perpetuity or to allow succession according to Hindu Law. **U. P. B. R.** JANG BAHADUR SINGH *v.* M. MUHAMMAD YAHIA **649**

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——— **s. 28,** *scope of—Perpetual lease by widow having life-interest—Landholder, right of.*

A perpetual lease granted by a widow who has only a life-interest in the occupancy tenancy is not after her death binding upon the land-holder under section 28 of the Tenancy Act.

Section 28 of the Tenancy Act contemplates merely a lease for a fixed term and not a lease in perpetuity. **U. P. B. R.** PHEKU TEWARI *v.* KALI DIN SINGH **23**

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——— **ss. 50, 154, 3**—*Rent-free land—Resumption—Proceedings to have rent assessed—Rent not assessed—Suit for resumption, whether barred.*

In 1869, a *zemindar* got a declaration that he had a right to have rent assessed on the rent-free land but got no rent assessed. In 1912 he brought a suit for resumption. It was contended that the only right of the *zemindar* was to have the rent assessed:

Held, that, under the present law as under the old law, the former proceedings were no bar to a proceeding for resumption. **U. P. B. R.** RAM CHARAN *v.* BISMILLAH BEGAM **5**

——— **s. 52**—*Decree for arrears of rent obtained—Decree not satisfied within fifteen days—Suit for ejectment filed—Decretal amount tendered by judgment-debtor during pendency of suit, effect of.*

A co-sharer who is not a recorded co-sharer need not join as a plaintiff in a suit for ejectment.

A landlord obtained a decree for arrears of rent against an occupancy tenant and then brought a suit for his ejectment under section 52, Agra Tenancy Act, on the ground of non-satisfaction of the decree for arrears of rent for more than fifteen days. Before the decree for ejectment was passed and while the ejectment suit was still pending, the judgment-debtor offered the decretal amount to the decree-holder, who refused to take it on the ground that it was not offered to him within fifteen days of the decree:

Held, that if the decree-holder had accepted the money when tendered, no decree for ejectment could have been passed, as at the date of the decree for ejectment there would have been no unsatisfied decree for arrears of rent, that, the landlord had no right to complain of non-satisfaction of the decree owing to his own refusal to accept the tendered money and that, therefore, the decree for ejectment could not be made.

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If, therefore, the ex-grove-holder is dispossessed by the land-holder, he cannot maintain a suit under section 79 of the Agra Tenancy Act, as he is not a tenant. **U. P. B. R.** SHEONANDAN SINGH *v.* LACHMAN RAI **447**

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——— **s. 154 (b)**—*Grant—Specific service*—Muafi—*Specific service not required—Resumption of grant—Notice—Pleading.*

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Held, that the plaint and the notice were both defective and the suit was not maintainable on these grounds. **U. P. B. R.** MURLI *v.* RAJA RAM **554**

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Held, that under section 177 (c) of the Tenancy Act an appeal lay to the District Judge from the decision of the Assistant Collector.

Where the District Judge misapprehended a certain entry in the *Wajib-ul-arz* and, while recording a finding did not in express terms discuss the evidence upon which the finding was based, the High Court, in the absence of a certificate that the finding rested upon no evidence, treated the decision of the lower Appellate Court on this point as a finding of fact with which it could not interfere. **A.** SUNDAR LAL *v.* MALTHU **710**

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——— **ss. 158, 177(e)**—*Resumption, suit for*—Muafidar *pleading proprietary title—Decision—Appeal—Jurisdiction.*

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——— **s. 165**—*Suit for profits against co-sharer* lambardar*, maintainability of.*

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The Board can interfere in revision only when there is a *very grave* error of law and as a matter of policy will not interfere unless there has also been a *miscarriage of justice.*

A *Kayastha* got entered in the *patwari's* papers the names of his natural (*kahar*) sons in place of his name in respect of his holding but himself remained in possession with his sons. The *zemindar* was no party to this application for entry of names:

Held, that as the entry of the sons' names had no legal force and the father remained in possession with his sons, his rights as an occupancy tenant did not come to an end. **U. P. B. R.** KALKA PRASAD *v.* BAIJ NATH PRASAD **676**

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——— ——— ——— s. **197**—*Suit for ejectment—Adverse possession—Jurisdiction—Issue not tried.*

In a suit instituted in a Revenue Court for ejectment on the ground that the defendant was in possession without the plaintiff's consent and without the payment of any rent, the defendant pleaded that he was in proprietary and adverse possession of the land but this issue was not tried:

Held, that the District Judge on appeal ought to have acted under the provisions of section 197 of the Agra Tenancy Act and disposed of the plea of jurisdiction. **A.** MANOHRI *v.* BHURA **565**

——— ——— ——— s. **197**—*Suit triable by Revenue Court—Appeal—Transfer of appeal by District Judge to Subordinate Judge—Subordinate Judge, whether can pass order of remand.*

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——— ——— ——— s. **201**—*Recorded co-sharer declared by Civil Court as having no title—Suit for profits by such co-sharer—Pending decision of suit his name expunged from Revenue papers—Presumption of s.* 201, *applicability of.*

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A recorded co-sharer in a village was declared by a Civil Court to have no title as such. Pending an application for correction of the Revenue Records in conformity with the Civil Court's declaration he sued for profits as a co-sharer but before this suit was decided the Revenue papers were corrected and his name was expunged:

Held, that under the circumstances, he could not take advantage of the presumption of section 201 of the Agra Tenancy Act. **A.** HARGU LAL *v.* MED SINGH **509**

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Waste water may be used for the purposes of a garden as it cannot be used for a second time for domestic purposes.

In cold weather the garden of the applicant was found well watered but the *pacca* reservoir and channel connected with a well in the garden were dry and full of leaves:

Held, that this circumstance was not sufficient for conviction of the applicant for having used for gardening the water supplied for domestic purposes. **A.** SITAL PRASAD GHOSH *v.* EMPEROR, 13 A. L. J. 546 **830**

Agreement not to execute decree previous to decree, effect of **838**

Alayasanthana Law — *Joint family — Minority—Partition of family property, when allowed.*

Under *Alayasanthana* Law as in *Marumakatayam* Law no partition of *tarwad* property should be permitted during the minority of some members of the *tarwad*, unless such partition is shown to be beneficial to such minors. **M.** SARVESHRI SHETTATHI *v.* PUTTAMMA SHETTATHI **474**

Alien enemy, suit against. *See* CIVIL PROCEDURE CODE, 1908, s. 83.

Alienation. *See* CUSTOM; HINDU LAW.

——— ——— *Custom—Mortgage of ancestral property—Necessity—Suit by after-born son—Other reversioner existing before not suing—Limitation—Strict proof of necessity, when not required—Legal necessity—Advances taken for defending a criminal case and for payment of revenue, if for legal necessity—Interest on just debt, whether necessity—Pleadings.*

The validity of a mortgage screened by time from attack cannot be questioned by a reversioner on the ground that it has been merged into a subsequent mortgage or sale to challenge which the suit is within limitation.

When time once begins to run against a reversioner for contesting the validity of an alienation of ancestral property no subsequent disability to sue on the ground of minority of another reversioner can bar its flow.

In the absence of any clear proof of reckless extravagance or immoral waste on the part of the alienor of ancestral property, strict proof of necessity for ordinary debts is not required, particularly where the income of the estate does not appear to be quite sufficient to meet the family expenses and the alienor has sons or does not expect to be sonless.

Alienation—concld.

Interest on a just debt is also a necessity. So is the money due on account of produce where the mortgagor holds the land as a tenant of the mortgagee and enjoys the whole produce himself and allows the rent to mount up against him provided the validity of the mortgage cannot be questioned.

Payment of revenue is also an act of necessity.

Money spent on defending a criminal case can be validly charged on ancestral property.

A plea not raised in either of the Courts below cannot be entertained for the first time in further appeal to the Chief Court. **P.** CHANDA SINGH *v.* MUKAND SINGH, 61 P. W. R. 1915; 144 P. L. R. 1915 **761**

——— *Necessity—Sale of ancestral property—Objection on ground of immorality of purpose*—Onus *—Obligation of vendee.*

Where a Hindu father sold his ancestral house to a third person and after his death his son sued for recovery of possession, alleging that the sale consideration money was taken for an immoral purpose:

Held, (1) that it lay on the plaintiff to prove the immorality of the transaction if he wanted to free himself from his liability to pay his father's debt;

(2) that the sale could not be maintained as a sale unless the vendee proved necessity;

(3) that as the sale had taken place some 20 years before suit, circumstantial evidence should be considered sufficient to establish necessity. **P.** RAM LABHAYA *v.* GOPAL DAS, 78 P. W. R. 1915; 151 P. L. R. 1915 **891**

Alluvial accretion—*Non-occupancy holding, accretion to—Occupancy rights in accretion, acquisition of—Limitation.*

Occupancy rights in an alluvial accretion to a non-occupancy holding arise only by twelve years' continuous cultivation of that accretion. **U. P. B. R.** GANESH *v.* SAHIB-UN-NISSA BIBI **37**

Amendment. *See* CIVIL PROCEDURE CODE, 1908, O. VI, R. 17.

——— ——— Original defect in plaint, if cured by amendment **249**

——— ——— Plaint, amendment of—Discretion exercised by lower Appellate Court—High Court, power of, to interfere **355**

——— ——— **of decree.** *See* APPEAL.

——— ——— **of plaint.** *See* CIVIL PROCEDURE CODE, O. VI, R. 17.

Anubhavam tenure—*Denial of landlord's title, whether works forfeiture of tenancy.*

Where land is held on *anubhavam* tenure, the denial of the landlord's title not directly addressed to the landlord does not work a forfeiture of the tenancy. **M.** SANKARAN NAIR *v.* KOCHAPPU MENON **427**

Animal—*Injury caused by vicious horse—Defendant knowingly keeping vicious horse, liability of—Negligence, if necessary to support action—Damages, suit for.*

The defendant knowingly kept a horse which was a vicious animal. The horse injured the plaintiff and he sued for damages:

Held, that the defendant must be held liable notwithstanding that he was not guilty of negligence, as negligence was not necessary to support a suit of this nature. **C.** GANDA SINGH *v.* CHUNI LAL SHAHA, 19 C. W. N. 916 **862**

Appeal (Civil)—*Amendment of decree—Material alteration—Civil Procedure Code (Act V of 1908), s. 152.*

An appeal lies from an amended decree where the amendment has the effect of appreciably adding to the right of the decree-holder. **N.** DINAJI *v.* LAXMAN, 11 N. L. R. 92 **589**

——— Appellate Court's power to cancel order of costs passed by first Court **137**

——— "Appellate jurisdiction"—Judgment—Appeal against such order, if maintainable—Discretionary power given to Subordinate Courts—Appellate Court, power of, to interfere **846**

——— Award—Application to set aside award dismissed—Decree—Appeal, maintainability of **512**

———, Court of, duty of—Weight to be given to opinion of trial Judge **229**

——— Court fees, deficiency of, made up after several orders, effect of **571**

——— Decree passed against several persons—Whether one of them can appeal without others joining him **568**

——— Exclusion of time requisite for obtaining copies **833**

——— Objection under section 92, Evidence Act, taken for first time in Court of Appeal **223**

——— Order providing for appointment of Receiver **504**

——— *Order of Record Officer, appeal from—Jurisdiction.*

No appeal lies to the District Judge from an order of the Record Officer. **A.** BHARAT DAUJ DAMODAR DAS *v.* MAHABBAT **421**

——— Pre-emption decree—Vendee applying to withdraw money, whether estopped from appealing **452**

——— Proprietary title, question of—Issue not decided—Appeal, whether lies to District Judge—Onus on wrong party—Finding based on no evidence—Revision, grounds for **61**

——— Reasonable opportunity to appellant to be heard in support of appeal—Advocate filing appeal not Advocate for appellant called upon to support appeal—Reasonable opportunity, if given **666**

——— Receiver, appointment of—Discretion of lower Court—Appellate Court, power of, to interfere **485**

——— Redemption, suit for—*Muafidar* pleading proprietary title—Decision—Jurisdiction **484**

———, security for—Notice to show cause—Sufficient cause not shown—Dismissal of appeal on that day—Material irregularity **59**

——— Suit triable by Revenue Court—Transfer of appeal by District Judge to Subordinate Judge—Subordinate Judge, whether can pass order of remand **633**

——— **Criminal**—Acquittal—High Court, power of, to interfere—Grounds of interference **657**

——— ——— Letters Patent (Mad.), cl. 15—Criminal trial—Revision **96**

Appeal (Criminal)—concld.

——Power of Sessions Judge in appeal—Acquittal—Procedure—Enhancement of sentence, whether a fit ground for ordering re-trial **65**

——Several accused — Judgment — Appellate Court, duty of **336**

——, **second**—Common carrier, negligence of—Question of law or fact **260**

——Commutation—Occupancy *raiyat*, advantage of—Revenue Court, decision of, how far affects Civil Court **896**

——Finding of fact—Substantial error in procedure—Court overlooking material evidence —Consideration—Legal necessity **785**

——, ground for interference in **801**

——, maintainability of—Orders passed in execution of decree—Revision, erroneous view of law, if ground for **740**

——Misreading of record **167**

——New defence if can be set up **811**

——*Omission to consider oral evidence — Material irregularity in procedure—Punjab Courts Act (III of 1914), s. 41 (1) (c).*

An omission by a lower Appellate Court to consider the oral evidence and record a finding thereon, is a material irregularity in procedure, and is a good ground for second appeal. **P.** KALU *v.* BIR SINGH, 73 P. W. R. 1915; 149 P. L. R. 1915 **901**

——*Oral evidence discredited on general reasons—Particular deponent not discredited—Error in law—Appeal.*

To discredit oral evidence on merely general reasons not affecting the credit of any particular deponent, is an error in law and justifies interference in second appeal.

Selected Decision No. 9 of 1914, relied upon. **U. P. B. R.** RAM SUBHAG CHAUBE *v.* KESHO PRASAD SINGH **673**

——Plea of want of registration of security, if allowed **271**

——*Point not taken in lower Courts cannot be raised—Parties bound by case arising on pleadings.*

A point not taken in the lower Courts cannot be raised for the first time in second appeal.

The parties are bound by the case which arises on their pleadings and which has been enquired into by the Court of first instance, and they cannot rely upon a point which has not been raised in that Court and which depends upon facts for its determination. **P.** DYAL *v.* HIRDE RAM, 80 P. W. R. 1915; 153 P. L. R. 1915 **895**

——*Question of fact decided without there being evidence to support finding—Question of law.*

Where a Court decides a question of fact without there being any evidence whatever to support its finding, there is a question of law and the Board will interfere in second appeal. **U. P. B. R.** KESHO PRASAD SINGH *v.* SUBA KHAN **563**

Appeal to Privy Council—Appeal dismissed for default by High Court—Decree affirming decree of Court below **469**

——*Execution of decree in suit of value of Rs. 10 lakhs—Subject-matter of dispute —Civil Procedure Code (Act V of 1908), s. 110.*

Where in execution of a decree in a partition suit involving property of the value of rupees ten *lakhs*, the applicants disputed their liability to 4/6ths of an item of Rs. 11,709:

Held, that such a case did neither satisfy both the conditions set forth in the 1st clause of section 110 of Act V of 1908, nor did it fulfil the conditions mentioned in the second clause of that section, and that consequently permission to appeal therefrom to their Lordships of the Privy Council could not be granted. **P.** DEVI DASS *v.* NARPAT RAI, 60 P. W. R. 1915; 140 P. L. R. 1915 **759**

Appellate Court, jurisdiction of, to determine proof whether according to law or not—Sufficiency of evidence, determination of, power of **282**

——Mortgage—Redemption—Time fixed for payment of money—Appellate Court extending time and fixing another date, effect of **289**

Approver—Pardon forfeited—Power of Sessions Judge to direct prosecution—Plea not taken before Committing Magistrate taken before Sessions Judge, legality of **323**

Arbitration—Award—Application to set aside award dismissed—Decree—Appeal, maintainability of **512**

——Award—Decree in terms of award —Both parties consenting to appeal being heard against such decree, effect of **408**

——Award, setting aside of—Appeal, maintainability of **411**

——*Award, suit on—Failure to file award in Court within 6 months, whether bars suit —Award, whether in nature of foreign judgment —Punchayatdars, if entitled to administer to witness any reasonable form of oath agreed upon by parties —Civil Procedure Code (Act V of 1908), Sch. II, para. 20—Limitation Act (IX of 1908), Sch. I, Art. 178.*

A suit lies on an award, even though the same has not been filed in Court under paragraph 20, Schedule II, Civil Procedure Code, 1908, within six months, as required by Article 178, Schedule I, Limitation Act, 1908.

An award is not in the nature of a foreign judgment and a Court is, therefore, entitled to go into the merits of the same.

There is nothing illegal in the parties to an arbitration agreeing before *punchayatdars* to have evidence taken after the administration of any reasonable form of oath to the witnesses. **M.** MUTHUKARUPPA KONE *v.* VEERABHADRA KONE, 2 L. W. 320; 17 M. L. T. 241 **49**

——*Reference by natural guardian of minors—Mutual agreement—Repudiation by other party, power of.*

A natural guardian can refer a question that concerns the wards to arbitration and when the question does not concern the minors solely but also the guardian, there is consideration and mutuality sufficient to preclude the other party to the reference from repudiating it. **L. B.** MG. PO MYA *v.* MA DOUNG, 8 BUR. L. T. 122 **800**

Arbitration Act (IX of 1899), s. 11—*Appointment of arbitrators, when complete—Reference to sole arbitrator—Subsequent insertion of additional arbitrator's name, effect of—Stamp Act (II of 1899), s. 14—Application to file award by one arbitrator only, validity of.*

The appointment of a certain person as arbitrator is not complete until such person has accepted the reference and consented to act.

Where a dispute between the parties was referred to a sole arbitrator, but before he had accepted the reference the name of a co-arbitrator was added:

Held, that the addition, having been made before the reference was accepted by the first arbitrator, did not convert it into a second instrument within the meaning of section 14 of the Stamp Act and the two arbitrators were competent to make an award.

The filing of an award is a purely ministerial act and can be legally performed by any one of the arbitrators appointed. **S.** SHAMDAS TEUMAL *v.* KHIMANMAL, 8 S. L. R. 302 **602**

Arms Act (XI of 1878), s. 14—*Spear, deposit of—Failure to deposit—Conviction, if legal.*

Section 14 of the Indian Arms Act does not require "a spear" to be deposited with a Magistrate and a conviction for omission to do so is illegal. **M.** CHAGANTIPATI CHINA BASAVAPP, *In re*, 2 L. W. 532 **544**

Arrears of rent, stale claim for—Interest, rate of, allowable—Interest, when allowable on arrears of rent—Enhanced Government revenue, whether payable by mortgagor or mortgagee **386**

Assam Land and Revenue Regulation (I of 1886), ss. 6, 71, scope of—*Ejectment—User for agricultural purpose—True test—Occupancy right, acquisition of, by 12 years' possession, effect of.*

Section 71 of the Assam Land and Revenue Regulation does not entitle a purchaser to eject any tenant having a right of occupancy under the rent law for the time being in force, or to enhance the rent of any such tenant, otherwise than in the manner prescribed by that law.

Where the defendants are found to be cultivators holding the entire tract for a period of more than twelve years, and a portion has been used for grazing purposes while the remainder is still covered by jungle:

Held, that the defendants are *raiyats* within the meaning of section 6 of the Assam Land and Revenue Regulation and that the use of the land for grazing purposes entitles them to claim a right of occupancy;

that the true test is to determine whether the user of the land has been for an agricultural purpose;

that the mere fact that a part of the land is still covered by jungle and has not been actually brought under tillage does not take the case out of the operation of section 6, which applies to land "cultivated or held."

A *raiyat* who has occupied and cultivated land for more than 12 years under a landlord who had no title to the land, nevertheless acquires a right of occupancy under section 6 of Act X of 1859 or Act VIII of 1869, B. C. **C.** BROJABASI KOER *v.* RAM SANKAR DAS **834**

——— **s. 71** **834**

Assignments in fraud of creditors—Part payment of consideration for a previous mortgage—Right of subrogation, whether exists **583**

Attachment. *See* EXECUTION.

——— Claim to attached property—Question of possession not decided—Power of High Court to interfere—Possession in one's own right—Release from attachment **228**

——— effect of, on property attached **572**

——— Mortgage of right to receive certain dues—Decree for sale—Order of attachment and injunction, whether competent **601**

——— before judgment. *See* CIVIL PROCEDURE CODE, 1908, O. 38 **271**

Award. *See* ARBITRATION.

———, suit to set aside—Application for copy—Time requisite for obtaining it, whether deducted **860**

Balance sheet, falsification of, if offence under s. 477A., I. P. C. **105**

Benami mortgage—*Benamidar* mortgagee, right of, to sue—Mortgagor, whether can object to mortgagee's right **892**

——— purchase. *See* CIVIL PROCEDURE CODE, 1908, s. 66.

——— purchase—*Benamidar's* position and title—Real owner's powers **787**

——— Sale—Consideration—*Kobala* containing recital of payment of consideration—*Benami*, onus of proving—Defendant in possession—Presumption, whether arises—Admission of first evidence **696**

——— *transaction—Ostensible vendee paying off debts and making ready cash payment—Burden of proof.*

Where an ostensible vendee pays off the debts due by the transferor and makes an advance of ready cash on the date of sale, there is a strong presumption that the transaction is not *benami* and the burden lies heavily on the party who alleges that the transaction is *benami*. **M.** VAITHINATHA AIYAR *v.* VAITHINATHASAWMY AIYAR **970**

Benamidar, right of—Suit for specific performance **12**

——— *Right to execute decree.*

A *benamidar* transferee of a decree is entitled to execute it **A.** KAMTA PRASAD *v.* INDOMATI, 13 A. L. J. 557; 37 A. 414 **593**

Benefit of doubt. *See* PENAL CODE, s. 307.

Bengal Drainage Act (VI of 1880), ss. 26 (1), 42, 44—*Drainage charge—Instalments, recovery of—Mistake—Limitation.*

Section 44 of the Bengal Drainage Act is merely a permissive section and does not control the right of a land-holder or a superior tenant to recover the instalments under the two sections 42 and 44.

A mistake about the year of the instalment cannot save limitation. **C.** MOHENDRA NATH *v.* NARENDRA KRISHNA **399**

——— **ss. 42, 44** **399**

Bengal Land Revenue Sales Act (XI of 1859), ss. 5, 6, 33—*Embankment charges, sale for, whether sale for land revenue—Collector, jurisdiction of.*

A sale of an estate for arrears of embankment charges (*pulbandi*) is not a sale for arrears of land revenue, and it is not competent to a Collector to hold such a sale under Act XI of 1859. **P. C.** DHIRAJ CHANDRA BOSE *v.* HARI DASI DEBI, 19 C. W. N. 507; 28 M. L. J. 480; 2 L. W. 422 **290**

——— **ss. 6, 33** **290**

Bengal Land Revenue Sales Act—concld.

——————— **ss. 13, 54,** *scope of—Sale, what passes by—Purchaser, rights of—Adverse possession—Incumbrance, acquisition of rights in respect of.*

At a sale under section 13, Bengal Land Revenue Sales, Act XI of 1859, it is not the rights of the recorded proprietor that pass, but the share itself.

Obiter.—A Hindu widow in possession of a share of an estate as the heiress of her husband or her father represents the full owner's interest and the purchaser of such a share acquires the share itself, and not merely a life-estate.

Adverse possession against the defaulter, whether for the statutory period or for a lesser period, does not bind the purchaser of a share, who is not a person claiming from or through the defaulter.

It is not the right, title and interest of the previous owner of the share which pass to the purchaser under section 54, but the share as recorded in the Collector's book, on which the revenue is assessed.

The words "shall not acquire any rights" in section 54, Bengal Land Revenue Sales Act, refer to the acquisition of rights in respect of interests, such as incumbrances or the like, which are referred to in the previous phrase of that section. **C.** KHEMESH CHANDRA *v.* ABDUL HAMID **350**

——————— **s. 54** **350**

Bengal, N. W. P. and Assam Civil Courts Act (XII of 1887), s. 8 (2) **935**

Bengal Tenancy Act (VIII of 1885) **563**

——————— **s 22,** *proviso, scope of—*Raiyati *interest, merging of, into landlord's by sale—Arrears of rent, sale for—Landlord, purchase by—Under-*raiyat's *right, how long remains.*

Though the *raiyati* right merges into that of the superior landlord by the sale of the holding for arrears of rent and its purchase by the landlord, the right of an under-*raiyat* does not cease but remains alive till he is evicted by law, according to the proviso of section 22 of the Bengal Tenancy Act. **C.** ANANT PRASAD SINGH *v.* H. MANNERS **459**

——————— **ss. 30, 101, 111,** *scope of—Rent, enhancement of, alteration of, suit for—Local area, meaning of.*

A suit for enhancement of rent under section 30 of the Bengal Tenancy Act and a suit of the nature described in section 52, are included in the expression 'suit for alteration of rent' in section 111.

Under section 101 of the Bengal Tenancy Act, an entire district is included in the meaning of the term 'local area', although an area smaller than an entire estate or country as a whole is usually meant by the term 'local'. **C.** BROJENDRO KISHORE RAI *v.* KHALIB NAGARCHI, 21 C. L. J. 489 **885**

——————— **s. 38**—*Abatement of rent—Existing conditions—"Permanent," interpretation of—Deterioration—Land covered with sand, whether permanent deterioration.*

A more liberal interpretation must be put on the word "permanent" in section 38 of the Bengal Tenancy Act and it must be construed with reference to existing conditions.

Bengal Tenancy Act—contd.

Thus where a land is covered with sand the deterioration is permanent with reference to existing conditions. **C.** KRISHNA SAHAI *v.* PALAKDHARI RAUT, 22 C. L. J. 42 **206**

——————— **ss. 40, 153,** *scope of—Appeal, second—Commutation—Occupancy* raiyat, *advantage of—Revenue Court, decision of, how far affects Civil Court.*

The question of *Bhowli* or *Nagdi* rent is one the decision whereon may be challenged by way of appeal under section 153 of the Bengal Tenancy Act.

The propriety of commutation of rent of a holding or of the amount fixed cannot be called in question in a Civil Court.

A proceeding under section 40 of the Bengal Tenancy Act is founded on the assumption that the tenant whose rent is sought to be commuted is an occupancy *raiyat.*

A decision in a dispute as to the status of the tenant decided by the Revenue Authorities in a commutation proceeding under section 40 is not final and conclusive between the parties, the Civil Court has jurisdiction to go over it. **C.** KALI KRISHNA BAISWAS *v.* RAM CHANDRA BAIDYA, 21 C. L. J. 487; 19 C. W. N. 823 **896**

——————— **ss. 49, 87**—*Occupancy right, non-transferability of, unless by custom—Notice, necessity of—Re-entry, landlord's right of—Transfer by* raiyat *without consent of landlord.*

Where in the absence of any custom of transfer an occupancy *raiyat* transfers the property to the under-*raiyats*, the landlord has a right to re-enter upon the property.

A notice under section 49 of the Bengal Tenancy Act, to which under-*raiyats* are entitled, is indeed required before ejectment, but that does not apply to a superior landlord who is claiming to re-enter because the occupancy *raiyat* has forfeited his holding by having transferred it without the consent of the landlord.

Section 49 applies where the occupancy *raiyat* still remains in the position of the landlord, not where the occupancy *raiyat* has forfeited his interest by having transferred his interest without the consent of the landlord.

A notice served under section 87 of the Bengal Tenancy Act is not required for the landlord to re-enter in a case like this. **C.** JADAB CHANDRA SARDAR *v.* GOVINDA CHANDRA MANDAL **466**

——————— **ss. 49 (b), 85 (2)**—*Lease, perpetual, validity of—Under-*raiyat*—Rent, acceptance of, if ratification.*

Where a *raiyat* grants a lease allowing the lessee to hold the land from generation to generation, and gets rent therefrom, the lease is a nullity, and the acceptance of rent from the lessee cannot effect a ratification of the lease, which is initially void. **C.** MOHIM CHANDRA DEY *v.* BAIDYA NATH, 21 C. L. J. 478 **879**

——————— **s. 85 (2)** **879**

——————— **s. 87** **466**

——————— **s. 100,** *Rules made under—Common manager, powers and duties of—High Court, jurisdiction of—Common manager, position of*

Bengal Tenancy Act—contd.

The High Court having made rules under section 100 of the Bengal Tenancy Act, defining the powers and duties of managers, it has power under section 15 of the Charter to superintend and revise the orders of a District Judge.

The position of a common manager under the Bengal Tenancy Act is analogous to that of a Receiver appointed by the Court under the provisions of Order XL of the Code of Civil Procedure, save and except that he is not liable to be sued. C. SATYENDRA MOHAN GHOSE *v.* RAJ MOHAN GUHA **177**

——— ——— ——— ——— s. 101 **885**

——— ——— ——— ——— s. 104 H — Record of Rights, preparation of, finality of **437**

——— ——— ——— ——— s. 106 **122**

——— ——— ——— ——— s. 106—*Tenant's right to cut and appropriate trees—Custom, reasonableness of—Question of law—Reasonableness, test for.*

The question whether a custom is reasonable or not is a question of law and not one of fact.

It is wrong to hold that a custom is unreasonable in so far as it permits the appropriation of timber trees on a holding by the tenant.

Where there is nothing unfair or dishonest or contrary to the public good in a custom, the custom is not unreasonable. C GURAI KAR *v.* KAURMONI SINGHA, 19 C. W. N. 1188 **312**

——— ——— ——— ——— ss. 109, 106, *scope of—Revenue Court's duty as to fair rent—Suits in Civil Court, bar of—Revenue and Civil Courts, jurisdiction of—No forfeiture for mistake in selecting one Court for another.*

Under the provisions of section 109 of the Bengal Tenancy Act, the decision of a Settlement Officer or rather a Revenue Court, with reference to what is the fair and equitable rent, is binding and conclusive and the tenants are not entitled to question that decision in any Civil Court, provided that the question in the Civil Court is concerning any matter which is or has clearly been the subject of an application made under sections 105 to 108 of the Bengal Tenancy Act.

The duty of a Revenue Court is limited to the inquiry as to what is the fair rent, having regard to the entry that appears on the Record of Rights and, therefore, section 109 of the Bengal Tenancy Act is no bar to a suit by a tenant for a declaration that the lands are either *lakheraj* or are held at fixed rates. Section 106 of the Bengal Tenancy Act does not exclude the right of a Civil Court. It is an extremely dangerous proposition to say that whenever a Statute gives a person a right to go, if he thinks fit, to a special Tribunal, that necessarily excludes the jurisdiction of the ordinary Courts of the country.

A person, because he went to a Civil Court instead of going to a Revenue Court, is not liable to be deprived of his rights to the property which he may have purchased or inherited from his ancestors. C. SHASHI BHUSAN *v.* ESABAR ALI, 19 C. W. N. 636 **122**

——— ——— ——— ——— s. 111 **885**

——— ——— ——— ——— s. 111A **437**

Bengal Tenancy Act—contd.

——— ——— ——— ——— s. 149 (3), *scope of—Arrears of rent, suit for—'Money,' meaning of—Apportionment, question of.*

In a suit for arrears of rent against a tenant, the money mentioned in sub-section (3) of section 149 of the Bengal Tenancy Act is the entire sum deposited into Court under sub-section (1) and no question of apportionment between rival claimants to proprietorship of the tenancy is intended to be raised or decided under the section.

Where it is admitted by the tenant defendant that part at any rate of the sum deposited is due to the defendant-landlord but the precise part so due is not determined:

Held, that section 149 of the Bengal Tenancy Act has no application, the question of apportionment being not within the scope of the suit. C. AMBICA CHARAN BEPARI *v.* ASWINI KUMAR, 21 C. L. J. 485 **883**

——— ——— ——— ——— s. 153 **836**

——— ——— ——— ——— , (amended by Act I of 1908), s. 153, *proviso and explanation, scope of—Sale—Irregularity—Question relating to title or some interest in land Civil Procedure Code (Act V of 1908), O. XXI, r. 90, order under, whether appealable—Irregularity and fraud in publishing or conducting a sale.*

Per *N. Chatterjea, J.*—Under Explanation to section 153 of the Bengal Tenancy Act (Eastern Bengal and Assam Tenancy Act) a question as to the regularity of the proceedings in publishing or conducting a sale in execution of a decree for arrears of rent is not a question relating to title to land or to some interest in land as between parties having conflicting claims thereto.

The question whether, or not, a case comes under the proviso to section 153, Bengal Tenancy Act, is to be determined by the Appellate Court not with reference to the question which may be raised in appeal, but with reference to the question decided by the order of the Subordinate Court.

An order setting aside or declaring to set aside a sale in execution of a decree for rent (where the decree-holder is the purchaser) is an order deciding a question relating to title to land as between parties having conflicting claims thereto, and falls within the proviso to section 153 of the Bengal Tenancy Act, and is, therefore, appealable, though there could be no appeal from the decree in the suit on account of the prohibition contained in the section.

An irregularity of the proceedings in publishing or conducting a sale is not the same as fraud in publication or conduct of the sale.

Section 153, Explanation, applies only to cases where there is a question as to irregularity in publishing or conducting a sale.

An application to set aside a sale made by a person (who prior to the sale had purchased the holding) more than a month after the sale comes within section 47 of the Civil Procedure Code and is not time-barred, section 18 of the Limitation Act being applicable to the circumstances of the case.

A question as to fraud in publishing or conducting a sale is not covered by the Explanation to section 153 of the Bengal Tenancy Act.

Bengal Tenancy Act—contd.

Per *Mullick, J.*—An irregularity in publishing or conducting a sale may be accompanied with or without fraud.

Section 153, Explanation, does not expressly exclude from its scope an irregularity tainted by fraud. **C.** NOBIN CHANDRA *v.* BEPIN CHANDRA ROY, 19 C. W. N. 953; 22 C. L. J. 244 **308**

——— **s. 171,** *scope of—Construction—Sum paid to avert rent-sale not considered part of mortgage-money—Transfer of Property Act (IV of 1882), s. 83, scope of—"Money remaining due on mortgage", what includes.*

Whatever construction may be put on section 171 of the Bengal Tenancy Act, it cannot mean that the sum paid for the protection of the property becomes part of the mortgage-money.

In view of the specific provisions of section 171 of the Bengal Tenancy Act, the money paid to avert the rent sale does not become part of the mortgage-money so as to entitle the mortgagee to treat it as included in the amount remaining due on his mortgage under section 83 of the Transfer of Property Act **C.** MANMATHA NATH *v.* SARAT CHANDRA ADDY, 21 C. L. J. 429 **929**

——— **s. 174**—*Deposit to be made by judgment-debtor himself—Transferee, whether can make a valid deposit.*

A deposit made under section 174 of the Bengal Tenancy Act must be made by the judgment-debtor himself and by no other person. A transferee of the judgment-debtor does not come under the section. **C.** SURENDRA NARAYAN SINGH *v.* LACHMI KOER **840**

——— **s. 182** **859**

——— **s. 186A,** *scope of—Denial of landlord's title, by tenants, effect of—Landlord, if can sue for recovery of possession*

Section 186A of the Bengal Tenancy Act does not apply to a case brought by a landlord in a Civil Court for possession when the tenants thereof have successfully denied the landlord's title in a rent suit. **C.** PROSONNO KUMAR *v.* KULADA PROSAD **472**

——— **Sch. III, Art. 2**—*Limitation Act (IX of 1908), s. 29, Sch. I, Art. 116—Arrears of rent, suit to recover—Agricultural land, lease of, for agricultural purposes—Transfer of Property Act (IV of 1882), s. 107.*

In a suit for arrears of rent the rent that was in arrears and was sued for, was for the year 1313 B. S. under a first *kabuliat*, and for the years 1313-1318 B. S. under a second *kabuliat*. The defendant's estate was taken charge of by the Court of Wards on the 11th November 1908, and whilst his estate was under their charge the Collector gave an acknowledgment in writing on the 20th September 1910 with respect to the rent now sued for:

Held, per *Fletcher, J.*, that the rent sued for the year 1313 was barred by limitation, as the case came under the Bengal Tenancy Act, and the leases were found to have been granted for agricultural purposes.

The Bengal Tenancy Act does not apply to leases of agricultural land which are not for agricultural purposes.

Per *Richardson, J.*—Where a lease relates to agricultural land but is not a lease for agricultural purposes, it is clearly governed by the Transfer of Property Act. Such a lease can only be made under section 107 by a registered instrument.

Where a lease appears to be in substance a temporary lease granted to a rent-farmer or middleman and relates to agricultural lands, there is no question of any conflict between the Bengal Tenancy Act and the Transfer of Property Act or of applying any provision of the latter Act.

Section 29 of the Limitation Act contains a saving clause in regard to special and local laws.

Whether a lease of agricultural land is or is not a lease for agricultural purposes the Bengal Tenancy Act applies, and the period of limitation applicable is that provided by that Act. **C.** RASH BEHARI LAL MANDAL *v.* TILUCKDHARI LAL **797**

——— **Sch. III, art. 3** **859**

Bengal Tenancy Amendment Act (I of 1907), s 31 (a), *scope of—Rent, enhancement of—"Prevailing rate," meaning of.*

Per *Sharfuddin, J.*—The 'prevailing rate' is not the average rate of rent of neighbouring villages

Where it is found that there is no prevailing rate in the neighbouring villages, no decree for enhancement can be given.

Where the provisions of section 31 (*a*) of the Bengal Tenancy Act are not extended, the principles of the prevailing rate cannot be applied.

Per *Coxe, J.*—Where the great majority of the *raiyats* are found to pay at the rate of Rs. 4 and over in the neighbouring villages:

Held, that Rs. 4 and over is not a rate at all, much less a prevailing rate, unless the artificial construction contained in section 31 (*a*) is placed on that expression.

It is not the intention of the Legislature that section 31 (*a*) should apply in a district to which it is not formally extended, however reasonable the provisions of that section are. **C.** RAM DEO SINGH *v.* MOHESWAR PROSAD, 21 C. L. J. 483 **880**

Betrothal Contract. *See* MUHAMMADAN LAW.

Bombay District Municipal Act (III of 1901), s. 167 **597**

Bombay Land Revenue Code (Act V of 1879), s. 37 **51**

——— ——— ——— **ss. 65, 66**—*Land used as a graveyard and also as a wood store—Possession and user for over 50 year without paying any assessment—Order of eviction, whether legal—Suit to set aside order—Limitation Act (IX of 1908), Sch. I, Art. 14.*

The land in dispute was used as a graveyard and also for storing wood by the plaintiffs, who had been in undisturbed possession of it ever since 1860 in their own right without paying any assessment. In 1907 the District Deputy Collector ordered the *mamlatdar* "to cause the building and the wood to be removed forthwith from the said land" and the order was confirmed on appeal by the Commissioner in April 1909. On the 22nd February 1910 the plaintiffs sued the Secretary of State for India in Council for the declaration that they were the owners of the land, for a cancellation of the order and for a perma-

Bombay Land Revenue Code—concld.

nent injunction against the defendant to prevent any obstruction being caused to them in the enjoyment of the property:

Held, (1) that in view of the long undisturbed possession of the plaintiffs the order of eviction was *ultra vires*.

(2) that the suit was not barred by Article 14 of the Limitation Act. **B.** RASULKHAN *v.* SECRETARY OF STATE, 17 BOM. L. R. 513: 39 B. 494 **490**

——— **s. 66** **490**

Bombay Mamlatdars' Courts Act (II of 1906), s. 23—*Collector, whether includes District Deputy Collector—High Court's power to revise.*

A District Deputy Collector has no authority to pass an order under section 23 of the Mamlatdars' Courts Act of 1906

Where a District Deputy Collector has assumed to act judicially, he will be treated as a Court under the superintendence of the High Court whose proceedings can be revised under the extraordinary jurisdiction. **B.** SONU JANARDAN KULKARNI *v.* ARJUN BARKU KUNBI, 17 BOM. L. R. 579 **954**

Bombay Mâtadars Act (VI of 1887), s. 9—*Death of representative Matadar—"Heir next in succession," how determined.*

On the death of a representative Matadar, the heir next in succession is ascertained in the first instance by reference to the personal law of the parties. **B.** DAHYA KHUSAL *v.* BAI BHIKHI, 17 Bom. L. R. 504: 39 B. 478 **500**

Bombay Prevention of Gambling Act (Bom. Act IV of 1887). ss. 6, 7, 10—*Evidence Act (I of 1872), s. 125—Criminal Procedure Code (Act V of 1898), s. 342—Complaint on which special warrant issued—Right of accused to have it produced at trial—Extent of privileged nature of such complaint—Power of Magistrate to examine as witnesses persons* challaned *by Police as accused persons under Gambling Act—Special procedure—General procedure.*

A Magistrate has power to examine as witnesses persons arrested and brought before him under section 6 (*b*). The whole procedure of the Gambling Act being a special procedure overrides the general law of procedure enacted in section 342, Criminal Procedure Code, and whenever it is inconsistent with it.

Per *Pratt, J. C.* (*Fawcett, A. J. C. dissenting*).—A complaint under section 6 of the Bombay Prevention of Gambling Act stands on the same footing as a first information of a cognizable offence recorded under section 154, Criminal Procedure Code, or complaint of a non-cognizable offence under section 200, Criminal Procedure Code, and although it is not a necessary part of the evidence for the prosecution, yet it is evidence and the accused have a right to call for it, and if the warrants are challenged, their production would be necessary.

Section 125 of the Indian Evidence Act rests upon public policy and it protects the name of a spy or secret informant, not the nature of the information and it has no application whatever to an informant who lays a sworn information and thereby initiates criminal proceedings.

Bombay Prevention of Gambling Act—concld.

Per *Fawcett, A. J. C.*—The Bombay Act requires the complaint to be on oath merely as an additional guarantee of the truth of the complaint. It is not intended to imply that the complaint is a document on which proceedings against any persons that may be arrested under the warrant are based. These proceedings are based on the fact of the arrest of the accused and their production before the Magistrate and not on the complaint which is merely the basis of the warrant which leads to their arrest

The rule stated in section 125, Evidence Act, is clearly applicable and appropriate in regard to gambling cases and, therefore, a Magistrate is perfectly right in refusing to order the production of the complaint under section 6 of the Bombay Act (IV of 1887). **S.** LILADHAR UMERSI *v.* EMPEROR, 8 S. L. R 309 **79**

Breach of Trust. *See* PENAL CODE, s. 405.

Buddhist Law—Husband and wife—*Wife's interest in joint property affected by mortgage executed by husband alone—Wife's conduct and acquiescence—Estoppel.*

Where a Buddhist couple jointly owned properties but the business was carried on by the husband in his name only and he alone mortgaged the joint properties but the wife knew of the mortgages created by him and acquiesced in them from the beginning:

Held, that the husband had power to bind and did bind the wife's interest in the mortgaged properties.

Where the leases of the sites of certain mills were in the name of the husband alone and where in his business transactions he alone appeared as the rice mill owner and the wife did not say that she was half owner of the mortgaged properties, although she took part in the negotiation of a mortgage:

Held, that the wife was estopped from pleading that the mortgage decree passed against her husband alone did not affect her interest in the mortgaged property as she was not a party to the suit. **L. B.** MA TIN ME *v.* MAUNG MAUNG, 8 Bur. L. T. 66 **881**

——— ——— *living separate—Custody of their girl aged seven years Natural guardian—Guardians and Wards Act (VIII of 1890), ss. 9, 17 (1), 19 (b)—Law applicable.*

In a suit by the mother of a Burmese Buddhist girl of seven years to recover her from the custody of her father, the plaintiff's husband, who was living separate:

Held, that the provisions contained in sections 254 to 257 of the Kinwun Mingyi's Digest, Volume II, providing for the custody of children upon divorce of the parents, did not apply where, though the husband and wife lived separate, the marriage status continued and that as guardianship was not one of the matters mentioned in section 13 of the Burma Laws Act, the personal law of Buddhists was not applicable.

Held, also, that according to section 19 (*b*) of the Guardians and Wards Act, the father was the natural guardian of the minor child under the circumstances of the case. **L. B.** MA THEIN ME *v.* MAUNG PO GYWE, 8 Bur L. T. 73 **890**

——— **Inheritance**—*Nearer relatives exclude more remote—Great-grand-daughter, whether can oust her grand-aunts.*

Buddhist Law—concld.

In Buddhist Law the nearer relatives exclude the more remote even in the case of inheritance by direct descendants.

An out-of-time grand-daughter of a predeceased son cannot inherit at all in competition with a daughter.

A widow has no claim to inherit when her husband dies without acquiring any vested rights in the property.

A great-granddaughter is not entitled to inherit in the presence of her grand-aunts. **U. B.** MI KIN MI SAN MIE, 8 BUR. L. T. 51 **741**

——— — **Marriage** — *Imprisonment of husband – Desertion — Dissolution of marriage—Right to claim divorce—Right to joint property.*

Under the Buddhist Law there is no authority for holding that a man sentenced to imprisonment is thereby to be deemed to have deserted his wife.

During the imprisonment of the husband, his wife has no right to take a second husband, and if she does so, her conduct amounts to desertion and adultery, and she cannot claim a divorce by pleading the desertion.

The marriage is not dissolved by the desertion but from the day when the first husband on his release from jail demands the joint property from her.

Where the husband treats the marriage as at an end on the ground of his wife's desertion and adultery he is entitled to all the joint property of the parties. **L. B.** AUNG BYU *v.* THET HNIN, 8 L. B. R. 50 **863**

——— ——— **Monk,** *whether can enter into valid contract.*

A Buddhist monk is incapable of entering into a valid contract for his own personal benefit.

Where, therefore, a Buddhist monk sued for redemption:

Held, that he was prohibited by his personal law from buying, selling or mortgaging land and was debarred from suing for redemption. **U. P. B. R** U. TILAWKA *v.* NGA SAWE KAN, U. B R. (1915) II, 61 **613**

Burden of proof—Accretions—By gradual, slow and imperceptible means—Small villages—Small river—Large accretions, if by gradual, slow and imperceptible means **278**

——— — Ancestral land, whether liable to attachment in hands of widow of deceased proprietor **572**

——— — *Benami* transaction — Consideration, payment of **696**

——— — *Benami* transaction—Ostensible vendee paying off debts and making ready cash payment **970**

——— — Charge created by Hindu widow—Necessity, proof of **54**

——— — Common carrier, negligence of **260**

——— — Criminal intent—Accused **67**

——— — Demise questioned—Original ownership and derivative tenure admitted—Nature of proof required **386**

——— — Gift in favour of one member of family—Property treated as joint property **190**

Burden of proof—concld.

——— — Inheritance—Custom **7**

——— — Legal necessity **926**

——— — *Marriage — Suit for declaration that plaintiff was not wife of defendant—Presumption—Divorced woman continues unmarried until proved to have married again.*

The defendant having stated in a criminal case that the plaintiff was his wife, the plaintiff sued for a declaration that she was not the wife of the defendant:

Held, that it was for the defendant to prove that the plaintiff was married to him.

Held, also, that in the absence of an objection on the part of the defendant that the onus was wrongly placed on him by the original Court, the Appellate Court ought not to have shifted it on to the plaintiff.

In the case of a divorced woman the presumption is that she continues unmarried until proved to have married again. **P.** DAULAT *v.* KHAN, 81 P. L. R. 1915; 88 P. W. R. 1915 **194**

——— — Permission to make tanks **11**

——— — Petition for revocation of patent **904**

——— — Right to re-call and cross-examine prosecution witness—Right refused—Prejudice **668**

——— — Shamilat—*Sale— Interpretation of sale-deed—Misreading of record—Appeal, second.*

The burden of proving that the land was sold to a party lies heavily on that party where the land is not specifically mentioned in the deed of sale and cannot even be said to be mentioned by implication.

A second appeal is competent when the lower Appellate Court is led to a wrong finding through a misreading of the record on vital matters. **P.** MUHAMMAD NAWAZ *v.* GHULAM HAIDER, 75 P. L. R. 1915 **167**

——— — Suit on a lost bond—Admission of execution—Plea of payment **606**

——— — Suit for possession of *math* and its property **724**

——— — Suit on promissory note—Written contract—Oral agreement—Conditional admission in pleadings—Objection under the section taken for first time in Court of Appeal—Pleadings, amendment of **223**

——— — Surety, evidence about fitness of —*Onus*, shifting of **111**

——— — Transfer of property or any interest therein by debtor insolvent—Fraudulent preference —Receiver **128**

——— — Provincial Insolvency Act (III of 1907), s 36—Transferee to prove good faith and valuable consideration **814**

——— — Waste land—*Melvaram* and *Kudivaram* rights—*Ryot* **634**

——— — Will—Custom **382**

Burmese Buddhist Law—*Inheritance—Orasa child.*

Under the Burmese Buddhist Law a daughter no less than a son may be an *orasa* child but there cannot be an *orasa* daughter as well as an *orasa* son in the same family. An *orasa* daughter's position is merely

Burmese Buddhist Law—concld.

presumptive and is liable to be displaced by an *orasa* son of competent age. **L. B.** MAUNG PO HMAN *v.* MAUNG TIN, 8 BUR. L. T. 140 **756**

——— ——— ———Orasa *son, death of—Younger brother, if becomes* orasa—*Share of* orasa *son—Failure to claim promptly, effect of—Presumption.*

Under the Burmese Buddhist Law if the eldest son tains his majority and fulfils the prescribed conitions and then dies before his parents, his position as *orasa* remains unfilled and the next younger brother does not succeed to it.

If the eldest son reaches the age of manhood before his death, the presumption is that he fulfils the prescribed conditions as *orasa*.

The *orasa* son must exercise his option of claiming a ¼th share promptly; if he fails to do so, he must be held to have abandoned the right. **L. B.** MAUNG KA GU *v.* MA HNIN NGWE **706**

Carriers Act (III of 1865)—*Common carrier, liability of, for loss of goods—Burden of proof—Negligence—Question of law or fact—Appeal, second.*

A common carrier in India is liable as an insurer, that is, he is responsible for the safety of the goods entrusted to him in all events, except when loss or injury arises from act of God or King's enemies. But his liability for loss or injury in respect of the goods carried may be varied by contract.

The burden of proof of absence of negligence is upon the common carrier, on the theory that the loss or damage to the goods is *prima facie* proof of negligence.

In order to find whether the question of negligence is a question of law or fact, the rule is that from any given state of facts the Judge must say whether negligence can legitimately be inferred and the Jury, whether it ought to be inferred. In other words, if the contention is that there is no evidence of negligence, the question is one of law; on the other hand, the question whether the evidence is sufficient to justify the inference of negligence is one of fact. **C.** AKHIL CHANDRA SHAHA *v.* INDIA GENERAL NAVIGATION AND RAILWAY CO., LTD., 21 C. L. J. 565 **260**

Cause of action—*Arrears of rent—Re-settlement, arrears after—Cause of action, whether same—Bengal Tenancy Act (VIII of 1885), ss 104H, 111A—Record of Rights, preparation of, finality of.*

A 're-settlement', or new contract of lease, contemplates a new obligation and a new contract to pay new rent and is not the same cause of action as the rent which becomes due under the original contract for letting.

It is not open to a Court to go behind the Record of Rights to ascertain what, in fact, is the true nature of the tenancy between the parties.

A Record of Rights, prepared during the settlement of Government revenue under the provisions of sections 104H and 111A of the Bengal Tenancy Act, is conclusive, subject to the right of the tenant to bring a suit as mentioned in section 104H (3) of the Bengal Tenancy Act. **C.** BISESHWAR RAY *v.* JUDHISTHIR NATH **437**

Caveat emptor—Promissory note, sale of—Purchaser bound to make enquiries of executant **887**

Central Provinces Municipal Act (XVIII of 1889), s. 66 (5)—*Notice requiring alteration or demolition—Reasonable time—Starting point.*

A notice given by a Municipal Committee requiring a party to alter or demolish a building is bad unless given within a reasonable time.

What is "reasonable time" is determined according to the circumstances of the case and with particular reference to the means and ability of the person by whom the duty is to be discharged.

Where a work necessarily spreading over a considerable time is concerned, time should start from its inception. **N.** ABDUL SATTAR *v.* SECRETARY, MUNICIPAL COMMITTEE, 11 N. L. R. 87; 16 Cr. L. J. 532 **660**

Central Provinces Tenancy Act (XI of 1898), s. 88—*Ejectment—Claim by sub-tenant to recover compensation for crops—Jurisdiction of Civil or Revenue Court.*

The method by which a tenant gets compensation for crops raised by him and reaped by the landlord is laid down in section 88 of the Central Provinces Tenancy Act, which is plainly a section, when the ejectment is on a decree for arrears of rent, in relation to the execution of decrees transferred to a Revenue Officer.

An ejectment of a tenant on legal grounds is binding on a sub-tenant, and the sub-tenant is not entitled to any remedy not open to the tenant. His only valid cause of action is as representative of the tenant within the meaning of section 47 of the Civil Procedure Code. **N.** GOPAL DAS *v.* RAMUSA, 11 N. L. R. 105 **836**

Certificate—Succession—Patent error of procedure—Interference in revision—Suit on promissory note assigned by undivided son—Succession certificate, whether necessary—Question of want of certificate raised for the first time in appeal—Appellate Court's duty to give plaintiff an opportunity of producing certificate **234**

Charge. *See* CRIMINAL PROCEDURE CODE, s. 225.

Charter Act (24 & 25 Vic. c 104), s. 13 **846**

——— ——— ——— **s. 15** **109**

Cheating. *See* PENAL CODE, s. 415.

Chota Nagpur Encumbered Estates Act (VI of 1876), ss. 3, 12, 32—*Manager, order of, effect of—Civil Courts, jurisdiction of, while estate held by Revenue Authorities—Interest, accumulation of, rendering estate insolvent—Deputy Commissioner's work—Manager, power of, to render interest on original debt.*

Where the Manager of an encumbered estate is the principal necessary party and there is no allegation that he, in making the order he did in pursuance of the Chota Nagpur Encumbered Estates Act, was not acting *bona fide*:

Held, that section 22 of the Act will alone bar the suit.

It is clear from the provisions of sections 3 and 12 and other sections of the Act that, during the time that an estate is held by the Revenue Authorities under the Act, a Civil Court has no jurisdiction to interfere on a suit brought by the creditors. The creditors have their remedy against any order of

Chota Nagpur Encumbered Estates Act—concld.

the Manager before the Deputy Commissioner and the Commissioner.

Where the Manager finds that the accumulation of interest, whether under a Civil Court decree or under any other kind of debt, would render the estate insolvent, he must at once get the Deputy Commissioner to release the estate.

If, therefore, the Manager does not possess the power to reduce the interest on the original debt as contracted, the operation of the Act would not only frequently but in every case prove infructuous. **C.** HIRANAND OJHA *v.* SATISH CHANDRA ROY **420**

——— ——— **ss. 12, 22** **420**

Chur *land formed in bed of river—Consent decree, nature of, how far binding—Consent decree and compromise, compared—Contract of parties, nature of—Head of family, decree against, how far binding—Map drawn for a different purpose, how far affects rights of property—Survey map and* thak *map distinguished Submerged lands, possession of, presumption of—Limitation—Adverse possession—Constructive possession does not apply to a wrong-doer.*

A consent decree is just as binding on the parties thereto as a decree after a contentious trial.

A consent decree cannot have greater validity than the compromise itself.

A consent order is only an order of the Court carrying out the agreement between the parties.

A contract of the parties is not the less a contract and subject to the incidents of a contract, because there is superadded the command of the Judge.

A decree obtained against the head of a family in a suit to which the other members are not parties may be operative against the latter under certain circumstances; but this principle clearly does not apply unless it is shown that the matter was one in which the member sued was entitled to represent the whole family.

The rights of property as between two parties cannot be affected by a map drawn for a different purpose, a purpose not relevant to the subject of the dispute between them.

Although the survey officers have at their disposal means of more accurate measurement than the *thak* officers have, yet no hard and fast rule can be laid down that a survey map is more reliable than a *thak* map. The true principle is that the map which more clearly agrees with the local land-marks, is the one that should be followed.

The rightful owners must be deemed in law to have been in possession of the submerged lands during the period of diluvion, the only point for investigation in such cases is the period of time when the lands re-appeared and became fit for occupation.

Where it is found that the possession of the defendants, after re-formation of the disputed lands, has not extended over the statutory period, the claim of the plaintiffs is not barred by limitation in respect of lands which lie within the *thak* boundaries of the *churs*.

The theory of constructive possession is applied only in favour of a rightful owner and is not extended in favour of a wrong-doer whose possession is treated as confined to land of which he is actually in possession. **C.** AMIRTA SUNDARI *v.* SHERAJUDDIN AHAMED, 19 C. W. N. 565 **156**

Civil Procedure Code (Act XIV of 1882), s. 373 **24**

——— ——— ——— **s. 375**—*Adjustment of suit—Interpretation—Agreement not to execute decree previous to decree, effect of.*

An agreement not to execute a decree, if effect is sought to be given to such agreement in execution proceedings, must be a transaction between the parties subsequent to the decree and not one which would make the decree itself void as being in its contravention.

The words 'adjustment of a suit' in section 375, Civil Procedure Code, refer not only to the form in which the decree is to be drawn up but also the manner in which the rights of the parties are to be enforced in the execution proceedings or that suit. Therefore, under section 91 of the of the Evidence Act, on extraneous evidence, oral documentary, regarding the terms of the compromise is admissible in that suit and its execution proceedings. **N.** HUKAM CHAND *v.* RADHA KISAN 11 N. L. R. 1.0 **838**

——— ——— ——— **s. 583**—*Application for restitution—Reversing decree, whether contains direction to restore any benefit received—Civil Procedure Code (Act V of 1908), s. 144, scope of.*

Applications made to obtain restitution under section 583 of the Civil Procedure Code, 1882, are proceedings in execution of the appellate decree, which the successful party has the right to treat as containing a direction to the other party to restore whatever benefit the latter has derived through execution under the reversed decree.

A decree for restitution passed in favour of a person in 1907 cannot be deemed to have ceased to exist in 1909 and can be executed whether an order of the first Court directing such restitution has been passed or not.

Section 144 of the new Civil Procedure Code does not apply to decrees passed before the Code came into force. **M.** MUNICIPAL COUNCIL, KUMBAKONAM *v.* SADAGOPACHARIAR **380**

——— ——— ——— **ss 624, 626, 629**—*Review of judgment—"Strict proof", meaning of—Objections—Proper safeguards—Formalities—Sufficiency of proof—Appellate Court's jurisdiction.*

Per *Jenkins, C. J.*—"Strict proof" means anything which may serve directly or indirectly to convince a Court and has been brought before the Court in legal form and in compliance with the law of evidence. It is the formality which is prescribed and not the result that is described.

Section 629 of the Code of Civil Procedure, Act XIV of 1882, limits the grounds on which objections may be taken to the admission of a review; an objection may be taken when the admission has been in contravention of the provisions of section 624, that is to say, it has been made to a tribunal that has no power to grant it.

Without proper safeguards, the Court of first instance is, the proper Court to determine whether or not there should be a review, but before a review is granted those safeguards must be observed.

Per *Woodroffe, J.*—The term 'strict', Order XLVII, rule 2 (*b*), refers to formalities, such as issue of notices, taking of evidence on oath

Civil Procedure Code—(1882)—concld.

or affirmation, legal proof of documents, cross-examination, and so forth. If such legal evidence be wanting objection may be made in appeal under Order XLVII, rule 7, which does not refer to the weight or sufficiency of the evidence. If the legal formalities are observed it is no objection that the probative force of evidence legally taken appears to be different to the Appellate Court from what it appeared to the Court granting review.

"Strict proof" means proof according to the formalities of law. It does not refer to sufficiency of proof in securing a particular conviction.

Whether the proof is according to law or not is within the jurisdiction of the Appellate Court to determine, but the question of sufficiency of evidence is for the Court admitting the review. **C.** ABED KHONDKAR *v.* MOHENDRA LAL, 19 C. W. N. 804; 42 C. 830 **282**

——— ——— ——— **ss. 626, 629 282**

Civil Procedure Code (Act V of 1908), ss. 2 (2), 36, 47—*Decree*—*'Matters in controversy', meaning of*—*Orders dismissing application to sue* in forma pauperis *and awarding day costs, whether amount to decrees and are appealable.*

The term 'matters in controversy' in section 2 (2) of the Code of Civil Procedure, 1908 must not be understood as relating solely to the merits of a case. It would cover any question relating to the character and status of the party suing, to the jurisdiction of the Court, to the maintainability of a suit and to other matters preliminary, which necessitate an adjudication before a suit is enquired into, in fact all questions concerning a *pending suit.* It does not, however, include an order passed on an application preliminary to the institution of the suit itself, such as an application for leave to sue, and proceedings passed in execution in regard to such orders as well as orders granting day costs are not appealable as they do not come within the scope of section 47, Civil Procedure Code, although such orders can be executed under section 36, Civil Procedure Code. **M.** ANKALA VENKATA REDDY *v.* MANCHALA VENKATA REDDY, 2 L. W. 519; 17 M. L. T. 447 **393**

——— ——— ——— **s 9**—*Specific Relief Act (I of 1877), s. 42*—*Suit for declaration to post of Honorary Secretaryship to an association, maintainability of.*

Where the plaintiff sues for a declaration that he is the Honorary Secretary to an association and that a resolution passed at a meeting of the association dismissing him from the secretaryship is null and void:

Held, that he is bound to satisfy the Court that the suit is one concerning the right to an office within the meaning of section 9 of the Civil Procedure Code, and also that what he is enforcing in the suit is his right to a certain 'legal character' within the meaning of section 42 of the Specific Relief Act.

Where the plaintiff's services to an association are voluntary and gratuitous and where there is no question of any contract between him and its Board of Trustees, the Civil Court has no jurisdiction to entertain the suit. **A** MAHARAJ NARAIN SHEOPURI *v.* SHASHI SHEKHARESHWAR ROY, 13 A. L. J. 455; 37 A. 313 **53**

——— ——— ——— **s. 11**—Title derived from a party, nature of—No issue raised or tried—No bar—Co-defendants **464**

Civil Procedure Code—(1908)—contd.

——— ——— ——— **s. 11, O. II, r. 2**—Res judicata—*Relinquishment of relief*—*Relief claimed but not granted*—*Direction to file separate suit for it*—*Objections to attachment and sale of immoveable property rejected summarily*—*Suit for recovery of property sold*—*Limitation Act (IX of 1908), Sch. I, Arts.* 1, 144.

Where a Court expressly declares (rightly or wrongly) that it is not competent in a particular suit to grant a specific relief claimed therein and directs the plaintiff to take separate proceedings to achieve his purpose, his subsequent suit to get that relief is neither barred by the rule of *res judicata* under section 11 nor by rule 2 of Order II of the Code of Civil Procedure, 1908.

Article 11 of Schedule I of Act IX of 1908 does not apply where objections to the sale of the property are not investigated but are summarily rejected by the Executing Court, and a suit for recovery of the property thus illegally sold in execution of a decree can be brought at any time within 12 years under Article 44 of the Act from the date on which the cause of action accrued. **P** MUHAMMAD BAKHSH *v.* BALKISHAN, 72 P. W. R 1915; 160 P. L. R. 1915 **731**

——— ——— ——— **s. 11, O. II, r. 2**—*Suit for resumption of rent-free grant*—*Land found not resumable*—*Rent or revenue not assessed*—*Provisions of s. 153, Agra Tenancy Act (II of 1901), not given effect to*—*Fresh suit to assess rent, if barred*—Res judicata.

A suit for resumption of a rent-free grant was brought and dismissed on the ground that the land was not resumable. In that suit, rent or revenue was not assessed as required by section 153 of the Agra Tenancy Act, II of 1901. A fresh suit was brought to assess rent and it was pleaded (1) that it was *res judicata* under section 11, Civil Procedure Code, (2) that the suit was barred under Order II, rule 2:

Held, overruling the contentions, that the suit was maintainable. **U. P. B. R.** UDAI RAM *v.* COURT OF WARDS, ALIGARH **678**

——— ——— ——— **s. 11, O. XXXII, r. 15**—*Suit for possession*—*Plea of insanity*—*Decree*—*Suit for declaration that decree not binding*—Res judicata.

The defendant sued the plaintiff for the possession of certain property, the subject-matter of a sale-deed executed by the plaintiff. The plaintiff pleaded that he was of weak intellect and that advantage had been taken of him and that he had not received the consideration. The Court found against the plaintiff and decreed the defendant's suit. The plaintiff then brought the present suit to have it declared that the decree in the former suit was not binding on him as he, being of unsound mind, had not been properly represented:

Held, that the plaintiff, not having been adjudged a person of unsound mind at the time of the previous suit, was a party to that litigation, and was bound by the result. **A.** BISHRUP *v.* NIL KANTH, 13 A. L. J. 562 **595**

——— ——— ——— **s. 11, Expl. IV**—*Set-off, claim of, not put forward*—*Subsequent suit for that amount, whether barred*—Res judicata.

Civil Procedure Code—(1908)—contd.

A defendant who can claim set-off is not bound to put forward his claim in answer to the suit against him, and his failure cannot take away his right to sue for the amount subsequently. **M.** PICHI AIYAR *v.* SUBBARAYAR, 28 M. L. J. 513 . **34**

——— **ss. 24 (1) (b), 148** —*Civil Rules of Practice, r.* 161A- *Transmission of decree for execution by one Court to another—Transmission of that decree to another Court—No steps taken for six months to execute decree—Proceedings thereafter, whether void.*

Where a public officer is directed by a Statute to perform a duty within a specified time, the provisions as to time are only directory. In considering whether a Statute is imperative, a balance may be struck between the inconvenience of rigidly adhering to, and the inconvenience of sometimes departing from, its terms.

In deciding whether a rule is mandatory or directory, the possibility of justice suffering from a too rigid application of the time limit should be taken into account.

A Court has under section 24, clause (1) (*b*) of the Civil Procedure Code, power to withdraw to its own file a transmitted execution proceeding and to dispose of it.

An omission to take within six months steps to execute a transmitted decree does not render the proceedings taken after six months infructuous and void *ab initio*. In such cases time is not of the essence of the stipulation.

Rule 161A of the Civil Rules of Practice, Madras, is a rule, of convenience issued by the High Court with the object of inducing decree-holders to take early steps to execute the decree. It is directory in its nature, and not mandatory. **M.** VELLIAPPA CHETTIAR *v.* SUBRAHMANIYAM CHETTY, 29 M. L. J. 172 **119**

——— **ss. 36, 47 393**

——— **ss. 47, 151, O. XXI, r. 16**—*Application for execution by transferee of decree—Notice to parties—Decree set aside—Execution—Procedure not given.*

An *ex parte* decree obtained in a mortgage suit was transferred but the transferee neither got his name substituted in the place of the decree-holder nor was any notice under Order XXI, rule 16 of the Civil Procedure Code, served either upon the decree-holder or upon the judgment-debtor. The judgment-debtor applied to set aside the *ex parte* decree making only the decree-holder party to it. The decree-holder failed to appear and the *ex parte* decree was set aside. The transferee of the decree thereafter applied for execution:

Held, that the transferee could not proceed with the execution before the order setting aside the *ex parte* decree was set aside;

that the Court could not set aside the order setting aside the *ex partee* decree under section 151, Civil Procedure Code. **C.** BONOMALI BANIKYA *v.* JOY KUMAR BAIDYA . . **673**

——— **ss. 47, 73, O. XXI, r. 52**—*Decree obtained by fraud or collusion, question of, whether relates to execution of decree—Attachment, whether gives any priority—Rateable distribution.*

Civil Procedure Code—(1908)—contd.

The question whether a decree was obtained by fraud or collusion is not one which relates to the execution of the decree and can only be raised by a separate suit.

Section 73 of the Civil Procedure Code applies where a judgment-creditor makes application in the prescribed form under Order XXI, rule 10, Civil Procedure Code, to the Court by which assets of the judgment-debtor are held, for the execution of his decree before the receipt of those assets by the Court.

An applicant for execution of his decree does not acquire any priority by virtue of his attachment and the fund in Court must be distributed on the principle followed by the Court in the administration of the assets of a deceased person or an insolvent, that is, rateably amongst the creditors who have put in claims thereto. **M.** SUIKEENA KATUM *v.* MUHAMMAD ABDUL AZIZ, 38 M. 221 **239**

——— **s. 47**—*Execution of decree—Sale—Minor widow brought on record as legal representative of her deceased husband, judgment-debtor—Court kept in ignorance of minority of widow—An earlier and higher bid for same property in another suit concealed—Sale void—Suit for declaration competent without regard to s.* 47—*Fraud—Limitation Act (IX of* 1908), *Sch. I, Arts.* 12, 166 *applicability of.*

In a suit for a declaration that the sale in execution of a decree was not binding on the plaintiff, the main objection to the sale was that at the time when the plaintiff and the 2nd defendant, the co-widow, were brought on the record as the legal representatives of the judgment-debtor, their deceased husband, and at the date of the sale, the plaintiff was a minor, while the other widow, the 2nd defendant, had ceased to have any interest in the estate of her deceased husband. The plaintiff was admittedly impleaded as a major, though the 1st defendant-decree-holder and the 3rd defendant, the auction-purchaser, both knew that she was a minor. The Court was wilfully kept in ignorance of the fact of the plaintiff's minority and of the offer of the Court-auction-purchaser in another suit (the decree in which was simultaneously executed) of three times the purchase-money for which it was ultimately knocked down:

Held, that the plaintiff, who had no guardian *ad litem* at all, had not been a party to the suit, and that she was entitled to bring the present suit to declare it as not binding on her without regard to the provisions of section 47, Civil Procedure Code;

that the plaintiff not having been a party to the suit and not having been sufficiently represented by any one who was a party, inasmuch as the other widow also had ceased to have any interest in the estate, the sale was not binding on the plaintiff, and did not require to be set aside;

that the plaintiff was entitled to a decree, as the Court-auction sale was brought about by the fraud of the decree-holder and Court-auction-purchaser;

that the declaratory suit having been brought within three years of the plaintiff's attainment of majority was not barred, Articles 166 and 12 of the Limitation Act being alike inapplicable. **M.** PASUMARTI PAYIDANNA *v.* GANTI LAKSHMINARASAMMA, 28 M. L. J. 525 **314**

Civil Procedure Code—(1908)—contd.

——— ——— ——— ss. 47, 65, O. XXI, r. 94—*Execution sale—Co-owner's interest—Auction-purchaser, assignee of—Title, acquisition of—Partition, right of—Limitation Act (IX of 1908), Sch. I, Art. 144, applicability of—Adverse possession—Co-owner's possession.*

An assignee of the interest of a decree-holder-purchaser of his judgment-debtor's right in a joint property, acquires title under section 65 and Order XXI, rule 94, of the Civil Procedure Code and as such is entitled to bring a suit for partition against the judgment-debtor and his other co-owners without obtaining any formal delivery of possession and his suit is not barred by section 47 of the Civil Procedure Code.

A purchaser at a Court sale in order to obtain possession of the property purchased may seek for such possession as he can obtain under the Civil Procedure Code or may ignore the provisions of the Code and stand upon his general rights of prosecuting his claim by instituting a suit.

Article 144 of Schedule I of the Limitation Act applies to a suit for partition between tenants-in-common, although a tenant has acquired his rights by purchase at a Court auction.

In such a suit there can be no question of adverse possession, because the possession of one co-tenant is the possession of all persons entitled as tenants-in-common. **M.** HASSAN AMMAL BIBI *v.* ISMAIL MOIDEEN, 28 M. L. J. 642; (1915) M. W. N. 414 **976**

——— ——— ——— ss. 47, 73, 104—*Mortgage-decree making judgment-debtor personally liable for deficiency—Sale of other properties belonging to him—Application by decree-holders for rateable distribution—Order, whether appealable—Execution application praying for specific reliefs—No final orders passed—Madras Civil Rules of Practice, r. 167.*

A party to whom a right of appeal is given, if he comes under section 47 of the Code of Civil Procedure, should not be deprived of it unless the Civil Procedure Code expressly denies it to him.

Orders passed under section 73 of the Code of Civil Procedure are appealable if they affect parties to the suit especially when the appeal is by the judgment-debtor who cannot avail himself of the right of suit given by clause (2) of section 73.

Mortgage decrees which provide for recovery of the deficiency of the decree after sale of hypotheca from the person and other properties of the mortgagor, are decrees *"for the payment of money"* within the meaning of section 73 of the Code and entitle the mortgagee to apply for rateable distribution under that section.

Execution applications praying for specific reliefs which were all granted several years before assets were realised and on which no further reliefs could be asked or granted, are still on the file and undisposed of if no final orders have been passed taking them off the file of pending applications.

Rule 167 of the Civil Rules of Practice, Madras, contemplates final orders being passed by the Court on a petition after the sale has been confirmed.

An objection that the decrees passed are not in accordance with law, cannot be raised in execution proceedings **M.** VENKATAPERUMAL *v.* VENKATA REDDI, 1915) M. W. N. 334; 17 M. L. T. 427; 29 M. L. J. 96 **231**

Civil Procedure Code—(1908)—contd.

——— ——— ——— s. 47 (2) **905**

——— ——— ——— s. 48 **237**

——— ——— ——— ——— s. 48—*Mortgage-decree making mortgagor "personally liable for balance due under the decree" after sale of mortgaged property, whether a decree for "payment of money" on a certain date—Twelve years to be calculated from date of decree or from date when sale-proceeds prove insufficient to satisfy decree—Decree against estate managed by Court of Wards—Decree not transferred to Collector for execution—Mortgagee, whether entitled to benefit of exclusion of period of management by Court of Wards.*

A mortgage decree directing that the "defendants be personally liable for any balance not obtained by such sale," is not a decree for payment of money on a certain date within the meaning of clause (1) (*b*) of section 48 of the Code of Civil Procedure, and the period of twelve years under that section must be calculated *from the date of the decree*, and not from the date when the sale-proceeds of the mortgaged property prove insufficient to satisfy the decree and the balance is ascertained.

A mortgagee holding a decree against an estate under the management of a Court of Wards is not entitled to the benefit of exclusion of the period of management by the Court of Wards, when the decree itself was not transferred to the Collector for execution. **M.** VENKATA PERUMAL *v.* PRAYAG DOSSJEE **556**

——— ——— ——— ——— s. 54—*Execution referred to Collector—Application to Civil Court to expedite execution, whether execution application—Power of Court to control Collector's proceedings.*

An application to a Civil Court to expedite and authorize the Collector to revive and continue old execution proceedings referred to him for execution by that Court and still pending before him, is not an application for execution and the bar of limitation does not apply to it.

A Civil Court is competent to entertain such an application as it has a right of control over the Collector's proceedings in execution. **S.** HARUN KHAN RAHIM KHAN *v.* TEJUMAL PARIOMAL, 8 S. L. R. 335 **58**

——— ——— ——— s. 60 (1) (n) **578**

——— ——— ——— s. 63 **21**

——— ——— ——— ——— ss. 63, 73—*Execution proceedings—Decree-holders of different Courts attaching in execution same property, right of, to rateable distribution—Court of highest grade—Transfer of decree.*

Under section 63 and 73, Civil Procedure Code, all the holders of money-decrees who have attached the property of their judgment-debtor in execution in several Courts before the actual receipt of the assets by the Court of the highest grade, are entitled to share in the rateable distribution on application to such Court without getting their decrees transferred to it. **L. B.** MA NYEIN HLA *v.* MAUNG GYI **21**

——— ——— ——— ——— s. 65 **976**

——— ——— ——— ——— s. 66 **716, 787**

——— ——— ——— ——— s. 66—Benami *purchase—Purchase by one of the decree-holders—Suit by other decree-holder against purchaser, maintainability of.*

Civil Procedure Code—(1908)—contd.

In execution of a simple money-decree held by two persons jointly, a certain *zemindari* property of the judgment-debtor was put up to sale and was with the permission of the Court purchased by one of the decree-holders in 1902. The purchaser was put in formal possession of the property in 1903. In 1913, the other decree-holder brought a suit against the purchaser and claimed possession of a share in the property, alleging that in accordance with an oral agreement the purchase was for the benefit of both the decree-holders:

Held, that the suit was barred by the provisions of section 66 of the Code of Civil Procedure. **A.** SALLE *v.* MOHAN LAL **447**

——— ——— ——— ——— **s. 66**—*Purchase in Court auction as* benamidar—*Agreement by purchaser to execute sale-deed in favour of plaintiff—Suit, whether maintainable.*

A suit for execution of a sale-deed and for recovery of possession on the ground that the defendant's father purchased the suit properties as *benamidar* for the plaintiff, falls within the scope of section 66 of the Civil ProcedureCode and is barred. **M.** SUBRAMNIAM PILLAI *v.* GOPALARAMA SUBRAMANIA **138**

——— ——— ——— ——— **s. 70**—*U. P. Government Rules under section* 70, *rr.* 30 31, 32—*Execution—Power of Assistant Collector to order prosecution—Jurisdiction—Penal Code* (*Act XLV of* 1860), s. 182.

An Assistant Collector has no powers of either Civil, Revenue or Criminal Court while receiving an application under rule 30 of the rules framed by the U. P. Government under sections 68 and 70 of the Code of Civil Procedure, 1908. Hence if an offence as defined in section 182 of the Penal Code is committed in the course of making the application under the above rule, the Assistant Collector has no jurisdiction to order prosecution. **A** BHAJAN TEWARI *v.* EMPEROR, 13 A. L. J. 479; 37 A. 334; 16 Cr. L. J. 457 **89**

——— ——— ——— ——— **s. 73 21, 231, 239**

——— ——— ——— ——— **s. 73, O. XXI, rr. 52, 63, O. XXXVIII, rr. 5, 10**—*Attachment before judgment, effect of—Decree-holder, if obtains priority—Other creditors, right of—Declaratory suit, whether maintainable.*

An attachment before judgment confers no right on the party who obtains the order of attachment.

Certain property of a perishable nature was attached before judgment by the defendant and the property was sold and the proceeds deposited in Court. The plaintiffs also obtained a decree against the same party and applied for execution by attachment of the money in Court and obtained an order of payment. On the defendant taking objection, the order was cancelled. The plaintiffs then sued for a declaration that they were entitled to the amount of their decree out of the proceeds deposited in Court:

Held, (1) that the priority of attachment gave no priority of title to the defendants who could not, therefore, object to the money being paid to the plaintiffs;

(2) that the plaintiffs were entitled to maintain the suit. **A.** BISHESHAR DAS *v.* AMBIKA PERSHAD, 13 A. L. J. 732 **622**

Civil Procedure Code—(1908)—contd.

——— ——— ——— **s. 73, O. XXXVIII, r. 2**—*Money paid for specific purpose, if available for other creditors under s.* 73—*Money paid on arrest before judgment—Other decree-holders, right of, for rateable distribution.*

Where certain money was deposited in Court under Order XXXVIII, rule 2, on the arrest of the defendant before judgment:

Held, that a lien was created on it in favour of the plaintiff from the time it was deposited and that any other creditors could not claim rateable distribution of the same, as it was money paid for a specific purpose. **U. B.** DOST MAHOMED *v.* SUBRAMANIAN CHETTY, 8 BUR. L. T. 22 **714**

——— ——— ——— **s 82**—*Alien enemy, suit against—Property of such enemy, how far available in execution.*

The plaintiff sued the defendants, a German Corporation, for an account. On the outbreak of hostilities between England and Germany in August 1914, the question arose whether the plaintiff could continue the suit during the war:

Held, that an alien being amenable to all local laws in consideration of the protection he enjoyed while residing in a foreign territory, there was no reason why he should not be sued or proceeded against in the Courts of India and that the decree against an alien enemy would be effective against his property subject to any rights of the Crown. **S.** HUSSEINI NANDOO *v.* MESSRS. WEICHERS, 8 S. L. R. 329 **22**

——— ——— ——— **s. 92 840**

——— ——— ——— **s. 92**, scope of reliefs under—*Mutwalli*, appointment of, by founder—*Mutwalli*, when and how can resign *mutwallishiip*—Appointment by founder, how far affects original deed of *wakf* **423**

——— ——— ——— **s. 100 892**

——— ——— ——— **ss. 102, 115**—*Second appeal, maintainability of—Orders passed in execution of decree—Revision, erroneous view of law if ground for*

Section 102, Civil Procedure Code, applies no less to orders passed in execution than to a decree itself.

An erroneous view of the law would not justify interference under section 115 of the Civil Procedure Code. **N.** MANYA *v.* DIWAKAR **740**

——— ——— ——— **s. 104 231**

——— ——— ——— **s. 105 (2)**—Res judicata *—Estoppel—Test Burden of proof—Demise questioned—Original ownership and derivative tenure admitted—Nature of proof required—Evidence Act* (*I of* 1872), s. 90, *presumption in, whether applicable to copies—Arrears of rent, stale claim for—Interest, rate of, allowable—Interest, when allowable on arrears of rent—Enhanced Government revenue, whether payable by mortgagor or mortgagee.*

Section 105, clause (2), Civil Procedure Code, only prevents a party from agitating in an appeal a question which he could have objected to in the appeal against an order. The test is not whether a decision has been given upon the points raised in the appeal against the order, but whether the party has availed himself of the appropriate remedy of appealing against the order.

Civil Procedure Code—(1908)—contd.

Where the question is as to whether certain property had been demised on *kanom* to the defendants' predecessors-in-title, and the property is conceded to have belonged originally to certain persons, others being recorded as holding under them, very little evidence regarding the actual letting relied upon will suffice to shift the burden of proving title to the defendants.

Where the title of the plaintiff is admitted and the defendants are shown to have come into possession as mortgagees under the plaintiff, Courts will not demand such strict proof of the mortgage sued on as where the title is denied and possession is not shown to have been under the owners.

The presumption contained in section 90, Indian Evidence Act, applies not only to original documents, but also to copies thereof.

The rate of interest allowable on a stale claim for arrears of rent is only 6 per cent.

In the absence of any specific contract to pay interest, or even a period fixed for payment, and in the absence of any demand for the same, no interest is claimable on arrears of rent.

It is the mortgagee in possession and not the mortgagor that is liable to pay the enhanced Government revenue. **M.** NANU NAIR *v.* KANTAN ASHTA MOORTHI, 2 L. W. 509 **386**

——— s. 110 759

——— s. 110—*Privy Council appeal—Appeal dismissed for default by High Court—Decree affirming decree of Court below.*

A decree of the High Court dismissing an appeal for default of prosecution is a decree affirming the decision of the Court below within the meaning of section 110 of the Civil Procedure Code. **A.** RAM KARAN *v.* MADHUKAR PRASAD, 13 A. L. J. 623 **469**

——— s. 114 133, 717

——— s. 115 740, 745, 875

——— s. 115, O. XLI, r. 10—*Appeal, security for—Notice to show cause—Sufficient cause not shown—Dismissal of appeal on that day—Material irregularity.*

Where a notice issued to the appellant to show cause why he should not be required to furnish security before his appeal was heard, does not put the appellant on his guard that the security must be ready in the event of sufficient cause not being shown, the dismissal of the appeal on failure to furnish the security not within a time under ordinary circumtances sufficient for him to furnish is a material irregularity within the meaning of section 115 of the Civil Procedure Code, 1908. **A.** BHOLA NATH *v.* KARTIK PRASAD PANDE **59**

——— s. 115—*Attachment—Claim to attached property—Question of possession not decided—Power of High Court to interfere—Possession in one's own right—Release from attachment.*

Where a Court has disposed of a case without deciding a question (*e. g*, the question of possession in a claim case) which under the Code of Civil Procedure it is bound to decide for a proper disposal of the case, the High Court will interfere under section 115 of the Code.

Where it was found that the properties attached were purchased in the names of the judgment-debtor and the claimant, that the entire purchase-money was paid by the claimant only, and that he had been in sole possession of the properties for the last ten years or more:

Held, that the claimant was entitled to get the properties released from attachment. **M.** RANGAMMAL *v.* SEVAUGAN CHETTI, 28 M. L. J. 327 **228**

——— s. 115, Sch. II, cl. 15—*Award, setting aside of—Appeal, maintainability of.*

An order of a Court setting aside an award on the ground of its invalidity on account of misconduct of the arbitrators is appealable. **A.** RAM AUTAR TEWARI *v.* DEOKI TEWARI, 3 A. L. J. 653 **411**

——— s. 115, O. IX, r 9—Ex parte *decree, order setting aside—Revision, maintainability of.*

A revision lies against an order re-admitting a suit which has been dismissed for default **A.** AJODHYA PERSHAD *v.* CHHABILA KOER **1004**

——— s. 115—*Judgment delivered—Formal decree not prepared—Case decided—Appeal allowed—Revision, whether maintainable.*

Where a Subordinate Judge has delivered judgment in a case and all that remains is the preparation of a formal decree, the case must be deemed to have been decided and if an appeal lies against such decree, the High Court would not interfere in revision under section 115 of the Civil Procedure Code. **A.** MOTI LAL *v.* GANGADHAR, 13 A. L. J. 435 **176**

——— s. 115—*Patent error of procedure—Interference in revision—Suit on promissory note assigned by undivided son—Succession certificate, whether necessary—Question of want of certificate raised for the first time in appeal—Appellate Court's duty to give plaintiff an opportunity of producing certificate.*

When a subordinate Court dealing with a suit of a small cause nature commits an error of procedure patent on the face of the record, the High Court will interfere in revision.

Where an objection is taken for the first time in appeal that the suit on a promissory note should not have been decreed inasmuch as the plaintiff had not produced the succession certificate, the suit should not be dismissed but opportunity should be given to the plaintiff to produce the certificate.

Where an assignment is from an undivided son, no succession certificate is necessary, nor when the plaintiff sues on the ground that he is a holder in due course and not that a debt did really exist. **M.** AMMASI KUTTI GOUNDEN *v.* APPATLU **234**

——— s. 115—*Revision—Interlocutory order—Refusal to frame additional issue.*

Even if the High Court can deal in revision with an interlocutory order in a suit, the exercise of the power is in the discretion of the Court and the power should not be exercised unless it appears that substantial injury may be caused to the applicant if he is left to wait for the ultimate remedy in appeal from the decree.

Civil Procedure Code—(1908)—contd.

There is no precedent for interference in revision with an order declining to frame an additional issue in a suit. **L. B.** V. V. M. CHETTY FIRM *v.* ARUNACHALLUM CHETTY, 8 L. B. R. 77 **876**

——— **ss. 141, 151, O. IX,** *—Execution proceedings struck off through mistake of Court—Power to restore.*

Section 141 of the Civil Procedure Code does not apply to execution proceedings and they cannot be restored under Order IX of the Code.

Even apart from section 151 a Court has an inherent power to rectify a mistake which has been inadvertently made by it.

Where, therefore, an execution application was fixed for hearing on the 6th January and was by mistake called up on the 5th and dismissed in the absence of the parties and the Court on the judgment-creditor's application set aside its order of dismissal:

Held, that the Court had an inherent power to rectify its own mistake and to restore the application to its file. **S.** LALBUX *v.* CHOITHRAM KALIANDAS, 8 S. L. R. 3 7 **592**

——— **s. 141,** *scope of—O. XXI, r. 90; O. IX, r. 9, applicability of Execution, application for—Sale, application for setting aside.*

Section 141 of the Civil Procedure Code, 1908, does not apply to applications for execution.

An application for setting aside a sale under section 47 and Order XXI, rule 90, Civil Procedure Code, is not an application for execution. It is a miscellaneous proceeding in the nature of an original proceeding in which the auction-purchaser is the principal interested party.

Where on the dismissal for default of an application for setting aside an execution sale under section 47 and under Order XXI, rule 90, of the Civil Procedure Code, another application for setting aside that order under Order IX, rule 9, is made:

Held, that Order IX, rule 9, is applicable to cases of this kind. **C.** DILJAN MIHHA BIBI *v.* HEMANTA KUMAR ROY, 19 C. W. N. 758 **395**

——— **s. 144 380**

——— **s. 145,** *scope of—Surety, when liable.*

Section 145 of the Code of Civil Procedure applies only where the surety has rendered himself personally liable for the decretal amount, and such liability can only be enforced against him to the extent to which he has become personally liable. **C.** BROJENDRA LAL DASS *v.* LAKSHMI NARAIN KHANNA, 19 C. W. N. 961 **149**

——— **s. 148 119**

——— **s. 149,** *scope of—Court-fees, deficiency of, made up after several orders, effect of—Discretion—Appeal.*

A plaint was presented to a Civil Court on the 19th April. On the 29th April an order was made on the plaintiff to pay the deficit Court-fees within a week. This was followed by several other orders providing for payment on later dates. Ultimately there was an order on the 7th August under which the balance was to be paid within five days, but it was paid the next day, the 8th August:

Civil Procedure Code—(1908)—contd.

Held, that there was an order and also payment in conformity with that order within the meaning of section 149, Civil Procedure Code.

A discretion exercised properly under the section cannot be challenged in appeal **C.** PRIYA NATH BACHHER *v.* MIANJAN SARDAR **571**

——— **s. 151 133, 592, 673**

——— **s. 152 589**

——— **s. 152***—Clerical error in judgment—Correction—Jurisdiction.*

A Munsif, by a clerical error, recorded in his final order an order dismissing the suit instead of decreeing it. The decree was prepared in accordance with the final order:

Held, that the Munsif had jurisdiction under section 152 of the Civil Procedure Code to subsequently correct the error. **A.** BHAGIRATH NONIYA *v.* SUKHDEO NONIYA **144**

——— **s. 152***—Error—Accidental slip—Jurisdiction—Refusal of Court to correct mistake—Revision.*

In a suit for sale on the basis of a mortgage one of the defendants pleaded that he was a prior mortgagee. An issue was struck to that effect and was decided in favour of the defendant. In the operative part of the judgment, however, no mention was made as to the priority of the defendant's claim, and accordingly there was no mention of it in the decree. After the time for appeal had expired, an application was made for amendment of the decree under section 152 of the Code of Civil Procedure. The Court refused to go into its merits, holding that section 152 did not apply:

Held, that this was a clear case of an error arising from an accidental slip or omission and as the Court below had refused to correct the error, the High Court could interfere in revision. **A.** SAHDEO GIR *v.* DEO DUTT MISIR, 13 A. L. J. 449; 37 A. 323 **50**

——— **O. I, r. 1 298**

——— **O. I, r. 8 248**

——— **O. I, r. 10 (i)***—Suit by mother as administratrix—Subsequent addition of sons as plaintiffs—Suit, whether barred—Limitation Act (IX of 1908), s. 12—Bona fide mistake, meaning of.*

Where by a *bona fide* mistake it is erroneously supposed that a plaintiff should be represented in a particular way and subsequently the plaintiff is permitted to rectify the mistake and appear personally, this does not amount to the addition of a new plaintiff within the meaning of section 22 of the Limitation Act.

In matters of this kind the substance is to be looked to rather than the form.

Where a mistake is not made deliberately and where it is honestly made, the mistake is *bona fide*.

Where, therefore, a suit upon a registered mortgage-bond was originally instituted within the period of limitation by a widow not for her own benefit, but as administratrix for the benefit of her sons, and subsequently the names of the sons were added as plaintiffs after the period of limitation:

Held, (1) that the change was one of form only and not of substance and that there was no introduction of new plaintiffs when the sons were brought on the record;

Civil Procedure Code—(1908)—contd.

(2) that, therefore, the suit was not barred. **C.** NISTARINI DASSYA *v.* SARAT CHANDRA 680

——— ——— ———**O. 2, r. 2** 678, 731

——— ——— ——— **O. 2, rr. 2, 4**—Res judicata—*Suit for mesne profits of land—Subsequent suit for possession of the same land, if maintainable.*

Where the plaintiff on being dispossessed of land filed a suit for mesne profits only which was decreed in his favour and subsequently filed another suit for recovery of possession of the land:

Held, that the subsequent suit was barred by the former suit under the provisions of Order II, rule 2, of the Civil Procedure Code. **S.** HIROMAL *v.* FARIDKHAN, 9 S. L. R. 23 939

——— ——— ——— **O. 2, r. 4** 939

——— ——— ——— **O. 5, r. 20**—*Service of summons upon defendant—Affixing of summons to outer door of house, when sufficient—Inquiry as to suit by third party, whether notice to party inferred.*

Notice of suit cannot be fixed to a party to a suit by officious inquiries made by parties unconnected with it about its result. Service of the summons by affixture to the outer door of the house of the defendant is good only when the plaintiff, on being told that the defendant has gone to a different place, makes an attempt to serve him in that place by taking out fresh summons against him to that place also. **M.** KATTAMPUDI SUBBIAH CHETTY *v.* WALJI LALJI SAIT 26

——— ——— ——— **O. 6, r. 17** 132

——— ——— ——— **O. 6, r. 17**—*Amendment of plaint—Minor plaintiff—Guardian and ward—Suit not to be dismissed on mere technicality*

The Divisional Court on appeal dismissed a minor plaintiff's suit on the ground that the plaint disclosed no cause of action, but it appeared that the plaint was only technically not properly drawn up:

Held, that under the circumstances of the case the plaint should be allowed to be amended. **P.** SANGAT SINGH *v.* UTTAM SINGH, 109 P. L. R. 1915; 65 P. W. R. 1915 769

——— ——— ——— **O. 9** 592

——— ——— ——— **O. 9, r. 8** 902

——— ——— ——— **O. 9, r. 8, O. 17, r. 2**—*Adjourned hearing—Non-appearance of plaintiff—Court, power of—Procedure.*

Where neither the plaintiff nor his Pleader appears on a day to which the hearing of a suit has been adjourned, the Court must make an order under Order IX, rule 8, and it is not entitled to proceed to decide the suit on the merits. **A.** PHUL KOER *v.* HASHMAT ULLAH KHAN, 3 A. L. J. 679 553

——— ——— ——— **O. 9, r. 9** 395, 1004

——— ——— ——— **O. 9, r. 13** 975

——— ——— ——— **O. 9, r. 13**—*Bengal Tenancy Act (VIII of 1885), s. 153A, scope of—Admission—Limitation Act (IX of 1908), Sch. I, Art. 164—Limitation—Dismmissal of suits—Material irregularity.*

Section 153A of the Bengal Tenancy Act requires that no application to set aside an *ex parte* decree in a suit between a landlord and tenant as such shall be admitted, unless the applicant has, at or before the time when the application is admitted, deposited in the Court to which the application is presented, the amount, if any, which he admits to be due from him to the decree-holder.

The admission of rent contemplated by the Legislature is an admission that rent is due in respect of the holding for which the suit has been instituted.

A person is not bound to make any deposit where he does not admit that any money is due from him to the plaintiff in respect of the holding for which rent is claimed.

Article 164 of the first Schedule to the limitation Act provides that an application by a defendant for an order to set aside a decree passed *ex parte* may be made within thirty days from the date of the decree or, where summons was not duly served, when the applicant had knowledge of the decree.

Under section 3 of the Indian Limitation Act it is obligatory upon the Court to dismiss a time-barred application, although limitation is not set up as a defence.

A Court acts with material irregularity in the exercise of its jurisdiction in granting relief, without adjudication of the question of limitation, on an application which, on the face of it, is barred by limitation. **C.** TARA SANKAR GHOSE *v.* NASARUDDI, 19 C. W. N. 970 876

——— ——— ——— **O. 9, r. 13**—Ex parte *decree against some of the defendants—Appeal by others—High Court, power of, to entertain application to set aside* ex parte *decree—Jurisdiction.*

A High Court has jurisdiction to entertain an application by some of the defendants to set aside an *ex parte* decree passed by the original Court when a second appeal by the other defendants is pending before it. **M.** SADAYA KONAN *v.* ANNAMALLAI UDAYAN, 2 L. W. 529 458

——— ——— ——— **O. 17, r. 2** 553

——— ——— ——— **O. 17, r. 3**, *scope of—Party's default after time has been granted to him—Court responsible for effecting service.*

The stringent provisions of Order XVII, rule 3, cannot be invoked unless time has been granted to a party specifically for performing any of the acts mentioned therein and that party has committed a default in performance thereof.

Where a party has paid the process fee for summoning witnesses the Court and its officers are responsible for effecting service and an adjournment caused by the non-attendance of witnesses for want of service is an adjournment in the ordinary course and does not amount to time granted to one party within the meaning of rule 3, Order XVII, Civil Procedure Code.

When an adjournment had already been rendered necessary by the non-appearance of the witnesses the fact that it was, at the same time, utilized for another purpose does not convert it into time granted to the defendants within the purview of rule 3 of Order XVII. **P.** HARJAS RAI *v.* NARAIN SINGH, 51 P. R. 1915. 938

——— ——— ——— **O. 20, r. 12, O. 22, rr. 2, 3, 4, 10, O. 34, rr. 2, 8, O. 43, r. 1 (1)**—*Preliminary decree, suit if continued till final decree after passing of—Suit by execution on mortgage in favour of estate of deceased testator—Death of executors—Right of widows to be brought on record as legal representatives of deceased testator—*

Civil Procedure Code—(1908)—contd.

Application under Order XXII, r. 3—Order, whether appealable—Transfer of Property Act (IV of 1882), ss. 88, 89.

Under the Civil Procedure Code of 1908, after the passing of a preliminary decree, the suit is continued until the stage of final decree is reached.

A widow of a deceased testator cannot apply to be brought on record as the "legal representative" on the death of the executors who instituted the suit. The term "devolution" in Order XXII, rule 10, means the devolution of the interest of the person who instituted the suit.

An application to be brought on record by such a widow could be made only under Order XXII, rule 3, and as orders on such applications are not made appealable under Order XLIII, rule 1, no appeal lies from an order rejecting such an application. **M.** LAKSHMI ACHI *v.* SUBBARAMA AIYAR, 2 L. W. 403; 28 M. L. J. 490; (1915) M. W. N. 327; 17 M. L. T. 385 **142**

——— ——— ——— ——— **O. 20, r. 12 464**

——— ——— ——— **O. 21, r. 12 479**

——— ——— ——— ——— **O. 21, r. 15** — *Execution of decree—Personal decree against Hindu woman with limited estate—Debt incurred for legal necessities—Suit based upon allegations of necessity—Decree-holder entitled to prove necessity in execution—Payment of Government demands, whether legal necessity—One of several decree-holders can apply for execution of the whole decree.*

Where the suit is founded upon a purely personal debt or contract of a Hindu woman with a limited interest in the estate, the estate is not bound to satisfy that debt. In order to bind the estate the suit should be so framed as to show that it is not merely a personal demand on the female in possession, but that it is intended to bind the entire estate and the interests of all those who come after her.

In execution of a personal decree against a Hindu woman with a limited interest in the estate obtained upon a plaint expressly alleging the debt to have been incurred for legal necessities, the decree-holder, in order to make the estate liable, is entitled to adduce evidence to prove the necessities for which the debt was contracted.

Government revenue and other Government demands are claims of Government on the land and their payment must be made by the estate and if these payments cannot be made out of the income and money has to be borrowed to make them, the estate is liable to satisfy these debts.

Any one of the several joint decree-holders may, unless the decree imposes a condition to the contrary, apply for execution of the whole decree. **C.** GAJADHAR PARSHAD SAHU *v.* BINDUBASHINI PERSHAD **181**

——— ——— ——— ——— **O. 21, r. 16 673**

——— ——— **O. 21, r. 37 (1)**— *Execution of decree—Arrest of judgment-debtor, when may be ordered.*

A decree-holder is not justified in applying for the arrest of the judgment-debtor in the first instance, without trying to obtain execution of the decree by other means available to him, *i.e.*, by the attachment and sale of his property other than land. **P.** BAHADUR KHAN *v.* VIROO MAL, 78 P. L. R. 1915; 94 P. W. R. 1915 **152**

Civil Procedure Code—(1908)—contd.

——— ——— ——— ——— **O. 21, r. 52 239**

——— ——— ——— ——— **O. 21, r. 52 622**

——— ——— ——— ——— **O. 21, r. 58** — *Mortgage-decree—Attachment of property—Claims, investigation of—Procedure.*

Proceedings by way of attachment are not applicable to mortgage-decrees, but if the decree-holder applies for and obtains an order for attachment and property is attached, claims and objection to the attachment can be brought under Order XXI, rule 58, of the Civil Procedure Code, and such claims and objections must be dealt with under that rule and the following rules prescribing the procedure for investigation of claims and objections. **L. B.** MG. MRA TUN *v.* U KAING **941**

——— ——— ——— ——— **O. 21, r. 63 622**

——— ——— ——— ——— **O. 21, r. 63**—*Claim Proceedings—Suit to establish right—Jurisdiction of Small Cause Court—Presidency Small Cause Courts Act (XV of 1882), s. 19 (s).*

A suit to establish a right given to the unsuccessful party in claim proceedings under the Code of Civil Procedure involves in every case a prayer for the setting aside of a summery order of a Civil Court. Such a suit cannot be regarded as a suit for a mere declaration and is not excluded from the jurisdiction of a Small Cause Court under section 19 *(s)* of the Presidency Small Cause Courts Act. **M.** RAJAMMAL *v.* NARAYANASAMY NAICKER, (1915) M. W. N. 376; 28 M. L. J. 600 **208**

——— ——— ——— ——— **O. 21, r. 89**—Decretal amount may be deposited in Court **916**

——— ——— ——— ——— **O. 21, r. 90 395**

——— ——— ——— ——— **O. 21, r. 90, O. 32, r. 3**—*Application to set aside sale on ground of fraud and collusion, maintainability of—Minor substituted as judgment-debtor—Guardian ad litem not appointed—Sale, effect of.*

On the death of a judgment-debtor an application for substitution of the name of the sole legatee of the judgement-debtor, a minor, and his father and others was made. No application was made under Order XXXII, rule 3, of Civil Procedure Code, for the appointment of a guardian *ad litem*. The father acted throughout and eventually the property was sold and purchased by the decree holder. The mother, acting as the guardian and next friend of the minor, applied to have the sale set aside under section 47 and Order XXI, rule 90, Civil Procedure Code, alleging fraud and collusion:

Held, that under the circumstances of the case the mother was entitled to make the application and that she should be appointed guardian *ad litem* of the minor:

Held, further, that the sale of the property without appointing such a guardian was in itself an irregularity which would vitiate the sale, if it caused injury to the minor. **C.** KESHAWE SURENDRA SAHI *v.* DEVENDRABALA DASI **211**

——— ——— ——— ——— **O. 21, r. 19**, order under, whether appealable—Irregularity and fraud in publishing or conducting a sale **308**

——— ——— **O. 21, r. 94 975**

——— ——— ——— ——— **O. 22, rr. 2, 3, 4, 10** **142**

Civil Procedure Code- (1908)—contd.

——————— **O. 22, r. 10**- *Insolvency of defendants in a money suit—Official Receiver, whether necessary or proper party to such suit Provincial Insolvency Act (III of 1907), s. 6. cl. (2) (b) - Suit instituted before pendency of insolvency proceedings—Decree, how far binding on Official Receiver.*

The plaintiff sued for recovery of money and after the institution of the suit, the defendants applied to be adjudicated insolvents and were so adjudicated under the Provincial Insolvency Act (III of 1907). The defendants contended that the Official Receiver ought to be made a party to the suit and in any event, the decree ought not to be made binding on the Official Receiver:

Held, (1) that the insolvency of defendants in a mere money suit did not effect the devolution of any interest upon the Official Receiver within the meaning of Order XXII, rule 10, of the Civil Procedure Code;

(2) that as no interference in pending proceedings was contemplated by section 16 of the Provincial Insolvency Act (III of 1907), it was not necessary nor even proper to join in a suit of that nature the Official Receiver, but at the same time the decree could not be executed against the estate of the insolvents, nor be binding on the Official Receiver. **S.** JETHALAL KALIANJI *v.* GANGARAM NAOOMAL, 8 S. L. R. 325 50

——————— **O 23, r. 3** 311

——————— **O 23, r. 3**—*Compromise—Stamped paper, whether necessary.*

Where the paties to a suit compromise, all that the Court is required to do under Order XXIII, rule 3, of Civil Procedure Code, is to ascertain that the suit has been adjusted by a lawful compromise, and to put the fact on record. It is not necessary that a *sulehnamah* on stamped paper should be filed. **U. P. B. R.** MAHADEO PRASAD *v.* BASDEO TIWARI 511

——————— **O 26, r. 9** 60

——————— **O. 26, r. 14**—*Partition decree—Execution—Division by casting lots, legality of—Equitable rule.*

A casting of lots for the purpose of allotting shares to the parties in execution of partition decrees is not opposed to Order XXVI, rule 14. The most equitable way by which properties could be assigned to co-parceners is to draw lots after dividing the properties with reference to the number of sharers. **M.** ANANTA RAMAPPA *v.* SUBRAYYA, 2 L. W. 430 245

——————— **O 32, r. 3** 211

——————— **O. 32, r. 4 (3)**—*Guardian* ad litem, *appointment of—Consent of proposed guardian, necessity of*—Ex parte *decree against minors, when liable to be set aside.*

Order XXXII, rule 4 (3), of the Code of Civil Procedure, makes it imperative that the consent of the proposed guardian should be obtained for his appointment; and the appointment of any person as guardian *ad litem* without his consent is not a legal appointment. An *ex parte* decree obtained against both the major and minor defendants without a guardian properly appointed to the minors is one that is liable to be set aside so far as minors are concerned and the fact that the proposed guardian subsequently made an application to set aside the *ex parte* decree against the minors will not validate the originally invalid appointment. **M.** SHROOF SAHIB *v.* RAGHUNATHA SIVAJI 579

Civil Procedure Code—(1908)- contd.

——————— **O. 32, r. 6 (2). O. 39, r. 10**—*Joint Hindu family, suit by minor—Managing member acting as next friend—Managing member, right of, to withdraw money—Security, deposit of—Court, duty of.*

A next friend of a minor plaintiff, even if he is the managing member of the joint Hindu family of which both are the members, is not entitled to draw money from Court on behalf of the minor plaintiff without furnishing security

A Court cannot, under Order XXXII, rule 6 (2) of the Code of Civil Procedure, order payment of money to a person not appointed guardian *ad litem* by any competent authority without demanding security from him. **M.** KRISHNA AIYAR *v.* CHAKRAPANI 475

——————— **O. 32, r. 15** 595

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——————— **O. 38, r. 2** 714

——————— **O. 38, r 5** 622

——————— **O. 38, r. 5**—*Attachment before judgment—Dismissal of suit by first Court—Cessation of surety's liability—Decree by Appellate Court—Security - Appeal, second—Plea of want of registration of security, if allowed*

When a surety pledges property by bond in order to save the property of a defendant attached before judgment under Order XXXVIII of Civil Procedure Code, the liability of the surety or of the property pledged ceases as soon as the suit is dismissed by the first Court, and that liability is not revived by the Appellate Court decreeing subsequently the plaintiff's claim.

The plea of want of registration of surety bond cannot be entertained on second appeal when the point has not been raised in the two Courts below. **P.** SHANKER *v.* RAM KISHEN, 53 P. W. R. 1915; 147 P. L. R. 1915 271

——————— **O. 38, r. (5), O 39, r (1)**—*Mortgage of right to receive certain dues—Decree for sale—Order of attachment and injunction, whether competent:*

The appellant mortgaged to the respondent his right to receive *malikana* dues from a number of villages and a decree for sale was passed on the mortgage, but before the sale the decree-holder obtained an order restraining the judgment-debtor from receiving the *malikana* dues:

Held, that the Court had no power either to attach the *malikana* dues or to prevent the appellant from receiving them. **A.** MUHAMMAD INAM-UD-DIN KHAN *v.* NARAIN DAS, 13 A. L. J. 65 601

——————— **O. 38, r. 10** 622

——————— **O 39, r. 1** 601

——————— **O. 39, r. 10** 475

——————— **O. 41, r. 10** 59

——————— **O 41, r. 20.** *scope of—Party to suit includes representative of such party—Power to add parties, to be exercised at hearing—Setting aside, application for—Abatement and substitution.*

The words "any person who was a party to the suit" in Order XLI, rule 20, of the Code of Civil Procedure will, on a reasonable construction of the same, include the representative of such a party.

Civil Procedure Code—(1908)—contd.

The power given to the Court to add parties is a power which is to be exercised at the hearing, for it is necessary that the Court should have before it all the circumstances of the case.

The mere fact that the representative of a deceased person happens to be a party already on the record in his own right, does not dispense with an application for setting aside an abatement and substitution. **C.** ROMESH CHANDRA DAS *v.* ANTHONY PENHEIRO **470**

——— **O. 41, r. 22**—*Cross-objections, whether can be urged against co-respondents.*

A respondent in an appeal is not ordinarily entitled to urge cross-objections except against the appellant.

Where a plaintiff had sued two defendants who had no common ground of defence, and was successful against one only and on that defendant appealing, the plaintiff filed a cross-objection in which he claimed a decree against the other defendant:

Held, that the plaintiff was not entitled to file a cross-objection against the second defendant and to prove his case against him. **U. B.** NGA TIN *v.* NGA SAW, U. B. R. 1915, II, 58 **610**

——— **O. 41, r. 33**—*Dismissal of suit as time-barred against one defendant—High Court, whether can dismiss it against other defendants who were not impleaded.*

Where a suit is dismissed against one of the defendants as time-barred, the High Court can dismiss it against those other defendants who did not appeal and were not impleaded in the lower Appellate Court. **M.** SUBBARAYALU NAIDU *v.* PAPAMMAL **579**

——— **O. 43, r. 1 (1) 142**

——— **O. 43, r. 1 (s)**—*Order providing for appointment of Receiver, whether appealable.*

An order merely directing that a proper person should be appointed a Receiver is not appealable under Order XLIII, rule 1 *s*) **B** NARBADASHANKAR MUGATRAM VYAS *v.* KEVALDAS RAGHUNATHDAS, 17 BOM. L. R. 510 **504**

——— **O. 43, r. 1 (u)**—*Order of remand under Madras Estates Land Act (I of 1908), whether appealable.*

No appeal lies against an order of remand made in proceedings under the Madras Estates Land Act I of 1908. **M.** GURUSWAMY NAIDU *v.* SUBBA NAIDU **265**

——— **O. 44**—*Appeal in forma pauperis—Limitation Act (IX of 1908), Sch. I, Art. 170—Limitation.*

An appeal was filed in the High Court long after 30 days had expired from the decision of the Court below. On the report of the office as to the deficiency of the Court-fees, the appellant expressed his inability to pay the Court-fee and asked the Court to take the appeal *in forma pauperis*:

Held, that the appeal having been filed beyond 30 days of the decision of the Court below could not be treated as an application for leave to appeal *in forma pauperis* and was barred by limitation. **A.** GATI *v.* RACHLA KUNWAR, 13 A. L. J. 635 **1003**

Civil Procedure Code—(1908)—concld.

——— **O. 47, r. 1 717**

——— **O. 47, r. 1**—*Review, sufficient ground for.*

An application for review was made on the sole ground that if the Court allowed the applicants another opportunity of producing evidence, they might persuade the Judge that the view taken by him on the previous occasion was erroneous:

Held, that this was not a sufficient ground for review under Order XLVII, rule 1, of the Civil Procedure Code. **A.** BINDA PRASAD *v.* RAGHUBIR SARAN 13 A. L. J. 673 **994**

——— **Sch. II, para. 16**—*Award—Application to set aside award dismissed—Decree—Appeal maintainability of.*

There is no right of appeal against a decree passed upon an award of arbitrators after dismissal of an application to set it aside. **M.** YELLA HANUMAYYA *v.* MULLANGI CHINNA DODDAPPA **512**

——— **Sch. II, para. 20 49**

Civil Service Regulations, arts. 458, 464, *interpretation of—Pension rules—Officer removed from Government service, whether entitled to pension under Article* 458.

Under Articles 458 and 464 of the Civil Service Regulations it is essential that an officer to be entitled to pension must be in the service on the date of his retirement. Therefore, an officer removed by Government from service before that date, can have no claim for any pension. **M.** KOTHANDARAMIAH *v.* SECRETARY OF STATE, 2 L. W. 431; (1915) M. W. N. 323 **252**

——— **art. 464 252**

Claims relating to properties in hands of insolvent and his representatives—Jurisdiction of Court to decide on application **168**

Common Manager. *See* BENGAL TENANCY ACT, s. 100.

Companies—*Right to forfeit shares, when properly exercised and by whom—Liability as contributory.*

A right to forfeit shares must, in order to be effectually exercised, be pursued with the greatest exactness by the proper parties, *i. e.*, by the Directors properly appointed and by the requisite number of them and in the proper manner and for proper cause. The right must be exercised *bona fide* for the purpose for which it was conferred.

Where, therefore, the Board of Directors passed a resolution authorizing the Managing Director to settle the matter of the appellant's liability with him and to place the result of such settlement before the next meeting of the Board for consideration and the Managing Director thereupon wrote to the appellant informing him that his shares had been forfeited, but the matter was never laid before the Board which, under the Articles of Association, was the only body empowered to forfeit the shares:

Held, that the Managing Director's action wa altogether *ultra vires* and not binding upon th Company and that on the Company going ins liquidation the appellant was rightly placed on the lis of contributories and his name could not be removeto **P.** KANSHI RAM *v.* KISHOR CHAND, 37 P. R. 1916, 101 P. W. R. 1915 **567**

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Companies Act (VII of 1913), s. 38—*Rectification of register—Application made late—Discretion.*

A person who claims to have been misled by fraud or false representation into taking shares in a Company should raise the objection without delay.

The power to take summary action under section 38 of the Companies Act, 1913, is discretionary. **P.** JAGAN NATH *v.* GOPI CHAND, 110 P. L. R. 1915 770

——— **s. 284**—Limitation—Appeal filed with delay—Sufficient cause—Objection by respondent at hearing—Companies Act (VI of 1882), s 169—Appeal—Notice to respondent—Limitation period, expiring during vacation—Extension of limitation period—Right of Official Liquidator to recover by summary process from creditor of Bank who realised his debt by suit before passing of winding-up order and after suspension of payment by Bank 265

——— **s. 284,** *meaning of—Pending proceedings, if affected by new Act—Interpretation of Statute.*

A construction which leads to absurdity or inconvenience should be avoided, unless the express words of a Statute compel the Court to hold otherwise.

Construction is to be made of all the parts together, and not of one part only by itself.

The plain and rational meaning of section 284 of the Companies Act of 1913 is that the new Act operates upon proceedings arising out of the windings-up which commenced after its enforcement *(i. e.,* 1st April 1914) and that no part of the Act has application to the pending liquidations. **P.** DAULAT RAI *v.* WAZIR CHAND, 20 P. R. 1915 272

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Confession. *See* EVIDENCE ACT, s. 24.

———*Confession implicating co-accused retracted at trial—Independent corroboration essential.*

Confession—concld.

Where one of two co-accused makes a confession implicating the other co-accused as well, independent evidence should be forthcoming to corroborate the confession in regard to each accused implicated.

Where *N* and *R,* husband and wife, were accused of the murder of *N's* brother and *R* made a confession before the Committing Magistrate implicating her husband as well, but subsequently retracted the confession:

Held, that as there was no real corroboration of the retracted confession against *N* and against *R* herself there was merely the retracted confession corroborated solely by evidence of her absence from her house during the night of the alleged murder, the accused were entitled to the benefit of the doubt and must be acquitted **P.** NUR MUHAMMAD *v.* EMPEROR 22 P. W. R. 1915 Cr; 163 P. L. R. 1915; 16 Cr. L. J. 469 101

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———*Sale or mortgage—Test—Suit to cancel re-conveyance—Limitation Act (IX of 1908), Sch. I, Art.* 113.

The question whether a transaction is a mortgage by way of conditional sale or a sale with a provision for re-purchase depends ultimately upon the intention of the parties to be gathered from the instrument and the surrounding circumstances.

Per *Kumaraswami Sastri, J.*—Two tests are generally applied in deciding whether a transaction which is on its face a sale, is only a mortgage, because of the condition to re-convey. One is whether there was a debt subsisting at the time to discharge which the document was executed and the other is whether the value of the land conveyed is so disproportionate to the amount mentioned in the document as the alleged consideration for the sale as to raise a reasonable presumption that the parties intended only a security.

The plaintiff's father and the 1st defendant's father who were brothers, divided their family property, and the 1st defendant's father sold his share, the property in dispute, to the plaintiff's father, the sale-deed containing a provision that if the purchase-money should be re-paid together with the value of any improvements effected, the land should be surrendered to the first defendant's father. On the death of the plaintiff's father his mother acted as his guardian and conveyed the land back to

Construction of document—concld.

the 1st defendant's father on his re-paying the purchase-money. The plaintiff sued for a declaration that his mother's release was not binding upon him and that he was entitled to get back the property on paying the original purchase-money:

Held, (1) (*Coutts-Trotter, J. dissenting*) that the document executed by the 1st defendant's father was a deed of sale and not a mortgage;

(2) that the right which the 1st defendant acquired under the option to re-purchase was in effect a right to demand specific performance of the contract to reconvey, and there being no refusal to perform in this case the question of limitation did not arise. **M.** KALAPPA KAMTHI *v.* KACHUR SAKHA RAMA RAO 898

——— **of sanad** 365

Contract by Buddhist monk. *See* BUDDHIST LAW.

——— of guarantee—Consideration—Actual release of claim necessary and not mere promise 422

——— *of partnership—Breach of contract, suit for—Damages—Death of one partner subsequent to suit, effect of.*

Where a cause of action exists, the damages must be estimated with regard to the time when the cause of action came into existence.

Where the suit is for damages for breach of contract of partnership, the death of one partner subsequent to the suit does not affect the quantum of damages. **M.** PAKALA RAMA RAO *v.* APPANA KUMARASWAMI 471

——— *of sale or lease followed by delivery of possession—Document not executed, effect of—Subsequent suit, maintainability of—Ejectment—Vendor, whether can eject purchaser.*

Where in pursuance of an agreement for a lease or sale the intended transferee has taken possession, though the requisite documents have not been executed, the position is the same as if the documents had been executed, provided that specific performance can be obtained between the same parties in the same Court and at the same time as the subsequent legal question falls to be determined.

Where, therefore, the plaintiff in a suit for ejectment was the admitted proprietor of the land in dispute and the defendants resisted his claim for ejectment on the ground that they had come into occupation by his leave and license under an agreement for sale on the payment of part of the consideration money:

Held, that the plaintiff was not entitled to eject the defendants nor was he entitled to a decree for the balance of the consideration in the suit, because he had not sued to recover the money. **C.** AKBAR FAKIR *v.* INTAIL SAYAL 707

——— for sale of immoveable property, whether creates vested interest—Rule against perpetuities—Contract, whether enforceable against survivors of joint Hindu family 435

———Sale—Covenant for title, meaning of—Compensation for breach of contract—Claim made after execution of conveyance 394

Contract Act (IX of 1872), s. 2 (g) 751

——— **s. 4** 12

——— **s. 4**—*Acceptance subject to a condition subsequent—Auction-sale—Bidder* benamidar *—Fraud—Misrepresentation—Repudiation of contract—Specific performance*—Benamidar *can sue—Exchange of* patta *and* muchilika *does not give title.*

Where an auction-sale conducted through an agent has been confirmed in the name of the highest bidder subject to the approval of the principal, there is a contract of sale on the grant of the approval.

Where there is an acceptance on behalf of the principal of an offer which has been made subject to a condition subsequent, there is a contract, if that condition subsequent is satisfied.

In the absence of any restriction in the conditions of sale that bids must be made in the bidder's own interest and not on behalf of anybody else, the mere fact that a person was acting on behalf of somebody else when he made a bid, would not make it fraudulent, nor would it amount to such misrepresentation or suppression of material facts as to entitle the other party to repudiate the contract.

In a suit for specific performance it cannot be successfully pleaded in defence that the man who has entered into the contract for specific performance is not the man who has the beneficial interest.

An exchange of *patta* and *muchilika* or an agreement to dispense with the exchange of *patta* and *muchilika* is a condition of the right to recover rent, but the mere exchange of *patta* and *muchilika* does not give title. **M.** CHITIBOBU ADENNA *v.* GARIMALLA JAGGARRAYADU, 28 M. L. J. 617 12

——— **s. 16**—*Security, if ample, effect of—Undue influence, presumption of—Rate of interest, excessive, effect of—Personal loans.*

Under the amended section 16 of the Contract Act the question of a harsh and unconscionable bargain can only be considered in reference to undue influence.

Where there is ample security, an excessive rate of interest has been held to be anything over 10 per cent. Where there is no security, no rate of interest can be considered excessive. There can be no standard rate on personal loans. **C.** ABDUL MAJID *v.* KSHERODE CHANDRA PAL, 19 C. W. N. 809; 42 C. 690 843

——— **s. 19**—*Misrepresentation avoiding contract must be one of fact—Damages for breach of contract—Criterion for assessing damages.*

Where the question is whether a certain statement is a substantive part of a contract or a mere representation, it is essential that the statement should be descriptive of the contract, in order to make it a term of the contract.

Where one of the contracting parties says: "I am well-known to the National Bank in your city," it is not a statement of fact, but only his own opinion as to the state of his credit, though it may be false; such statement is not one of fact, and even if false, does not avoid the contract under section 19 of the Indian Contract Act (IX of 1872).

In assessing damages for breach of contract the price ruling on the date on which the contract was finally cancelled must be taken to be the criterion and not that prevailing on any previous date. **M.** HOPE PRUDHOMME & Co, *v.* M. EARNEST MAX 575

——— **s. 23** 241

Contract Act—contd.

——— ——— **ss. 23, 65**—*Contract to appoint any one to public office—Suit for recovery of money paid thereunder, whether maintainable—Contract void ab initio.*

Contracts which have for their object the influencing of appointments to public offices and the restricting of the discretion vested in public officers in the selection of persons are illegal and void.

A Court will not assist a party who has entered into a contract tainted by moral turpitude.

Where a contract is illegal because contrary to positive law or against public policy, an action cannot be maintained to enforce it directly or to recover the value of services rendered under it or money paid on it.

Section 65 of the Contract Act relates to the obligation of a person who has received an advantage under an agreement which is discovered to be void or under a contract which becomes void but not where the agreement is void *ab initio*. **C** LEDU, COACHMAN *v.* HIRA LAL BOSE, 21 C. L. J. 537; 19 C. W. N. 919 **625**

——— ——— **s. 23**—*Excisable articles, sale of —Liquor, license to sell—Transfer—Partnership, terms of—Legality—Findings of fact.*

A partnership for the sale of excisable articles is not illegal. **C.** JNANENDRA NATH *v.* CHANDI CHARAN SAHA **480**

——— ——— **s. 23**—*Marriage — Divorce—Custom—Payment to caste—Repugnant to Hindu Law.*

A custom by which the marriage tie can be dissolved by either husband or wife, against the wish of the divorced party, and for no reason but out of mere caprice, the sole condition attached being the payment of a sum of money fixed by the caste, is opposed to public policy within the meaning of section 23 of the Contract Act and is also repugnant to Hindu Law, and, therefore, cannot be judicially recognised. **B** KESMAV HARGOVAN *v.* BAI GANDI, 17 BOM L. R. 584 **952**

——— ——— ——— **ss. 23, 30**—*Money lent for gambling purposes—Finding to be specific and clear.*

Where in a suit upon a promissory note the defence is that it was executed in respect of money advanced for gambling purposes, to render the money irrecoverable under section 23 or 30, Contract Act, 1872, it is not enough for the Court to find generally that the debt was contracted for gambling purposes, but it must also find whether it was lent for future play or for past play and what portion of it was used for such a purpose. **M.** RAMALINGA REDDI *v.* MUTHU THEVAN **573**

——— ——— ——— **s. 30** **573**

——— ——— **ss. 38, 52, 54, 83**—*Principal debtor entitled to avoid but not avoiding contract —Surety, whether liable for breach—Notice of arrival of goods, if offer—Failure to take delivery—Damages.*

A surety cannot escape liability on the ground that the circumstances were such that the principal debtor was entitled to avoid the contract, when in fact the contract was not avoided.

Where a condition in a contract that notice should be given of the arrival of the goods by a particular ship is not an essential part of the contract, failure to give such notice or a mistake in the notice given, is not a breach of contract entitling one party to avoid it for that reason nor can that notice by itself be deemed to be an *offer* of performance within the meaning of section 38 of the Contract Act.

Where on the receipt of notice of arrival of goods, one party has to apply for delivery of goods but fails to do so, he commits the breach and is liable in damages. **M.** SOUTH INDIAN EXPORT CO., LTD. *v.* CONDIAH CHETTY **712**

——— ——— ——— **s. 43** **811**

——— ——— ——— **s. 44** **760**

——— ——— ——— **s. 44**—*Joint judgment-debtors — Release of one, release of other—Amount paid by one —Pro tanto reduction of liability.*

The release of a joint judgment-debtor does not operate as release of the others. It confers on them no higher rights than they would have had prior to the judgment, but they can claim the benefit of the amount actually paid by the released judgment-debtor. **M.** MOOLCHAND *v.* ALWAR CHETTY, 17 M. L. T. 449 **303**

——— ——— ——— **s. 45**—*Mortgage—Several mortgagees—Payment by mortgagor to one mortgagee, if valid.*

A payment of the mortgage-debt by the mortgagor to one of the several joint mortgagees is not a valid payment as against the other mortgagees. **C.** UMES CHANDRA BANERJEE *v.* DINABANDHU MAHANTI, 21 C. L. J. 570 **956**

——— ——— ——— **s. 45**—*Payment to one of several heirs of a promisee, whether operates as a discharge.*

A payment made to one of the several heirs of a deceased promisee is not binding on other heirs. **M.** MUNIANDI SERVAI *v.* RAMA SAMI **586**

——— ——— **s. 56**—*Sub-contract — Principal contract, cancellation of—Effect on sub-contract.*

Where a sub-contract postulates the existence of a principal contract for its operation and continuance, the cancellation of the latter terminates the former also. **M.** GOPALASAMI PILLAI *v.* CHIDAMBARAM CHETTY, 2 L. W. 411 **151**

——— ——— **ss. 62, 63**—*Specific Relief Act (I of 1877), s. 6 (e)—Contract with a variation of terms after its breach—Suit for specific performance of such contract, maintainability of—Consideration—Fresh consideration—Rule of English Law, applicability of.*

Where on a suit for the breach of a contract to sell lands, a subsequent contract to sell lands other than those at first agreed upon was executed for the original consideration:

Held, that section 6 (*e*) of the Specific Relief Act applied and the plaintiff was entitled only to specific performance of the contract with the subsequent variation.

The rule of English Law that a fresh consideration is necessary for a new contract after breach is not imported into Indian Law.

Sections 62 and 63 of the Indian Contract Act have entirely altered the English Law in this respect and the original contract subsists notwithstanding the variation. **M.** RAMIAH BAGAVATHAR *v.* SOMASI AMBALAM, (1915) M. W. N. 408; 29 M. L. J. 125 **449**

Contract Act—concld.

——— s. 63 449
——— s. 65 625, 751
——— ss. 73, 75—Contract, breach of —Plaintiff, liability of, to prove damages—Written contract—Inconsistent contract, if can be proved 950
——— ss. 74, 107—*Right of re-sale by vendor where property not passed to purchaser—Re-sale commission and brokerage when goods not re-sold—Agreement to pay, unreasonableness of*

The right of re-sale after the breach of contract to purchase may be allowed as a means of ascertaining damages subject to the rule of reasonable compensation contained in section 74 of the Contract Act and is not limited to cases where property has passed to the buyer.

Where the property in the goods re-sold has not passed to the buyer, a re-selling commission cannot be allowed.

Re-selling brokerage and commission for goods not actually re-sold cannot be allowed as they are unreasonable and not justified by section 74 of the Contract Act, being imaginary and fictitious. **S.** FORBES, FORBES, CAMPBELL AND CO. *v.* OFFICIAL RECEIVER, 9 S. L. R. 20 933
——— s. 75 950
——— s. 107 933
——— s. 134 760
——— s. 171 870
——— s. 209 679
——— ss. 217, 221 870

Contribution—Properties of two owners mortgaged to secure one debt—One owner and his property, release of, on payment of one-half of debt—Major portion of property released—Liability of other mortgagor and remaining portion of mortgaged property 113
———, recovery of—Survey charges 595
———, *suit for—Court, duty of, to determine liability of each defendant—Joint decree erroneous.*

In a suit for contribution it is the duty of the Court to determine the amount of liability of each defendant and to make a decree apportioning to each of them the amount for which he is found to be liable. A joint decree is clearly erroneous.

In such a suit what the Court ought to determine is whether the plaintiff has paid for the defendants their share of liability for the original debt. So far as the creditor is concerned, he is entitled to recover what is due to him from all the debtors, but as between the debtors, each of them is liable for so much of the debt as he has not paid to the creditor and as the plaintiff has paid for him. **A.** SHEO PRASAD *v.* LALA RAM 205
———, suit for. *See* PARTNERSHIP.

Co-sharers—*Joint land—Long exclusive possession of one co-sharer—Building, erection of—Presumption—Other co-sharer, right of, to demolish.*

Where one co-sharer is for many years in exclusive possession of a particular plot and makes constructions thereon, the presumption is that he is so in possession with the consent of the co-sharers. The other co-sharers cannot after lying by for many years come in and ask to have the constructions demolished. **A.** LAHASO KUNWAR *v.* MAHBIR, 13 A. L. J. 555; 37 A. 412 15

Costs to abide—*Costs to abide and follow the result, meaning of.*

The words "to abide and follow the result" convey the suggestion that the successful party must be given his costs. But the words "abide the result" only connote that the order as to costs is to await till decision is given in the case. They do not have the effect of fettering the discretion of the trying Court. **M.** GODAVARTHI PERIA *v.* GODAVARTHI LAKSHMIDEVAMMA, 28 M. L. J. 441; (1915) M. W. N. 330 203

Co-tenancy. *See* PARTITION.

Court, power of, to introduce new provisions in Transfer of Property Act 113
——— Subordinate Judge empowered to entertain appeals, whether Court 71

Court-fees. deficiency of, made up after several orders, effect of—Discretion—Appeal 571

Court Fees Act (VII of 1870), s. 7 (i), (ix)—*Foreclosure suit—Appeal for enhancement of mortgage-money—Court-fee to be* ad valorem.

The appellants sued to obtain foreclosure of a mortgage and joined as one of the defendants a co-mortgagee who, they alleged, had parted with his rights to their predecessors-in-title. The co-mortgagee also filed a suit and admitting appellants' right to the extent of a half share, made them defendants as they refused to be co-plaintiffs with him. The suits were tried jointly and two different decrees were passed. The appellants filed an appeal for enhancement of the mortgage money payable to them:

Held, that they must pay *ad valorem* Court-fees on the amount by which enhancement was sought. **N.** WASUDEO *v.* DAYARAM, 11 N. L. R. 83 609
——— ss. 7 (iv) (f), 11—*Suit for accounts and administration—Valuation in the discretion of plaintiff.*

The plaintiff gave in the plaint all the facts and circumstances regarding her want of knowledge of the various interests, their nature, and state of accounts of the estate of her deceased ancestor, which obliged her to bring her suit in the form she did, and, therefore, sued for accounts and administration of the said estate and claimed her share therein. The suit was valued at Rs. 130 for purposes of Court-fees and at Rs. 30,00,000 for purposes of jurisdiction:

Held, that the suit was for an account and was properly valued under section 7 clause *(iv) (f)* of the Court Fees Act. **B.** KHATIJA *v.* ADAM HUSENALLY VASI, 17 BOM. L. R. 574 949

Criminal misappropriation. *See* PENAL CODE, s. 409.

Criminal Procedure Code (Act V of 1898), ss. 4 (h), 199—*Complaint—Petition by husband simply for coercing wife, whether a complaint—Magistrate directing Police inquiry—Charge sheet preferred before another Magistrate—Jurisdiction.*

Where the accused No. 1 leaving her husband's house went to the house of accused No. 2 with her jewels and some property, and the husband went to the house of the Deputy Magistrate at about 9 P. M., where was also the first accused, and presented a complaint not with the object of getting the Magistrate to take action but simply to coerce his wife to give back the jewels;

Criminal Procedure Code—contd.

Held, that there was no complaint under section 199 of the Criminal Procedure Code such as could entitle the Magistrate to take cognizance of the case after the death of the husband.

Where a Magistrate having cognizance of a case refers it to the Police for inquiry and report, the Police have no power to prefer a charge sheet before another Magistrate and such other Magistrate has no jurisdiction to take cognizance of the case.

It is not open to persons after the husband's death to revive proceedings which were dropped during his life-time. **M.** RUKMANI AMMAL, *In re*, 16 CR. L. J. 466 **98**

——— ——— ——— **S. 110**—*Charge to be communicated to accused—Reputation, nature of, evidence of—Order without reasonable grounds as to prevent accused from furnishing security, legality of—Sureties, qualifications of.*

An order under section 110 of the Criminal Procedure Code should not be made unless the charge which the accused has to meet is communicated to him.

When it is sought to prove the reputation of a person, the evidence which is required is the evidence of respectable persons who are acquainted with the person on his trial, who live in the same neighbourhood and are aware of his reputation, and these persons should ordinarily not be officials.

An order under section 114 framed without reasonable grounds or with the express intention of preventing the accused from furnishing security is *ultra vires*.

The sureties required in a case under section 110 of the Criminal Procedure Code are persons who are in a position to influence the accused and likely to be able to restrain him and who, if they fail to do so, can forfeit the amount mentioned in the bond.

It is not to be supposed that only holders of landed property can be in such a position. **U. B.** NGA HEIN *v.* EMPEROR, 8 BUR. L. T. 53; 16 Cr. L. J. 553 **825**

——— ——— ——— **ss. 110, 121, 514**—*Security for good behaviour—Subsequent conviction under s. 325, Penal Code—Forfeiture of bond of sureties.*

Where a man was placed on security under section 110, Criminal Procedure Code, not merely as being a receiver of stolen goods but also as being a dangerous man and the son of a notorious dacoit, and was subsequently convicted of a bad offence under section 325, Indian Penal Code:

Held, that there was nothing in law to prevent the forfeiture of the bond of sureties under the circumstances. **P.** EMPEROR *v.* SHER SINGH, 10 P. R. 1915 Cr.; 16 Cr. L. J. 549 **821**

——— ——— ——— **S. 121** **821**

——— ——— ——— **S. 122**—*Sureties—Report by Police as to fitness of sureties, admissibility of.*

A Magistrate called for a report from the Sub-Inspector of Police as well as from the Tahsildar as to the fitness of particular persons to act as sureties in a case: the Tahsildar reported in the affirmative and the Sub-Inspector in the negative. The Magistrate accepting the report of the Police Sub-Inspector declined to accept the sureties:

Criminal Procedure Code—contd.

Held, that the report of the Police Officer was not admissible in evidence and that it was the duty of the Magistrate to have taken evidence as to what was the basis of that report and he should have come to a decision thereon himself. **A** ZORAWAR *v.* EMPEROR, 13 A L. J. 469; 16 Cr. L. J. 445 **77**

——— ——— ——— **S. 122**—*Surety, evidence about fitness of, rejection of—Magistrate, duty of—Burden of proof.*

The power of rejection of sureties conferred on Magistrates by section 122 of the Criminal Procedure Code, 1898, should not be used merely to prevent a *'badmash'* from giving security.

Although it is the duty of the accused to produce the evidence of the fitness of the surety, that burden is ordinarily discharged by the evidence of the surety himself. If the Magistrate is not satisfied with the evidence of the surety, that alone is not sufficient ground for rejection. Section 122 of the Criminal Procedure Code recognizes only one ground for rejection of the surety and the reason given by the Magistrate must be a positive reason for believing the surety to be unfit. If he is not so satisfied, he must make further inquiry and come to a definite conclusion one way or the other. **S.** MUHAMMAD IBRAHIM *v.* EMPEROR, 8 S. L. R. 322; 16 Cr L. J. 479 **111**

——— ——— ——— **ss. 125, 406**, *scope of—Order to execute bond for keeping peace—District Magistrate's power to cancel bond.*

The terms of section 125 of the Criminal Procedure Code are sufficiently wide to cover a case where the District Magistrate finds that the materials before the Subordinate Magistrate were not sufficient to justify an order for taking security.

Section 406 of the Code gives an appeal to the District Magistrate from an order to furnish security for good behaviour, while section 125 relates to orders for keeping the peace as well as to those from which section 406 allows an appeal. **N.** EMPEROR *v.* DALLI, 11 N. L. R. 98; 16 Cr. L. J. 555 **827**

——— ——— ——— **S. 145**—*Criminal revision—Oudh Judicial Commissioner's Court, powers of—Magistrate's order under section 145, Criminal Procedure Code, power to set aside.*

The Oudh Judicial Commissioner's Court, having no authority to revise proceedings except that given to it by the Criminal Procedure Code, has no authority to set aside an order passed by a Magistrate under section 145 of the Criminal Procedure Code. **O.** IBAD-ULLAH KHAN *v.* RAHATULLAH KHAN, 18 O. C 69; 16 Cr. L. J. 541 **669**

——— ——— ——— **S. 145**—*Dispute as to land between two channels—Boundary—Province of Agra and Oudh—Deep stream of Ghagra—Magistrate—Jurisdiction.*

The deep stream of the river Ghagra, as it exists at any given point, forms the boundary line between the District of Fyzabad in the Province of Oudh and the District of Basti in the Province of Agra.

A dispute arose about a piece of land situated between the two distinct channels of the river Ghagra between the District of Fyzabad and the District of Basti and the channel which was towards the Fyzabad side was found to be the deep stream of the river:

Held, that the Magistrate of Basti had jurisdiction to take cognizance of the dispute under section 145 of the Criminal Procedure Code. **A.** AUDHENDRA PARTAP SINGH SAHAI *v.* DAMAN SINGH, 16 CR L. J. 527 **543**

ss. 145, 146—*Order "not to obstruct" without taking evidence, if final—Procedure.*

In a proceeding under section 145, Criminal Procedure Code, the preliminary order was made, the statements of the parties as required by clause (4) of the section were put in, but the Magistrate without examining the parties or taking any evidence ordered a party "not to obstruct":

Held, that the order was not a final order under the section and that if there was still a danger of a breach of the peace, the Magistrate must complete the proceedings as required by section 145 and make a proper order either under that section or under section 146. **B.** *In re* DYAWAPPA BASGUNDA PATIL, 17 BOM. L. R. 382; 16 CR. L. J, 434 **66**

s. 145, *scope of—Actual physical possession, consideration of—Possession, nature of, irrelevant—Written statement—Jurisdiction.*

Section 145 of the Code of Criminal Procedure is concerned solely with the fact of actual physical possession whether lawful or unlawful, whether in contemplation of law enjoyed by the possessor in his own right or on behalf of others.

Therefore, in proceedings under that section any question as to whether possession is on behalf of others or in one's own right is quite irrelevant.

Questions as to the rights of parties raised by their written statements under section 145, Criminal Procedure Code, are quite irrelevant; as such proceedings are initiated by the Magistrate in the interests of public order and tranquillity and it is his preliminary order that settles the actual issue between the parties and founds his jurisdiction. **M.** NARAYANA ASARI *v.* KANDASAMI ASARI, 16 CR. L. J. 525 **541**

s. 146 **66**

s. 146—*Attachment of property—Duration of attachment—Adjudication of rights of parties by competent Court—Magistrate, duty of, to withdraw attachment.*

An order of attachment of property under section 146 of the Criminal Procedure Code remains in force until withdrawn, but it is the duty of the Magistrate to withdraw it and release the attachment as soon as it is brought to his notice that a competent Court has determined the rights of the parties thereto or of the person entitled to possession. **M.** MAHARAJA OF VENKATAGIRI *v.* AMBARKANA SRINIVASA ROW, 17 M. L. T. 392; 16 CR. L. J. 481 **321**

ss. 157, 165—*Locking of doors of accused's house by Police of one Police station in jurisdiction of another Police station, whether* ultra vires

Although the wording of section 165, Criminal Procedure Code, limits the powers of a Police officer to the places within the limits of the station of which he is in charge or to which he is attached and although the locking of the doors of an accused's house is a step which would facilitate the search of the house and would make the search a thing of some value, yet the locking of the doors and the keeping of guard over the house are also a part of the ordinary duties of the Police under the words in section 157 "to investigate the facts and circumstances of the case and to take such measures as may be necessary for the discovery and arrest of the offender;" and in section 157 there is no provision preventing the Police of one Police station from acting under that section in the jurisdiction of another Police station. **P.** NATHA SINGH *v.* EMPEROR, 12 P. R. 1915 CR.; 16 CR. L. J. 551 **823**

s. 165 **823**

ss. 179, 181—*Charge of criminal breach of trust—Jurisdiction—Special and general provisions—Interpretation.*

According to the ordinary canons of construction a special provision should ordinarily receive effect unqualified by the general.

Section 179 of the Criminal Procedure Code can be applied only to cases in which the consequence necessary to constitute the offence ensues in some place other than that in which the accused's act is done.

It is the Court within whose jurisdiction the primary loss takes place that can take cognizance of the offence of criminal breach of trust.

Where, therefore, the accused was appointed agent for the sale of the complainant's oil at Nandyal and used to send periodical reports to his principal at Madras showing the quantity of oil sold and the amount of money received, but after a certain time failed to do so and left his place of business and made away with the money:

Held, that inasmuch as the misappropriation was only of the money received and the loss primarily ensued to the complainant as a consequence of the accused's conduct at Nandyal, the Court of the Presidency Magistrate at Madras had no jurisdiction, to try the case. **M.** KRISHNAMACHARI *v.* SHAW, WALLACE & Co., 18 M. L. T. 25; (1915) M. W. N. 419; 29 M. L. J. 178; 16 CR. L. J. 491 **331**

s. 179—*Penal Code (Act XLV of* 1860), *s.* 415—*Cheating—Deceit—Jurisdiction—Court within whose jurisdiction complainant deceived.*

The accused, a trader of Salem in the Madras Presidency, deceived a trader in Dhulia in Bombay Presidency by leading him to believe that he was buying clean ground-nut oil when, in reality, he was buying a mixture of ground-nut oil with rock oil. The Dhulia trader was induced by the deceit to pay the price agreed upon on the understanding that it was clean oil:

Held, that the complainant was deceived in Dhulia and the Courts at Dhulia had jurisdiction to hear the case. **B.** JAMNADAS VASANJI *v.* EMPEROR, 17 BOM. L. R. 389; 16 CR. L. J. 433 **65**

s. 181 **331**

ss. 195, 467, 471—*Execution proceeding—Sanction to prosecute for offences—Appeal to District Judge—Jurisdiction.*

An application was made to a Judge of the Court of Small Causes for sanction to prosecute the applicant in respect of offences under sections 195,

Criminal Procedure Code—contd.

467 and 471 of the Penal Code, committed in an execution proceeding before him. The application was rejected. The matter was taken up to the District Judge under section 195, clause 6, of the Criminal Procedure Code. In that Court the application was registered as a criminal appeal:

Held, that the application should not have been registered as a criminal appeal as it was a matter in which the Sessions Judge had no jurisdiction. **A.** MOHAMMAD YASIN *v.* CHEDA LAL, 13 A. L. J. 709; 16 CR L. J. 524 **540**

s. 195, cls. (6), (7) —*Subordinate Judge empowered to entertain appeals, whether Court—Jurisdiction—Sanction, revocation of—Penal Code (Act XLV of* 1860), *s.* 209—*Claim, meaning of—Madras Civil Courts Act (III of* 1873), *s.* 8.

Where, by a notification issued under the Madras Civil Courts Act (III of 1873), Government empowers all Subordinate Judges in the Madras Presidency situated in a place different from that of the District Court, to receive appeals direct and not by transfer from the District Court, such Subordinate Judges are Courts to which appeals "ordinarily lie" from the subordinate Courts within the meaning of section 195 (7) of the Code of Criminal Procedure, and such Subordinate Judges have jurisdiction to revoke on appeal the sanction to prosecute for an offence under section 209, Penal Code, granted by a subordinate Court.

The word "claim" used in section 209, Indian Penal Code, cannot refer to a document produced in evidence to substantiate the relief asked for in a suit. **M.** BODDU RAMAYYA *v.* CHITTURI SURAYYA, 28 M. L. J. 486; 17 M. L. T. 446; 6 CR L. J. 439 **71**

s. 195 (6) —*Sanction to prosecute—Superior Court—Jurisdiction to re-consider whole case.*

A Court of superior jurisdiction whose jurisdiction is invoked under section 195 (6) of the Code of Criminal Procedure should re-consider the entire matter on the merits and while allowing all reasonable weight to the opinion of the Court below, it should nevertheless re-consider the question of the propriety of the order of sanction on its merits upon a complete review of the entire facts. **A.** RAM RAJA DAT *v.* SHEO DAYAL, 13 A. L. J. 685; 16 CR. L. J. 489 **329**

s. 199 **98**

ss. 225, 537, 239, 256, 257, 342—*Charge, defective, effect of—Accused, right of, to know charge against him—Explosive Substances Act (VI of* 1908), *s.* 4 (b), *charge under, essentials of—Charge drawn up—Court, duty of, to adhere to statutory language—Misjoinder of charges—Trial, if illegal—"Same transaction," meaning of—Penal Code (Act XLV of* 1860), *ss.* 120A, 120B—*Criminal conspiracy, person when guilty of—Indictment, nature of, in conspiracy cases—Verdict, objection taken after, effect of—Co-conspirators, separate trial of—Court, power of—Offence under s.* 4 (b), *Explosive Substances Act—Prosecution, right of, to prosecute for the offence irrespective of ultimate design of conspiracy—Crime, sufficient proof of—Charge of conspiracy—General evidence, particular facts to be proved after—"Unlawfully and maliciously," meaning of—Explosive substances under s* 4 (b), *nature of—Prosecution, duty of—Offence, proof of—Accused, whether bound to show his object or design—Possession of explosive substances—Knowledge and assent, if necessary—Failure of conviction for crime committed—Prosecution for conspiracy, if expedient—Guilt, how established—Evidence Act (I of* 1872), *ss.* 10, 143, 154 *Evidence under s* 10, *when admissible—Cross-examination—Defence, right of, to ask leading questions—Discretion under s.* 154—*Witnesses, privileges of, in criminal cases—Detective, whether privileged to refuse to answer as to where he was secreted—Statutory provisions, strict compliance with—Written statement in criminal cases, value of.*

Where it is alleged on behalf of the accused that the charge under section 4 (*b*) of Act VI of 1908 is materially defective, inasmuch as it omits to state, *first*, that the accused were in possession of explosive substances or had them under their control "unlawfully and maliciously," and *secondly*, that it was the intent of the accused to endanger life in British India:

Held, that these defects in the charge do not vitiate the trial and conviction, and that the case would be covered by section 225 and by clause (*a*) of section 537 of the Code of Criminal Procedure.

An accused is entitled to know with certainty and accuracy the exact value of the charge brought against him, otherwise he may be seriously prejudiced in his defence.

It is not essential to specify in the charge the explosive substances which the accused have conspired to have in their possession or under their control, where the illegal act, charged under section 120B, Indian Penal Code, is the unlawful and malicious possession of explosive substances within the meaning of section 4 of the Explosive Substances Act, 1908.

Even though the illegal act which he has agreed to do or caused to be done, has not been done, a person may be guilty of criminal conspiracy.

Although an indictment, which omits to set out the particular false pretence alleged, is held bad where an objection is taken before verdict, the defect is deemed cured by verdict if no such objection is taken and there is a verdict of guilty on such an indictment.

The indictment in all cases of conspiracy must, in the first place, charge the conspiracy, but in stating the object of the conspiracy the same degree of certainty is not required as in an indictment for the offence conspired to be committed.

When a charge is drawn up, the Court should adhere to the language of the Statute as far as practicable.

Sections 120A and 120B did not find a place in the Indian Penal Code before the 27th March 1913, when Act VIII of 1913 became law; and, therefore, persons accused under section 120B cannot be convicted, unless the prosecution establishes that the accused were members of a conspiracy after the 27th March 1913.

Where it is established that there has been a misjoinder of charges, the trial must be deemed illegal, because held contrary to an express provision of the law relating to the mode of trial.

A comprehensive formula of universal application cannot be framed to determine whether two or more acts constitute the same transaction: but circumstances which must bear on the determination of the question in an individual case may be easily indicated; they are, proximity of time, unity or proximity of place, continuity of action and community of purpose or design.

If *A*, *B* and *C* conspire to make or have in possession or under control an explosive substance within the meaning of the Explosive Substances Act, and if in pursuance of such conspiracy, *A* makes or has in his possession or under his control an explosive substance, they may, if the Court thinks fit, be charged and tried together under section 120B, Indian Penal Code, and section 4 (*b*) of Act VI of 1908.

The Court has the option to place the co-conspirators on their trial separately.

Whenever evidence is attempted to be made admissible under section 10 of the Indian Evidence Act, the defence is entitled to insist on strict compliance with its provisions, namely, upon proof of reasonable ground for belief that the persons named have conspired together.

Where an offence is committed under section 4 (*b*) of the Explosive Substances Act, 1908, in pursuance of a criminal conspiracy, it is open to the Crown to prosecute the accused for such offences, irrespective of the question of the ultimate design of the alleged conspiracy.

In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt

If the commission of a crime is directly in issue in any proceeding, it must be proved beyond reasonable doubt.

Where there is a charge of conspiracy, particular facts are proved to show that one or more of the defendants took part in it after general evidence of the existence of the conspiracy is first given.

Evidence of similar facts may be received to prove a party's knowledge of the nature of the main fact or transaction, or his intent with respect thereto.

To admit evidence under this head, however, the other acts tendered must be of the same specific kind as that in question, and not of a different character and the acts tendered must also have been proximate in point of time to that in question.

The term "unlawfully and maliciously," in the sense in which it is familiarly used in the criminal law of England, signifies "not for a lawful object and intentionally, without justification or excuse or claim of right."

The explosive substance mentioned in section 4 (*b*) of Act VI of 1908 need not be such as to enable a person by means thereof alone, without the aid of other substances, to cause danger to life or injury to property.

Any part of any apparatus, machine or implement intended to be used or adapted for causing or aiding in causing any explosive substance, is included in the term 'explosive substance' as used in section 4 (*b*).

To place all the available evidence in the case

fairly and fully before the tribunal by which alone the guilt or innocence of the accused is to be determined, and not to secure a conviction, is the main duty of the prosecution.

The offence charged against the accused must be proved by those who made the charge, and the accused stands only to hear the evidence that is given against him and, therefore, he is not bound to show at all, or in any way whatever, what his real object or design in doing any act or acts undoubtedly done by him was.

In a charge under section 4 (*b*) of the Explosive Substances Act, 1908, possession to be punishable must also be possession with knowledge and assent.

When the prosecution fails, on the evidence, to secure a conviction for the crime committed, it is inexpedient, even though it may be lawful, to prosecute the accused for a conspiracy the proof where of really rests on the establishment of that very crime.

It is not by proof of his character but by proof of the facts that a man's guilt is to be established.

In the course of cross-examination by the defence for the purpose of eliciting facts in their favour from the prosecution witnesses, though those facts are irrelevant, the defence are entitled, in view of the generality of the provisions of section 143 of the Indian Evidence Act, to ask leading questions.

The Court may in its discretion, under section 154, Indian Evidence Act, permit the prosecution to cross-examine a witness, even though he had been originally called by them with regard to the matters elicited by the defence.

In criminal prosecutions, the witnesses for the Crown are privileged from disclosing the channel through which they have received or communicated information.

But the same privilege cannot be claimed by a detective, who cannot refuse on grounds of public policy to answer a question as to where he was secreted.

In a case where every possible point is likely to be contested, a strict compliance with the statutory provisions is desirable.

When a written statement is accepted by a Court from the accused, it does not take the place of evidence nor of such examination of the accused as is contemplated by the Code of Criminal Procedure.

C. AMRITALAL HAZRA *v.* EMPEROR, 13 C. L. J. 331; 19 C. W. N. 676; 16 CR. L J. 497 **513**

——— s. 239 513

——— ss. 254, 255, 256, 257—*Trial in warrant case—Provisions of Code binding nature of—Magistrate, whether can vary procedure according to usage—Cross-complaints—Prosecution evidence in one cannot be treated as defence evidence in other.*

A Magistrate is not at liberty to substitute for the procedure of the Code a procedure which has arisen by usage, however convenient the latter may be. The provisions of the Code must be followed.

Where, therefore, in trying two cross-complaints, the Magistrate heard the evidence for the prosecution in each and without framing a charge formally as required by section 254 of the Criminal Procedure Code and without following the provisions of sections 255,

Criminal Procedure Code—contd.

256 and 257 in the first case, he dealt with it as if a charge had been framed and treated the evidence in the other case as defence evidence in the first:

Held, (1) that a trial conducted in a mode so materially different from that prescribed by law was not a proper trial;

(2) that the differences between the procedure followed and the legal procedure were of too fundamental and important a kind to be treated as irregularities curable by any of the sections in Chapter XLV of the Code. **B.** EMPEROR *v.* DOSABHAI J. DHONDY, 17 BOM. L. R. 490; 16 CR. L. J. 538 **666**

——— **s. 256** **513**

——— **s. 256**—*Summons case tried together with warrant case—Procedure to be followed—Warrant case dismissed during trial—Summons case proceeded with—Right of accused to re-call and cross-examine prosecution witnesses—Right to re-call and cross-examine—Right refused—Prejudice—Burden of proof.*

Where a summons case is tried together with a warrant case, the procedure to be followed is that of a warrant case.

A summons case and a warrant case were tried together. During the trial the charge of the warrant case was dismissed and the charge of the summons case was proceeded with. The Magistrate refused to allow the accused to re-call and further examine the prosecution witnesses:

Held, that the refusal was illegal.

The privilege conferred by section 256, Criminal Procedure Code, is a substantive one and when denied, it is for the prosecution to show that the accused was not prejudiced by the denial. **M.** RALLABANDI SOBHANADRI, *In re*, 2 L. W. 574; 18 M. L. T. 92; (1915) M. W. N. 546; 16 Cr. L J. 540 **668**

——— **s. 257** **513**

——— **s. 307 (3)** **72**

——— **s. 339**—*Approver—Pardon forfeited—Power of Sessions Judge to direct prosecution—Plea not taken before Committing Magistrate taken before Sessions Judge, legality of.*

In a case of dacoity one of the accused *G* was given a conditional pardon. The Sessions Judge, being of opinion that he had not spoken the truth, directed his prosecution under section 397 of the Penal Code. *G* pleaded pardon before the Sessions Judge, but not before the Magistrate:

Held, that the Sessions Judge had no authority to direct the prosecution of *G* on any specific charge and that if he came to the conclusion that the approver had wilfully concealed anything essential or given evidence on any point which was positively false, he was entitled to record an opinion to that effect and to invite the attention of the District Magistrate to his opinion or possibly to suggest the propriety of his prosecution:

Held, further, that *G* was entitled to plead pardon before the Sessions Judge, although he had not done so before the Committing Magistrate. **A.** EMPEROR *v.* GANGUA, 13 A. L. J. 424; 37 A. 331; 16 CR. L. J. 483 **323**

——— **s. 342** **79, 513**

Criminal Procedure Code—contd.

——— **ss. 367, 424**—*Judgment—Several accused—Appellate Court, duty of.*

Where there are several accused who have appealed, it must appear from the face of the judgment that the case against each of the accused has been taken into consideration and reasons should be given, as far as may be necessary, to show that the Appellate Court has devoted judicial attention to the case of each of the accused. **M.** CHERUKATH MAMMAD, *In re*, 16 CR. L. J. 496 **336**

——— **ss. 374, 376 (b)**—*Reference—Capital charge—Accused undefended—Re-trial, order of—High Court, power of.*

When an accused appears before a Judge on a Capital charge, he ought not to be allowed to go undefended, the custom being for the Judge to appoint or request any member of the Bar to conduct the defence of the accused.

Under section 376 (*b*), Criminal Procedure Code, the High Court has jurisdiction to order a new trial on the same or an amended charge. **C.** EMPEROR *v.* MOHAR ALI SHEIKH, 19 C. W. N. 556; 21 C. L. J. 495; 16 CR. L. J. 481 **321**

——— **ss. 380, 562**—*Proceedings submitted to Sub-Divisional Magistrate—Jurisdiction—Power to acquit.*

A Magistrate to whom proceedings are submitted as provided by section 562 of the Criminal Procedure Code may pass such sentence or make such order as he might have passed or made if the case had originally been heard by him. He is not prevented from acquitting the accused, if on a perusal of the evidence he comes to the conclusion that conviction should not have taken place. **U. B.** MI TI HLA *v.* MI KIN, U. B. R. (1915) II, 55; 16 CR L. J. 535 **663**

——— **s. 406** **827**

——— **ss. 417, 435**—*Acquittal in Sessions case tried with aid of Assessors—Revision petition to High Court against order of acquittal—Power of High Court to interfere in revision—Sessions Judge and assessors concurring—Important witnesses disbelieved—Sessions Judge, power of, to stop prosecution—Revision by private person.*

Ordinarily a High Court has jurisdiction to interfere on revision with an order of acquittal but it should exercise this jurisdiction sparingly and only where it is urgently demanded in the interests of justice.

The power of a Court to stop a case if it thinks it a waste of time to go on with it is undoubted and, therefore, where in a Sessions case two of the important witnesses for the prosecution were disbelieved by the Judge and the Assessors and the prosecution was stopped, there was no such patent miscarriage of justice as to call for interference by the High Court.

It is very doubtful if a private party should, as a matter of right, be allowed to move the High Court in such cases. **M.** NATESA PADAYACHI, *In re*, 17 M. L. T. 457; 28 M. L. J. 690; (1915) M. W. N. 411; 16 CR. L. J. 558 **830**

——— **s. 421**—*Reasonable opportunity to appellant to be heard in support of appeal—Advocate filing appeal not Advocate for appellant called upon to support appeal—Reasonable opportunity, if given.*

Criminal Procedure Code—contd.

Where the Advocate filing the petition of appeal is not himself the Advocate for the appellant, a reasonable opportunity for hearing the Advocate cannot be said to have been given where he is called upon forthwith to support the appeal. **U. B.** NGA SHWE HMUN *v.* EMPEROR, U. B. R. (1915), II, 52; 16 Cr. L. J. 538 **666**

——— **s. 423 (1)**—*Jurisdiction—Acquittal—Appeal—High Court, power of, to interfere—Grounds of interference.*

In appeals against acquittals the High Court ought not to interfere unless the trying Judge was clearly wrong and the judgment is either perverse or based on obvious error of procedure. **M.** PUBLIC PROSECUTOR *v.* NARAYANA NAYUDU, 16 Cr. L. J. 529 **657**

——— **ss. 423 (1), 439 (3)**—*Reference—Power of Sessions Judge in appeal—Acquittal—Procedure — Enhancement of sentence, whether a fit ground for ordering re-trial.*

Where a Sessions Judge sitting in appeal is of opinion that an accused should be acquitted, he ought not to refer the case to the High Court. It is his duty to allow the appeal and acquit the accused.

Where a Sessions Judge sitting in appeal thinks that the case ought to have been tried by the Court of Sessions, he should himself set aside the conviction and order a commitment under section 423 (1) (*b*) of the Code.

The power of ordering a new trial merely for the purpose of enhancing the punishment is a power that ought to be very sparingly exercised. **A.** EMPEROR *v.* MOHAN LAL, 13 A. L. J. 477; 16 Cr. L. J. 433 **65**

——— **s. 424** **336**

——— **s. 435** **830**

——— **s. 435**—*Charter Act, s. 15—High Court, power of, to quash proceedings at any stage—Penal Code (Act XLV of 1860), ss. 189, 504, offence under, essentials of—Abusing process-server, whether offence—Service of summons, when complete—Process-server, right of, to enter any house without permission.*

A High Court has jurisdiction to interfere at any stage of the proceedings if it considers that, in the interests of justice, it should do so.

Before an offence under section 189 of the Indian Penal Code can be made out, it must be shown that there was a threat of injury to a public servant for the purpose of inducing him to do any act or forbear or delay to do any act connected with the exercise of his public function.

The mere fact that the accused abused the process-server will not constitute an offence under section 189 of the Indian Penal Code, nor will it constitute an offence under section 504 of the Indian Penal Code without an intention to cause a breach of the peace or knowledge that a breach of the peace is likely to result.

Service of summons is complete when it is tendered to the witness and his refusal to sign the original makes no difference.

The fact of a subpœna being entrusted to a process-server does not give him a general right of entry into any house without obtaining the permission of the owner or person in charge. **M.** KUPPUSAMI AIYAR, *In re*, 28 M. L. J. 505; 2 L. W. 463; 16 Cr. L. J. 477; 17 M. L. T. 398; (1915) M. W. N. 365 **109**

Criminal Procedure Code—contd.

——— **s. 439 (3)** **65**

——— **ss. 467, 471** **540**

——— **s. 476**—*Time within which proceeding should be taken—Limitation.*

There is nothing in section 476 of the Criminal Procedure Code which requires a Court to take action, if at all, immediately after the conclusion of the case in which the offences are said to have been committed or within any fixed time thereafter. **A.** TILAK PANDEY *v.* EMPEROR, 13 A. L. J. 466; 37 A. 344; 16 Cr. L. J. 465 **97**

——— **ss. 488, 489**—*Application by husband to cancel order of maintenance—Plea of divorce—Duty of Magistrate—Person of full age, whether can be presumed to act under influence of relations.*

Where a husband applies for the cancellation of an order of maintenance passed in favour of his wife on the ground that he has been divorced from her, it is the duty of the Magistrate to entertain such plea and give it consideration.

Muhammadan Law does not give a wife any authority, except possibly in accordance with a contract entered into at the time of the marriage, to prevent her husband divorcing her by the pronouncing of *talak*.

A person who is of age cannot be presumed to be acting under the influence or compulsion of his relations with whom he is living in the absence of any evidence. **U B.** HASAN CHANEA *v.* MI SIN, U. B. R. (1915), II, 53; 16 Cr. L. J. 531 **659**

——— **s. 489** **659**

——— **s. 514** **821**

——— **s. 517** **92**

——— **s. 523** **85**

——— **s. 526 cls. (1) (a), (8)**—*Transfer of case—Fair and impartial inquiry—Reasonable apprehension.*

Where an application was made by the accused to the trying Magistrate, before the commencement of the hearing, notifying his intention to move the High Court under section 526, Criminal Procedure Code, for transfer and praying for an adjournment for that purpose, but the application was rejected and some condemnatory remarks were made in a superfluous order by the Magistrate against the accused:

Held, that the Magistrate was bound to grant the adjournment and that as these irregularities coupled with the condemnation of the accused appeared to have created a reasonable apprehension in the mind of the accused that a fair and impartial inquiry could not be had, the case ought to be transferred. **S.** OTANDAS DWARKADAS *v.* EMPEROR, 8 S. L. R. 341; 16 Cr. L. J. 476 **108**

——— **s. 530**—*Bench of Magistrates—Conviction—Some not having heard evidence, effect of.*

A conviction by a Bench of Magistrates some of whom have not heard the evidence is vitiated and must be set aside. **M.** SUBRAMANIA AYYAR, *In re*, 38 M. 304; 16 Cr. L. J. 489 **329**

——— **s. 537** **513**

——— **s. 562** **663**

Criminal Procedure Code—concld.

——————— **s. 565**—*High Court, power of, to pass order under, in appeal or revision.*

Where a trying Magistrate, not especially empowered in this behalf, passed an order under section 565, Criminal Procedure Code, and directed a convict to notify his residence for a period of two years and the District Magistrate moved the High Court to pass such an order on revision:

Held, that the Magistrate's order being without jurisdiction must be quashed, but that as section 565, Criminal Procedure Code, required that the order should be made by the trying Magistrate at the time of passing the sentence, the Appellate Court or the Court of Revision could not make an order under that section where the original Court was not so empowered. **S.** EMPEROR *v.* DINO, 8 S. L. R. 340; 16 CR. L. J. 469 **101**

Criminal revision—Criminal Procedure Code (Act V of 1898), s. 145—Judicial Commissioner's Court, powers of—Magistrate's order under s. 145, Criminal Procedure Code, power to set aside **669**

Crown Grant—Ferry—Presumption **692**

Custom. *See* ALIENATION.

——————**Alienation**—*Necessity—Strict proof, when not required—Consideration, small portion of, not for necessity—Sale, if set aside.*

When a suit to set aside an alienation is filed a considerable time after the alienation was effected, strict proof of necessity cannot be expected from the vendee.

A sale is not to be set aside when only a small portion of the consideration for the sale is not found to be for necessity. **P.** KISHEN SINGH *v.* SOHNA, 117 P. L. R. 1915 **799**

——————— *of ancestral property—Necessity—Good faith—Second appeal—Question of law or fact.*

The question of valid necessity may be one of law, or of customary law or one of fact according to the peculiar circumstances of each case.

Where, therefore, in a suit by the minor sons for a declaration that the sale of ancestral property by their father shall not affect their reversionary right after his death, it appeared that the alienor was really in need of money for household necessities and that he took the money in good faith for ordinary purposes:

Held, that the question of valid necessity was one of fact in the case and its necessity being proved, the plaintiffs' suit must fail. **P.** RAJA *v.* ALLAH DITTA **802**

——————— **by widow**—Occupancy rights, creation of—Suit for declaration that creation of occupancy rights by widow was invalid—Limitation, starting point of **789**

———————*Ancestral land, whether liable to attachment in hands of widow of deceased proprietor*—Onus—*Effect of attachment.*

Where a male proprietor governed by Customary Law has contracted a debt, in respect of which a simple money-decree has been passed against him, and thereafter has died leaving ancestral landed property, which has come into the possession of his widow on the usual life-estate, such property

Custom—contd.

is liable to be attached at the instance of the deceased proprietor's judgment-creditor in execution of his money-decree.

The burden of proving that the deceased's estate in the hands of his widow is not liable for his just debts lies heavily on the person asserting this.

An attachment of property does not affect any title therein, but merely prohibits its transfer. **P.** BHAMBUL DEVI *v.* NARAIN SINGH, 39 P. R. 1915; 103 P. W. R. 1915 **572**

——————— *Necessity—Payment of debt due by husband—Hindu Law—Payment of barred debt—Payment out of income of property.*

Under the Hindu Law a widow can validly alienate property to raise money for payment of debt due by her husband, even if she be able to pay it off out of the income of the property in her hands, but under the Customary Law she is not competent to do so.

Under Customary Law, unlike Hindu Law, a widow is not bound to pay debts due by her husband which have become barred by limitation. **P.** INDAR *v.* MOTI RAM, 112 P. L. R. 195; 75 P. W. R. 1915 **780**

———————Privacy — Windows interfering with privacy—Easement **154**

———————, reasonableness of—Question of law—Reasonableness, test for **312**

——————— **of math.** *See* MAHANT.

——————— **Sale** — *Consideration — Necessity for trifling amount not proved, effect of—Punjab Courts Act (IV of 1912), s. 41 (1) (a)—Second appeal, ground for interference in.*

In a suit to set aside a private sale the Courts should not interfere where the sale is an act of ordinary prudence or where the consideration is held to be necessary except to a comparatively trifling amount.

Therefore, where a lower Court overlooks these provisions, the Chief Court is entitled to interfere in second appeal. **P.** HAZARASINGH *v.* ARUR SINGH, 118 P. L. R. 1915 **801**

——————— **Succession**—Dakhna Aroras *of Multan—Sons—Eldest son entitled to extra share—Partition suit—Value of suit—Value of share of plaintiff.*

Among *Dakhna Aroras* of Multan there is a recognized custom as to giving of 1¼th share of ancestral immoveable property to the eldest son.

In a suit by a plaintiff for his share in joint family property the value of suit for purposes of jurisdiction is the value of the property claimed and not the value of the whole estate of which partition is prayed for. **P.** KHILANDA RAM *v.* NANDA RAM, 108 P. L. R. 1915; 68 P. W. R. 1915 **769**

———————*Hindu Gorewaha Rajputs of Garhshankar Tahsil, District Hoshiarpur—Daughter—Collaterals of fifth degree—Preferential heir—Ancestral property.*

Among agricultural tribes in the Punjab near collaterals do, as a general rule, exclude daughters from succession to ancestral property and it is for the daughter to prove her right to oust the collaterals.

Where on the death of *K*, a Hindu *Gorewaha Rajput* of the Garhshankar Tahsil, Hoshiarpur

Custom—concld.

District, his widow held the land and after her death mutation was effected in favour of the collaterals who took possession: On a suit for possession by the daughter of *K*

Held, that she had failed to prove that by custom among Hindu *Gorewaha Jats* of Garhshankar Tahsil, Hoshiarpur District, a daughter was entitled to succeed to the ancestral property of her father in preference to his collaterals in the fifth degree. **P.** RADHI *v.* PUNNU, 35 P. R. 1915 **561**

——— **Succession**—Lodi Pathans *of Mustafabad, Ambala District—Presumption*—Onus.

In matters of inheritance *Lodi Pathans* of Ambala District follow agricultural custom and not their personal law, and the presumption is that among them first cousins succeed to ancestral estate in preference to daughters.

Where the daughters seek to rebut this presumption the *onus* lies on them to establish their prior right. **P.** ABDUL GHAFUR KHAN *v.* MUSHARRAF BI, 47 P. R. 1915; 89 P. W. R. 1915; 161 P. L. R. 1915 **7**

——— ——— ——— ——— Pagwand *or* chundawand —Malkotra Rajputs, *Una Tahsil, Hoshiarpur District—Difference between the plains and hilly districts.*

Among the *Malkotra Rajputs* of the village Panjawar of Tahsil Una in the Hoshiarpur District, the rule of succession is *chundawand*, and not *pagwand*.

In the Punjab plains the custom of *chundawand* is slowly giving place to *pagwand* even where it may have been prevalent at one time, but there is no such certainty as regards the hilly tracts of the Province. **P.** GOPAL SINGH *v.* PRABH DIYAL SINGH, 50 P. R. 1915; 99 P. W. R. 1915 **650**

——— **Will**—Gulfarosh Arains *of Lahore city —Will—Burden of proof, nature of.*

Among the *gulfarosh Arains* of Lahore city there is a custom of Will-making contrary to Muhammadan Law.

The burden of proving such a custom lies on the person who asserts it, but in view of the fact that the tribe is a mere fragment of a very large body of *Arains*, who are agriculturists and follow, except as regards certain things, ordinary Punjab custom, the burden is not a heavy one.

The fact that a party has repeatedly by act or word shown that he does not really follow a particular law, though it does not amount to an estoppel against him, still shows the views held by the party.

Instances in support of an alleged custom are not always to be treated as of little or no value because supported only by oral testimony; if the deponents have means of knowledge and the opposite party makes no attempt to rebut, facts stated may often be accepted as proved. **P.** RAHIM BAKHSH *v.* UMAR DIN, 49 P. R. 1915; 111 P. W. R. 1915 **382**

Damages—*One co-sharer's right to sue another co-sharer—Mutual arrangement about actual possession, effect of—Increased rent, demand for, for fishing.*

Where the plaintiff sues one of the co-sharers for damages for the wrongful removal of fish from a tank and it is found that there was an arrangement by which the defendant was put in possession of the tank with the right to take fish from it:

Held, that the arrangement or lease could not be void even under the Transfer of Property Act, because the act that was done in removing the fish was a past act and at that time, if under an arrangement, lease or license, whatever it may be called, the right was in existence, the defendant was justly exercising his right in fishing in the tank, and damages could not be claimed against him. **C.** BEHARI LAL NANDY *v.* KEDAR NATH NEBU, 19 C. W. N. 872 **806**

Damages—concld.

——— ——— Principal debtor entitled to avoid but not avoiding contract Surety, whether liable for breach—Notice of arrival of goods, if offer—Failure to take delivery **712**

——— ——— Misrepresentation avoiding contract must be one of fact—Damages for breach of contract—Criterion for assessing damages **575**

——— ——— Sale—Mortgagee selling mortgaged land —Covenant to transfer another land if vendee dispossessed by redemption—Statutory prohibition of transfer of land—Vendee, right of **751**

——— Specific performance — One contract alleged and different contract proved **969**

——— Suit for recovery of balance of mortgage-money, whether maintainable in Small Cause Court—Damages for breach of contract **621**

——— ———, suit for —Malicious prosecution—Proof —Conviction of plaintiff in lower Court, effect of **883**

Declaration of title, *suit for—Nature of title to be ascertained first—Plaint, amendment of—Discretion exercised by lower Appellate Court—High Court, power of, to interfere.*

A Court ought not to declare the title of any party to a piece of land without knowing what the nature of that title is.

A High Court ought not to interfere with the discretion deliberately exercised by a lower Appellate Court in refusing to allow a plaintiff to amend his plaint during the progress of the suit, unless it is satisfied that the lower Court came to a wrong conclusion. **C.** HARI KRISHNA DAS *v.* DINOR KINLA **355**

Declaratory suit, maintainability of—Attachment before judgment—Decree-holder, if obtains priority **622**

Decree. *See* CIVIL PROCEDURE CODE, 1908 s. 2 (2).

——— ——— against head of family, how far binding upon other members **156**

——— ———, *ex parte*, against minors, when liable to be set aside **579**

——— ——— **nisi,** definition of **178**

Dedication *to religious or charitable purposes—Land once dedicated to one purpose, whether can be used for any other.*

If a piece of land is dedicated to one purpose, it cannot, contrary to the terms of the dedication, except in cases which fall under the *cy-res doctrine* (or its equivalent in Muhamadan Law) be utilised or any other purpose. **M.** GRAMANI ADAM SAHIB *v.* HAJI ABDULLA SAHIB **575**

Deed, *construction of*—Dastbardarinama—*Widow relinquishing her life-estate for consideration—Sale or relinquishment—Consideration, not passed—Deed, validity of.*

Where a widow executed and registered a deed styling it a *dastbardarinama*, and stated in it that she renounced all her rights as widow in the estate of her husband held by her in favour of the next male reversioner in consideration of his agreeing to pay her a certain amount which amount was never paid:

Held, that the deed was not a sale-deed but a deed of release by which the widow surrendered her life-estate in her husband's land.

Held, further, that since no part of the consideration for the surrender of her life-estate was paid to her by the reversioner the agreement embodied in the deed was void and unenforceable. **P.** *Musammat* FAZLAN *v.* IMAM-UD-DIN, 95 P. W. R. 1915 **253**

Defamatory statement. *See* PENAL CODE, s. 500.

Deposit. *See* BENGAL TENANCY ACT, s. 174; TRANSFER OF PROPERTY ACT, s. 83.

—— in Court—*Money paid under compulsion of legal order, recovery of—Conditional payment—Judicial order, nature of—Rules of Supreme Court, O. XLV, rr.* 5, 6, *scope of—Inherent power of Court.*

The principle that, where money has been paid by the plaintiff to the defendant under compulsion of legal process which is afterwards discovered not to have been due, the plaintiff cannot recover it back in an action for money had and received, cannot apply in a case where money was deposited by the plaintiff, *C*, on the faith of an order which stated explicitly that the money would be retained in Court pending the determination of the question whether the money belonged to *B*, the then judgment-debtor of *A*, or to *D*, the alleged creditor of the depositor *C*, but where without holding any inquiry and without notice to the depositor and his alleged creditor the Court paid it out to *A* on his application.

A deposit made by order of a Court pending adjudication of the question whether *B* or *D* is beneficially interested in the money, is a conditional one.

No judicial order can be made to the detriment of a person till he has been afforded ample opportunity to defend his rights.

The Rules of the Supreme Court in England contemplate not an *ex parte* order to the prejudice of third person who may be really interested in the debt due from the garnishee but an inquiry in the presence of all the persons interested.

The Code of Civil Procedure (Act V of 1908) does not contain any specific rule of the type of rules 5 and 6 of Order XLV of the Rules of the Supreme Court in England. But the Court has inherent powers to guard against an abuse of its process and to ensure that its orders do not operate to the prejudice of persons who have no notice of the proceedings.

The money deposited does not cease to be the money of the depositor merely because he brought it into Court on the faith of a conditional order, which directed its retention in Court pending inquiry into the question raised,

Deposit in Court—concld.

The Court has full authority to compel a party to bring back such money into Court to be re-paid to the other party entitled to it. **C.** HARINATH *v.* HARA DAS ACHARJA **580**

Detective, whether privileged to refuse to answer as to where he was secreted—Statutory provisions, strict compliance with **513**

Directors, whether agents or trustees **192**

Divorce decree by District Judge—Reference to High Court—Practice—Parties absent, effect of **178**

Divorce Act (IV of 1869), ss. 16, 17, 69—*Divorce decree by District Judge—Reference to High Court—Practice—Parties absent, effect of—Decree* nisi, *definition of—Prostitute, who is—Evidence Act (I of* 1872), *s.* 112—*Legitimacy.*

Per *Wallis, C. J. and Ayling, J.*, (*Sadasiva Aiyar, J.*, dissenting.)—The jurisdiction of the High Court to confirm the decree in a divorce suit arises immediately upon a reference. To complete that jurisdiction it is not necessary that there should be a personal appearance of the petitioner before the High Court.

Per *Sadasiva Aiyar, J.*—The order passed in a divorce case by a District Court is not a decree *nisi*. It is only a divorce decree passed by a High Court on its original side which is called a decree *nisi*. Under the Divorce Act the person who wants the confirmation of a decree pronounced by a District Judge ought to make an application to the High Court for confirmation and without such application the High Court should not confirm the decree passed by the District Judge.

The mere fact that a woman talks promiscuously with all, does not show her to be a prostitute, though she may be a coquette or a flirt.

The presumption of a child's legitimacy can be said to be rebutted, if it is shown by strong, distinct, satisfactory and conclusive evidence that the husband before conception had not access to his wife. **M.** GUDA WILLIAM *v.* GUDA KARUNAMMA, 17 M. L. T. 357; 29 M. L. J. 269 **178**

—— —— **s. 69** **178**

Document, cancellation of—Limitation, from when begins to run **968**

—— ——, *construction of—Principle—Plain and unambiguous words—Court, duty of—Evidence Act (I of* 1872), *s.* 94—*Deed—Language plain and definite—Evidence, admissibility of, to prove language applies to other facts.*

Per *Spencer, J.*—When the language used is plain and applies accurately to existing facts, evidence is not admissible, for the purpose of showing that it was not meant to apply to those facts.

Per *Coutts-Trotter, J.*—Where the words used in a document are definite and unambiguous, the Court must not travel outside the words used to found or confirm speculations as to the parties to the document having in fact intended other than what they have said. **M.** VELAPPA GOUNDEN *v.* PALANI GOUNDEN, (1915) M. W. N. 325 **201**

Dower. *See* MUHAMMADAN LAW.

Easement—*Custom—Privacy—Windows interfering with privacy—Injunction.*

A plaintiff is entitled to have a decree closing doors and windows opened by his neighbour, by obtaining an injunction from the Court on the ground that his privacy has been interfered with and by custom he is entitled to restrain the defendant from interfering with his privacy by opening new windows and ventilators. **P.** LAJJA RAM *v.* FAQIRA, 74 P. L. R. 1915 **154**

———*Latrine erected on another man's land—Enjoyment for long series of years—Right of easement, if acquired—Right unknown to law—New easement, if created—Pleadings.*

Where the plaintiff along with some of the defendants erected latrines on land which did not belong to them, and used them for a long series of years and, thereafter claimed a right of easement:

Held, that no question of easement arose in the case, for an easement of this description was unknown to law and the Court would not create a new species of easement.

Where, as in the present case, the act of the plaintiff was in the nature of trespass and it might perhaps have been open to him to contend that he had acquired a good title to the disputed property by adverse possession, but where no such claim was set forth at any stage of the litigation:

Held, that the plaintiff could not be permitted to make a case inconsistent with the title alleged in the plaint and that the relief sought could not be granted **C.** HERA LAL ROY *v.* LOKENATH SHAHA, 19 C. W. N. 864 **865**

———*User for less than prescriptive period, whether possession—Right of suit—Incorporeal right, nature of—Adverse possession—Inclosure, proof of—Strongest evidence:*

Easements are not capable in an exact sense of being possessed. The enjoyment which may in time ripen into an easement is not possession and gives no possessory right before the due time is fulfilled.

Per *Sadasiva Aiyar, J.*—An incorporeal right which can be the subject of legal possession while in the process of acquisition should be a right which, by its very nature, is presumably one enjoyed to the exclusion of others, or there must be clear evidence that one who is acquiring the incorporeal right by the enjoyment of it has been in enjoyment with the distinct *animus* or intention of excluding other persons from like enjoyment with himself.

Inclosure is the strongest possible evidence of adverse possession. **M.** NARASAPPAYYA *v.* GANAPATHY RAO, 38 M. 280 **255**

———*Water channel blocked—Power of Court to direct opening of another passage without demolition of construction.*

Where the defendant had blocked a water channel of the plaintiff by building a wall:

Held, that the Court had power to direct the opening of another channel through the defendant's land without demolishing the wall. **A.** BISHUNATH SHUKUL *v.* GANESH DATT SHUKUL, 13 A. L. J. 637 **1002**

———Water-course and way, obstruction to —Continuing nuisance **385**

Easements Act (V of 1882), s. 13, cl. 3 (d)—*Easement of necessity—Doors not necessary for light and air, if can be opened—Drains.*

Where the defendants were alleged to have practically closed by staking bricks three doors appertaining to a house and to have stopped the flow of water through a drain which had existed for a number of years, and it appeared that the keeping open of the doors was not necessary for the enjoyment of the premises, that the doors used practically to be closed always, that there was access to the house of the plaintiffs otherwise than through one of these doors and that sufficient light and air could be obtained without the opening of the doors:

Held, (1) that the plaintiffs' claim in respect of the doors was rightly dismissed;

(2) but that as there was no other drain in the house of the plaintiffs and for the flow of water from the kitchen of the house there was no other outlet, the plaintiffs were entitled to use the drain for the flow of water from the kitchen and the defendants could not obstruct it. **A.** BISHAMBHAR NATH *v.* JAGAN NATH PRASAD **695**

Ejectment. *See* AGRA TENANCY ACT, 1901, s. 197; CENTRAL PROVINCES TENANCY ACT, 1898, s. 88; LANDLORD AND TENANT.

———— Contract of sale—Document not executed—Vendor, whether can eject purchaser **707**

———, defence against—Contract of sale and delivery of possession, if can be pleaded—Remedy **195**

———Notice of ejectment—Proper rent not specified—Court-fee paid sufficient—Land from which ejectment sought, not specified—Notice, if defective **656**

———Occupancy holding, mortgage of—Mortgagor, if can eject mortgagee without paying mortgage-money **490**

———*Person occupying land—No rent paid—Occupancy rights, acquisition of—Agra Tenancy Act (II of 1901), s. 34.*

In a suit for ejectment it was found that the land in dispute was held without payment of rent for a period of 26 years, twelve years out of which had expired while the old Act was in force. The status of *muafidars* was expressly disclaimed:

Held, that as there was no contract of tenancy between the parties, the tenant did not acquire occupancy rights. **U. P. B. R.** BALAK *v.* COLLECTOR OF JAUNPORE **285**

———Raiyat *at fixed rate of rent and occupancy* raiyat, *privileges of, distinguished*—"Kayemi", *meaning of*—"Sthayee karsha kabulyat," *meaning of—Under*-raiyat's *interest, whether heritable—Agricultural year, suit instituted before expiry of—Decree—Execution.*

A *raiyat* at a fixed rate of rent is competent to create a permanent heritable interest in favour of his grantee, although the latter is an under-*raiyat*.

The use of the term '*kayemi*' in a *kabulyat* imports not fixity of rent, but only permanence of occupation of the land.

Where the plaintiff is an occupancy *raiyat*, he is not competent to create in favour of his grantee a permanent heritable under-*raiyati* interest.

Ejectment - concld.

The description of a *kabulyat* as "*sthayee karsha kabulyat*" does not necessarily imply that the grantee was intended to have a permanent heritable interest.

Where the grantee is an under-*raiyat* of an occupancy *raiyat*, his interest is not heritable.

Where the suit was instituted before the expiry of the agricultural year current at the time when the original under-*raiyat* died:

Held, that the proper form of the decree would be one for ejectment against his representatives, the defendants, to be executed only on the expiry of that particular agricultural year. **C.** MEHER ALI *v.* KALAI KHALASHI, 19 C. W. N. 1129 **461**

——— ——— User for agricultural purpose—True test—Occupancy right, acquisition of, by 12 years' possession, effect of **834**

——— ——— ——— **suit**—*Cause of action, when arises—Suit withdrawn without permission to bring fresh suit—Fresh suit based on another cause of action, if barred—Civil Procedure Code (Act XIV of 1882), s. 373.*

A fresh cause of action arises each year as regards ejectment and, therefore, a suit for ejectment withdrawn without permission to bring a fresh suit does not bar another suit of ejectment based on another cause of action. **U. P. B. R.** GOPHURAN *v.* KALLU **24**

——— ——— *by* lambardar—*Other co-sharers no parties—Co-sharers making separate collections*——Lambardar, *rights of, to eject* qua lambardar—*Oudh Rent Act (XXII of 1886), ss. 108 (8), 126 (1).*

A *lambardar*, though he does not make the entire collections of the village, is entitled to maintain a suit for the ejectment of a tenant, the consent or dissent of other co-sharers being immaterial. Section 126 (1) of the Oudh Rent Act is no bar to such a suit. A share-holder objecting to his action has his remedy to apply for his removal and to partition his share. **U. P. B. R.** GAJRAJ SINGH *v.* UDEY PARTAP NARAIN SINGH **297**

——— ——— *Parties—All co-sharers must join unless agent appointed*—Lambardar *as such, power of, to eject.*

All the co-sharer landlords must join in a suit for ejectment unless they appoint an agent for the same.

A *lambardar* as such has no power of ejectment. **U. P. B. R.** SAHAI *v.* ALI BAKSH **35**

——— ——— ——— ——— *Trespass — Tenant-in-common, right of one to sue alone—Civil Procedure Code (Act V of 1908), O. XXVI, r. 9—Personal inspection by Judge, finding based on—Judgment, if valid.*

As against a trespasser in possession of immoveable property any one of co-owners or co-tenants can alone maintain an action in ejectment.

A judgment solely based on knowledge gained by the Judge during local inspection is illegal. An inspection which a Judge makes should be used by him only to test the accuracy and value of the evidence let in. He should not, without submitting himself to the test of cross-examination, make his knowledge the sole evidence for determining the question raised before him. **M.** AHMAD SAHIB SHUTARI *v.* MAGNESITE SYNDICATE LTD., 2 L. W. 460; 17 M. L. T. 387; 28 M. L. J. 598 **60**

Election of Mahant—Practice. *See* MAHANT.

Enhanced ren *, recovery of, suit for—Tenure-holder, rent paid by, whether liable to enhancement—Construction of document, essentials for.*

Variableness of rent is the normal condition and even the naming of a sum is not conclusive against this; and, therefore each case of enhancibility of rent is to be judged by its own peculiar circumstances.

Where there is no document, the conduct of the parties, especially where it extends over a long period of time, may justify an inference as to the terms on which land is held; but where there is a document defining the right of the parties, its terms must in the first instance be investigated.

In construing a document to ascertain its meaning, the Court must have regard to every fact a knowledge of which may conduce to the right application of the words used.

Where no sufficient ground is found for excluding the normal condition of variableness, the rent is enhancible. **C.** ANATH NATH MITRA *v.* MIDNAPUR ZEMINDARY CO. **802**

Estoppel **807**

——— ——— *See* EVIDENCE ACT, s. 115.

——— ——— *Agreement not to eject tenant so long as rent was duly paid—Such agreement whether to be in writing.*

A *zemindar* agreed not to eject his tenant so long as he paid rent in consideration of the receipt of the large amount of arrears due from a previous tenant:

Held, that the *zemindar* was estopped from ejecting the tenant so long as he paid rent.

That there was no reason for holding that such an agreement should be in writing. **U. P. B. R.** YUSUFUZZAMAN *v.* BODHAN **656**

——— ——— Buddhist Law—Husband and wife—Wife's interest in joint property affected by mortgage executed by husband alone—Wife's conduct and acquiescence **881**

——— ——— ——Mortgage, if can be questioned against a *bona fide* purchaser for value without notice **841**

——— ——— ———, principle of **734**

——— ——— ——— Representation by minor as major, effect of **957**

——— ——— *Tenancy admitted by landholder to be a fixed-rate tenancy—Tenant, whether can be ejected as occupancy tenant.*

In a suit for enhancement of rent against his tenant, the *zemindar* entered into a compromise in which he said that the nature of the tenant's tenancy would be that of a fixed-rate tenancy and proceeded to describe certain of its incidents. No mention was made of the grounds mentioned in clause (*d*) of section 57 Act II of 1901, probably because he had said that the land will be treated as a fixed-rate tenancy. The land-holder then brought the present suit for the ejectment of the tenant and his mortgagee on the ground that the tenant had transferred his holding which he alleged to be an occupancy tenure:

Held, that the *zemindar* was estopped from asserting that it was not a fixed-rate tenancy. **U. P. B. R.** BHAGWAN SINGH *v.* DWARKA RAI **677**

——— ———Test **386**

Evidence, admissibility of *razinama* in **311**

—— ——, admission of, by Magistrate when writing judgment—Irregularity **90**

————, propriety of — Admission of further evidence **696**

—— ———— *Compromise in execution Court—Registration, if necessary—Compromise, whether admissible in evidence.*

The joint holders of a decree entered into a compromise among themselves as to the manner in which the decree should be executed and their petition of compromise presented to the execution Court and acted upon:

Held, that the compromise did not require registration:

Held, further, that the compromise was admissible in evidence and binding upon the parties by reason of the order to that effect which was passed upon it by the Court executing the decree. **A.** BHARATH CHAUBE *v.* GAYA CHAUBE **418**

———— Final judgment—Review—Application for reception of new evidence—Sufficient reason not shown—Rejection of application, propriety of—Civil Procedure Code (Act V of 1908), s. 114, O. XLVII, r. 1 **717**

———— Lease—Documentary and oral evidence, admissibility of—Tenancy, proof of **502**

———— *Oral—Weight to be given to opinion of trial Judge—Duty of Court of Appeal—Cross-examination to credit—Relevancy—Credibility of witness.*

On appeal the whole case, including the facts, are within the jurisdiction of the Appellate Court: but generally speaking it is undesirable to interfere with the findings of fact of the trial Judge who sees and hears the witnesses and has an opportunity of noting their demeanour especially in cases where the issue is simple and depends on the credit attached to one or the other of conflicting witnesses. Nor should his pronouncement with respect to their credibility be put aside on a mere calculation of probabilities by the Court of Appeal.

Where the issue is simple and the only question is which set of witnesses is to be believed the verdict of the Judge trying the case should not be lightly disregarded.

Cross-examination to credit is necessarily irrelevant to any issue in an action, its relevancy consists in being addressed to the credit or discredit of the witness in the box so as to show that his evidence for or against the relevant issue is untrustworthy; it is most relevant in a case where everything depends on the Judge's belief or disbelief in the witness's story.

Where the Judge who heard the evidence rejected the story of a witness declaring that he had seldom seen in the box a more "thoroughly unscrupulous, untrustworthy, untruthful man" than the witness, but the Court of Appeal accepted the witness's story saying that the cross-examination of the witness which convicted him of being a party to a false and fraudulent balance sheet, was "not a very relevant point," and that witness was prejudiced thereby by being placed "in an uncomfortable position and reduced to shuffling answers;"

Evidence—*contd.*

Held, that the Court of Appeal ought not to have excused the witness and actually accepted his story on the ground that he was uncomfortable when he was shown to be a fraudulent falsifier of accounts. **P. C.** BOMBAY COTTON MANUFACTURING Co. *v.* MOTILAL, 19 C. W. N 617; 17 M. L. T. 408; 28 M. L. J. 593; 21 C. L. J. 528; 17 BOM. L. R. 455; 2 L. W. 521; 39 B. 386 **229**

———— Proof—Other articles in newspaper, admissibility of—Disaffection to be excited must be against Indian Government—Relevancy of disaffection excited against other authorities **827**

———— Report by Police as to fitness of sureties, admissibility of **77**

———— Waste land—Title—Possession — Quantum of evidence necessary—Bombay Land Revenue Code (Bom. Act V of 1879), s. 37—Open village sites, title of Government—Presumption **51**

———— Will not produced—Secondary evidence, admissibility of **807**

———— *Written statement—Admission by one defendant, when admissible against others.*

An admission of one defendant in a written statement in a suit will not be evidence against others unless it is made evidence at the trial by examining that defendant who made the statement. **M.** SESHAGIRI AIYANGAR *v.* SADACHI **924**

Evidence Act (I of 1872), ss. 10, 143, 154—Evidence under s. 10, when admissible—Cross-examination—Defence, right of, to ask leading questions—Discretion under s. 154—Witnesses, privileges of, in criminal cases **513**

———— **ss. 24, 25, 26, 27**—*Confession—Information received from accused, how far relevant.*

Where the statement made by an accused to the Sub-Inspector of Police was to the effect that he would point out the spot where he had committed the murder, and thereafter he conducted the Police to a spot where earth was found saturated with blood:

Held, that so much of the Sub-Inspector's evidence as related to the alleged confession by the accused that he committed the murder was not admissible in evidence.

It was not the intention of the Legislature to allow the Police by an ingenious perversion of the provisions of section 27, Indian Evidence Act, to get rid of the safeguards thrown round prisoner by sections 24, 25 and 26 of the Act and the exception to the general rule must be very strictly confined within its legitimate limits. **P.** TARA SINGH *v.* EMPEROR, 11 P. R. 1915 CR.; 16 CR. L. J. 545 **817**

———— **ss. 25, 26, 27** **817**

———— **ss. 32, 91** — *Statement not against pecuniary or proprietary interest of person making it, whether admissible—Plaintiff relying upon document—Other evidence of transaction, if admissible.*

A statement by a plaintiff as a witness to the effect that her father told her that he had mortgaged the land in suit to the defendant is inadmissible under section 32 of the Evidence Act.

Evidence Act—contd.

Where the plaintiff relies upon a mortgage-deed produced by her but not proved, she is precluded by section 91 of the Evidence Act from giving other evidence of the terms of the transaction. **U. B.** MI NGE MA *v.* NGA TALOK PYU, U. B. R. (1915), II, 56 **607**

——— ——— **s. 32 (2)**—*Relevant fact—Ordinary course of business—Appellate Court, powers of—Settlement papers, admission of, after first Court's decision.*

There is nothing in section 32, clause 2, which requires any formal proof that certain papers were kept as a fact in the ordinary course of business.

Settlement papers cannot be admitted by the Appellate Court after the first Court's decision in the case. **C.** BAID NATH SAHAY *v.* NANKU MAHTON **219**

——— ——— **s. 32 (7)** **974**

——— ——— **s. 33** **639**

——— ——— **ss. 33, 145, 157**—Previous statements, when and how to be used—Civil suit—Procedure—Documents to contradict witnesses—Witness to be given opportunity to explain **639**

——— ——— **s. 35**—*Survey records, entry of measurement of survey fields in, admissibility of, to prove encroachment—Title, proof of.*

Entries of the extents of the survey fields made in survey registers are admissible under section 35 of the Evidence Act to prove an encroachment, though insufficient to prove title to the extent encroached upon. **M.** KALAYI NARAYANA JOGITHAYA *v.* SECRETARY OF STATE, 2 L. W. 413 **154**

——— ——— **s. 58** **698**

——— ——— **ss. 68, 72**—*Mortgage-bond not properly attested, if admissible in evidence—Simple money-bond.*

Where a mortgage-deed is not properly attested in accordance with the provisions of section 59 of the Transfer of Property Act, it is not admissible in evidence as a mortgage-deed but it is admissible in evidence as a simple money-bond. **A.** MATHRA PERSHAD *v.* CHEDDI LAL, 13 A. L. J. 553 **363**

——— ——— **s. 72** **363**

——— ——— **s. 90**, presumption in, whether applicable to copies **386**

——— ——— **s. 91** **607**

——— ——— **s. 92** **760, 892**

——— ——— **s. 92**—*Agreement out of Court to compromise suit—Order of adjournment—Additional evidence, whether legally admissible—Transfer of interest in immoveable property—Registration.*

An order of Court adjourning a case and incidentally noting the fact of an agreement made out of Court between the parties as a ground of adjournment does not purport to be and is not a record of the terms of the compromise; and additional evidence to add to the terms of the compromise is not inadmissible under section 92 of the Evidence Act.

Where in a suit for possession of a house the parties arrived at an agreement that the defendant should deliver possession of the house on payment of Rs. 500 by the plaintiff and on the defendant failing to do so, the plaintiff sued on the basis of this agreement:

Held, that the suit was maintainable even though the agreement was not registered inasmuch as

(*i*) it did not contemplate any transfer of interest in immoveable property; and

(*ii*) the suit was one for possession and not for a declaration of title. **M.** SAMBANDA MUDALIAR *v.* CHINNASAWMI SAH **860**

——— ——— **s. 92**—*Contract Act (IX of 1872), ss. 73, 75—Contract, breach of—Plaintiff, liability of, to prove damages—Written contract—Inconsistent contract, if can be proved.*

It is not open to a party to a written contract to prove a contract the terms of which are clearly inconsistent with the terms of the written contract.

Sections 73 and 75 of the Contract Act make it compulsory on the plaintiff to show that he has suffered and the extent to which he has suffered; before a Court can award him damages for a breach of contract. **A.** BANARSI DASS *v.* LULLA MAL **950**

——— ——— **ss 92, 94**—*Mistake in description of property sold—Evidence to prove what was actually sold, whether admissible—Rectification of sale-deed—Specific Relief Act (I of 1877), s 31.*

Under section 92, clause (*a*), of the Evidence Act, any fact may be proved which would entitle a person to a decree on the ground of mistake of fact or law, and there is nothing in the section giving such a right to a plaintiff alone.

Where there is a misdescription of the property sold, the vendee can claim a rectification of the sale-deed under section 31 (*a*) of the Specific Relief Act.

Such a right can be used as a shield when possession is sought to be wrested from the party entitled to the rectification, and the fact that he is a defendant does not disable him from setting up the plea which could have availed him as plaintiff.

The combined effect of section 92, clause (*a*), Evidence Act, 1872, and of section 31, Specific Relief Act, 1877, is that the defendant can resist a suit on the ground that what was sold to him was different from what the sale-deed contained. **M.** RANGASAWMI AIYANGAR *v.* SOWRI AIYANGAR, (1915) M. W. N. 448; 18 M. L. T. 75; 29 M. L. J. 229 **588**

——— ——— **s. 92, proviso 2**—*Suit on promissory note—Written contract—Oral agreement—Burden of proof—Conditional admission in pleadings—Objection under the section taken for first time in Court of Appeal—Pleadings, amendment of.*

It is allowable under section 92 of the Evidence Act, 1872, to urge an oral agreement which will have the effect of leaving matters otherwise than if they had depended on the written agreement alone but such oral agreement must be clearly proved and the onus lies on him who sets it up.

If an admission in pleading is made subject to a condition, it must either be accepted subject to the condition or not accepted at all.

The plaintiff sued the defendant upon a promissory note, jointly executed by the defendant and one *H*, for Rs. 50,000 payable on demand, alleging that under a certain agreement the plaintiff was bound to pay *H* Rs. 50,000 on 30th January 1908,

Evidence Act—concld.

but he agreed to prepay that amount on being given the joint promissory note in question of date 23rd December 1907, and the money was handed over to the defendant; that the plaintiff agreed that he would surrender the note if on 30th January 1908 *H*, who was largely indebted to him, had given sufficient security for the whole debt as then due by him; that on the 30th January no such sufficient security was given that accordingly he was entitled to maintain defendant's liability under the note. The defendant admitted the execution of the note, but pleaded that it was verbally agreed that his liability on it should cease on the 30th January 1908. The trial Judge allowed the parties to go to trial and examine witnesses. At the trial the defendant's true contention was that it was agreed that upon the arrival of the 30th January 1908 the advance made under the promissory note should be held as the advance of the amount to be paid by the plaintiff to *H* on that date, and that the note should be re-placed by a single acknowledgment on the part of *H*. The trial Judge, coming to the conclusion that it had not been proved that any agreement had been made for the giving of security by *H*, gave judgment in favour of the defendant. The Court of Appeal took the view that no witnesses should have been examined and that the testimony could not be looked at, because the promissory note constituted a written contract binding the defendant to pay on demand and section 92 of the Evidence Act, 1872, prevented any oral agreement being set up to contradict that written agreement:

Held, that if the defendant's pleading was to be dealt with in absolute strictness, the view of the Court of Appeal was right; but that his true contention, when put in the form of averment, would be an oral agreement in terms of proviso 2 to section 92, which would allow it to be proved.

Held, also, that inasmuch as the view of the Court of Appeal might have been obviated by a mere amendment of the pleadings and as the parties had been allowed to go to proof, the evidence led should be considered; and that as the defendant failed to discharge the onus that lay on him of proving the oral agreement set up by him, the suit must be decreed. **P. C.** MOTABHOY MULLA *v.* MULJI HARIDAS, 17 M. L. T. 402; 28 M. L. J. 589; 13 A. L. J. 529; 19 C. W. N. 713; 21 C. L. J. 507; 17 BOM. L. R. 460; 2 L. W. 524; (1915) M. W. N. 522; 39 B. 399 **223**

——— ——— **s. 94** **588**

——— ——— **s. 94**—Deed—Language plain and definite—Evidence, admissibility of, to prove language applies to other facts **201**

——— ——— ——— **s. 112**—Legitimacy **178**

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Excise Act (XII of 1896), s. 45 **339**

Execution of decree—Application to set aside sale on ground of fraud and collusion, maintainability of—Minor substituted as judgment-debtor—Guardian *ad litem* not appointed—Sale, effect of **211**

——— ——— ———Arrest of judgment-debtor, when may be ordered **152**

——— ——— ———*Attachment*—Custodia legis—*Property not liable to be legally possessed by private persons, attachment of—Court, duty of—Beer, whether attachable and saleable—Excise Act (XII of 1896), s. 45.*

A *custodia legis*, such as the possession of attached property by a Civil Court executing a decree, requires no departmental sanction or license even, where the property is of a kind which cannot legally be possessed by a private person without such permission.

Therefore, the possession of attached property by a Court is no violation of the special law governing the possession of such property by private persons.

Where a District Judge passed an order attaching beer, an excisable property:

Held, that section 45 of the Excise Act had no application whatsoever to the acts of the District Court or any of its officials or agents acting under its orders.

It is the duty of every Judge to exercise the powers vested in him in such a way as to give effect to all provisions of the law.

Beer brewed within the local limits to which the Excise Act, 1896, applies is not exempt from attachment and sale in execution of a Civil Court decree.

Where a Civil Court attaches property of a nature governed by any Special law, such Court is bound to proceed with great circumspection so as not to defeat any of the purposes for which such Special law was enacted. **N.** BHARGAVA COMMERCIAL BANK, LTD. *v.* MACKINNON & Co., 11 N. L. R. 67 **339**

——— ——— ———*Benamidar*, right of, to execute decree **595**

——— ——— ———*Decree comprising property outside jurisdiction—Right to sell such property—Undervaluation, whether material irregularity—Civil Procedure Code (Act V of 1908), s. 115.*

The fact that all the property is not situated within the jurisdiction of the Court which passed the decree, does not affect its jurisdiction to sell the property comprised in the decree.

An undervaluation of property in the proclamation of sale is not a material irregularity within the meaning of section 115 of the Civil Procedure Code. **M.** HANSRAJ SAWCAR *v.* MOHIDEEN ROWTHER **745**

——— ——— ———Decree obtained by fraud or collusion, question of, whether relates to execution of decree—Attachment, whether gives any priority—Rateable distribution **239**

——— ——— ———*Execution Court, power of, to complete an ambiguous decree—Decree, ambiguity in.*

Where a decree is incomplete and ambiguous, it is not the duty of the Court executing the decree to complete it and to give a definite expression to the ambiguity. **A.** MUHAMMAD HASAN *v.* NIAZ HUSAIN, 13 A. L. J. 428 **213**

Execution of decree—contd.

——————————— Inventory of property attached not annexed to application—Application, whether in accordance with law 479

——————————— *Money-decree — Attachment before judgment—Deposit in Court—Decree in favour of 3rd parties against judgment-debtor—Subsequent decree-holders, whether can attach money deposited in Court—First decree-holder's lien.*

The plaintiff in an action for money against one *K* got this property attached before judgment. Later, he obtained a decree, but its execution was stayed on the application of the judgment-debtor pending the decision of the appeal. Subsequently, with the consent of the parties the Court modified its order allowing *K* to sell the property on condition that after paying off the debts etc., he paid the remainder into Court as security for the decree against him. It was subsequently discovered that another creditor had a mortgage in his favour on the estate and in consequence of this both the parties arrived at a fresh agreement, the terms of which were embodied in an application to the Court signed by both the parties which stated specifically that the plaintiff should have a first lien on the balance for the sum for which he may ultimately get a decree. This application was granted and the property sold. The plaintiff then filed cross-objections asking for a further sum and increased interest from the date of the institution of the suit. Ultimately the judgment-debtor's appeal was dismissed and the cross-objections partially accepted by the Chief Court.

During the pendency of the appeal the defendant obtained a money decree against *K* and attached the money paid by him into Court as security. The plaintiff objected, but the executing Court ordered rateable distribution. The plaintiff then sued for a declaration that he was entitled to payment in preference to the other decree-holders:

Held, (1) that the plaintiff was fully justified in bringing the declaratory suit;

(2) that the money was deposited by *K* and accepted by the Chief Court as security for the due performance of such decree as might ultimately be binding upon him and the defendant by attaching the money before the date of the final decree in favour of the plaintiff did not prejudicially affect the latter's rights. **P.** *Miss* HAMILTON *v.* SHANKAR DAS, 120 P. W. R. 1915 791

——————————— *for partition of property based on award—One of the properties mortgaged by one of the parties to the decree—Separate suit to determine liability on mortgage, maintainability of.*

Where an award and the decree based thereon for partition of immoveable property make no mention of the encumbrance created thereon by one of the parties who are father and sons and where the mortgagees are no party to the proceeding, the executing Court is not competent to decide in execution of the decree, the respective liabilities of the parties as regards the mortgage. Such a question is a fit subject for a regular civil suit to be brought by the aggrieved party. **P.** NARPAT RAI *v.* DEVI DAS, 59 P. W. R. 1915; 139 P. L. R. 1915 755.

——————————— Personal decree against Hindu woman with limited estate—Debt incurred for legal necessities—Suit based upon allegations of necessity—Decree-holder entitled to prove necessity in execution—Payment of Government demands, whether legal necessity—One of several decree-holders can apply for execution of the whole decree 181

——————————— referred to Collector — Application to Civil Court to expedite execution, whether execution application—Power of Court to control Collector's proceedings 58

——————————— Sale—Minor widow brought on record as legal representative of her deceased husband, judgment-debtor—Court kept in ignorance of minority of widow—An earlier and higher bid for same property in another suit concealed—Sale void—Suit for declaration competent without regard to s. 47—Fraud—Limitation Act (IX of 1908), Sch. I, Arts. 12, 166, applicability of 314

——————————— Transmission of decree for execution by one Court to another—Transmission of that decree to another Court—No steps taken for six months to execute decree—Proceedings thereafter, whether void 119

——————————— *Uncertified payment under decree, recognization of—Instalment decree—Default - Limitation Act (IX of 1908), Sch. I, Art. 182 (7).*

An uncertified payment under a decree cannot be recognized for any purpose under the new Code of Civil Procedure.

Where a decree provides for payment of the money due under it in instalments and in case of default in payment of any of the instalments, the whole amount becomes payable at once, an application for execution should be made within three years of the first default. **A** AMIR SINGH *v.* CHHATTAR SINGH, 13 A. L. J. 666 274

——————————— , who may come in in— Party having no interest in property when decree passed, right of 502

——————————— *against wrong representative—Sale—Property in hands of usufructuary mortgagee—Reversioner, suit by—Decree-holder purchaser, whether protected.*

In a mortgage suit the mortgagee obtained a decree against the mortgagor and on the latter's death brought his widowed daughter-in law on the record while his widow was still alive. He then proceeded to execute the decree and purchased the property himself at the Court sale. At that time the property was in the hands of a usufructuary mortgagee and when the estate fell into possession, the reversioners sued to recover possession:

Held, that inasmuch as the property was in the hands of a usufructuary mortgagee at the time of sale the purchaser acquired merely the equity of redemption and the sale could not be binding on the reversioners. **M** VUPPALAPATI VENKATAPPA *v.* THOVAGUNTA VIRARAGHAVAYYA 6

——————————— **proceedings** — Decree-holders of different Courts attaching in execution same property, right of, to rateable distribution - Court of highest grade Transfer of decree 21

——————————— struck off through mistake of Court—Power to restore—Civil Procedure Code (Act V of 1908), ss. 141, 151, O. IX 592

Execution of decree—concld.

——————— **sale**—*Auction-purchaser's right—Mistake or oversight in procedure, effect of.*

When the auction-purchaser, in execution sale of a mortgage decree is claiming possession from persons who could claim only through one or more of the mortgagors and whose claim has been declared unfounded, a mistake or oversight in the proceedings cannot affect the real substance and subject of the litigation between the mortgagors and the mortgagee. **L. B.** MAUNG MAUNG *v.* SAN NYEIN **17**

——————— ———Co-owner's interest—Auction-purchaser, assignee of—Title, acquisition of—Partition, right of—Limitation Act (IX of 1908), Sch. I, Art 144, applicability of—Adverse possession—Co-owner's possession **976**

——————— *Occupancy holding not saleable—Sale held before application of objection heard—Irregularity—Proper procedure.*

Where in an execution proceeding for the sale of an attached holding, the Munsif allowed the application of objection to the sale to stand over and in the meantime held the sale without making inquiries into the objection raised by the judgment-debtor:

Held, that the proceedings of the Munsif were wholly irregular;

that the proper procedure in such a case for the judgment-debtor was to appeal against the order refusing to postpone the sale or directing the sale to take place. **C.** LAKENATULLA *v.* ASMATULLA SARKAR **616**

Ex parte decree. *See* DECREE.

——— ——— *Costs—Procedure to be adopted, when date of hearing holiday*—Ex parte *decree, setting aside of—Costs of adjournment—Appellate Court's power to cancel order of costs allowed by first Court.*

Where the date fixed for hearing a case happens to be a holiday, the Court is in no way justified in taking up the case on the following day and in passing any order to the prejudice of any of the absent parties without duly serving upon him a fresh notice of the hearing.

Passing an *ex parte* decree without duly serving the summons upon the defendant is wholly unjustifiable and liable to be set aside unconditionally.

A party having good and sufficient reason for non-compliance with an order of a Court cannot be burdened with the costs of an adjournment. **P.** UMAT-UL-MUGHNI BEGUM *v.* SALIG RAM, 51 P. W. R. 1915; 126 P. L. R. 1915 **137**

———, setting aside of. *See* CIVIL PROCEDURE CODE, 1908, O. IX, R. 13.

———, *setting aside of—Application made after five years—Procedure—Jurisdiction—Revision—Limitation Act (IX of 1908), Sch. I, Art. 164—Civil Procedure Code (Act V of 1908), s. 115, O. IX, r. 13.*

An *ex parte* decree was passed in 1909 when the defendant was in jail. An application to set aside the decree was made in 1913 when the defendant was released from the jail. The Munsif without considering whether the application was barred by limitation granted it on the ground that the defendant being in jail at the time of the hearing of the suit had been prevented from attending the Court and defending it properly:

Ex parte decree—concld.

Held, that the proceedings of the Munsif were irregular and without jurisdiction.

That the Munsif ought to have considered whether the application before him, treated as an application under Order IX, rule 13, of the Civil Procedure Code, had been made within time, or if he treated the application as one for review of judgment, he should have considered whether the applicant had established sufficient cause for not applying till after five years had expired since the passing of the decree. **A.** JANKI PRASAD *v.* PARMESHWAR DIN PANDEY, 13 A. L. J. 482 **975**

Explosive Substances Act (VI of 1908), s. 4 (b), *offence under—Prosecution, right of, to prosecute for the offence irrespective of ultimate design of conspiracy—Explosive substances, nature of—Possession of explosive substances—Knowledge and assent, if necessary.*

Where an offence is committed under section 4 (*b*) of the Explosive Substances Act, 1908, in pursuance of a criminal conspiracy, it is open to the Crown to prosecute the accused for such offences, irrespective of the question of the ultimate design of the alleged conspiracy.

Any part of any apparatus, machine or implement intended to be used or adapted for causing or aiding in causing any explosive substance, is included in the term 'explosive substance' as used in section 4 (*b*).

The explosive substance mentioned in section 4 (*b*) of Act VI of 1908 need not be such as to enable a person by means thereof alone, without the aid of other substances, to cause danger to life or injury to property.

In a charge under section 4 (*b*) of the Explosive Substances Act, 1908, possession to be punishable must also be possession with knowledge and assent. **C.** AMRIT LAL HAZRA *v.* EMPEROR, 21 C. L. J. 331; 19 C. W. N. 676; 16 Cr. L. J. 497 **513**

Ex-proprietary right. *See Sir* LAND.

Fact, finding of—Evidence not referred to in judgment, effect of **710**

Factor, definition of **462**

Factum Valet, principle of, how far applicable to marriage in Muhammadan Law **871**

Falsification of document. *See* PENAL CODE, s. 477A.

Ferry—*Crown grant—Right to ply boats—Prescription.*

The plaintiffs were the owners of *Mouza* R and the defendants of *Mouza* B. Between villages R and B flowed the river G. The plaintiffs alleged that they were entitled to ply boats across the river and to disembark passengers on land belonging to the defendants and prayed that the defendants be restrained from obstructing:

Held, that the use of a ferry by the *zemindars* of *Mouza* B, which had been found to be a long and continuous use, was entitled to prevail until the plaintiffs, who were starting up an opposition ferry, could show a Crown grant or could give evidence from which a Crown grant could be presumed. **A.** JWALA SINGH *v.* ABDUL RAZAK, 13 A. L. J. 775 **692**

Foreclosure suit—Appeal for enhancement of mortgage-money—Court-fee to be *ad valorem* **609**

Forest Act, s. 25 (d) 325

Forest land—*Proof of possession—Acts of ownership quite essential to determine title—Nature of evidence to prove title and possession.*

Where the defendants are shown to be in possession of certain forest land, the plaintiff in order to establish his claim to it must prove definite acts of ownership exercised by him on the land from time to time.

A sketch prepared by one of the parties at a time when the Government attempted to take up these lands under the Land Acquisition Act before any controversy as to the boundary of these lands arose is strong cogent evidence to prove ownership. **M.** MANJERE KARNAMULPAD *v.* KOZHIKOTE KIZHAKKE 729

Forfeiture. *See* LANDLORD AND TENANT.

———— *Anubhavam* tenure—Denial of landlord's title, whether works forfeiture of tenancy 427

Fraud, allegation of—Mortgage-decree, sale under 402

———— Auction-sale—Bidder *benamidar* — Misrepresentation 12

———— *Contemplated fraud not effected, effect of—Fraudulent confiderate, when can take advantage—Equitable relief—Collusive decree—Agreement not to execute, effect of.*

Where the contemplated fraud has not been effected, a party to the fraudulent transaction does not lose his right to be relieved from the effect of such a transaction.

To enable a fraudulent confederate to retain property transferred to him in order to effect a fraud, the contemplated fraud must be effected when and when alone does the fraudulent grantor or giver lose his right to claim the aid of the law to recover the property he has parted with.

The principle, that a party to a fraudulent transaction is entitled to relief in a Court of Equity as against his fraudulent confederate so long as the fraud contemplated has not been carried into effect, is not inapplicable merely because the party suffers a decree to be passed against him in a fictitious and collusive suit which is only a part of the fraudulent scheme.

Where, therefore, the defendant obtained a collusive decree against the plaintiff promising to execute only against the plaintiff's brother and then sued out execution against the plaintiff himself, on a suit to have it declared void and of no effect:

Held, that even if the plaintiff could not impugn the decree he was entitled to relief having regard to the agreement that it could not be enforced against him. **C.** RAJAB ALI *v.* HEDAYET ALI, 19 C. W. N. 1151; 22 C. L. J. 197 699

———, *plea of—Issues—Allegations, mere, not sufficient.*

No man ought to be found guilty of fraud and collusion of a particularly gross kind of fraud unless it is clearly and unambiguously alleged and put in issue against him.

Therefore, in a suit upon an indemnity bond the plea that the damnification suffered by the plaintiff is the result of his negligent and fraudulent conduct in the previous litigation ought to be in issue against him in clear terms; it is not enough that there are allegations in the written statement from which

Fraud—concld.

a plea of this kind could be spun out. The plea should be clearly and distinctly raised. **M.** SANKUNNI MENON *v.* NALLAPPAH RAMUNNI MENON 482

———— *Suit for setting aside decree obtained by fraud not brought—Fraud can be still relied upon.*

A party can rely on fraud even though he has not brought a suit to set aside the decree alleged to have been obtained by fraud. **C.** KURARAM DATTA *v.* BANOMALI PATRA 838

Fraudulent decree, suit to set aside, when maintainable—Consequential relief, necessity of—Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of plaint, when not permitted 132

———— **transfer.** *See* TRANSFER OF PROPERTY ACT, s. 53.

———— *Estoppel, principle of—Duty to speak—Purchaser at execution sale, if can question transferability—Auction-purchaser equally bound with judgment-debtor—Co-sharer landlord, power of, to raise question of transferability—Non-transferable occupancy holding, sale of, effect of.*

Where there is nothing to show that a transferor intended a sale of his immoveable property as a cloak or device for his own protection and where the *bona fides* of the transfer cannot be doubted, the transfer cannot be impeached as fraudulent.

The case, where the person against whom the estoppel is sought to be applied is under no duty to speak, is not covered by the principle that where a person, by his words or conduct, wilfully causes another to believe the existence of a certain state of things and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter that a different state of things existed at the time.

A purchaser at an execution sale is not entitled to raise the question of transferability of the holding and is bound by the same rule of estoppel as the judgment-debtor.

A co-sharer landlord having a three-fourths share is entitled to raise the question of transferability of the holding.

The purchaser can be evicted by any of the co-sharer landlords to the extent of his own share, in a sale of a non-transferable occupancy holding, and if possession of the entire holding has been acquired by some of the co-sharers the other co-sharers are entitled to joint possession thereof. **C.** KANCHAN MANDAR *v.* KAMALA PROSAD, 21 C. L. J. 441 734

Gift. *See* HINDU LAW; MUHAMMADAN LAW.

———— *made in contemplation of death—Possession not delivered, effect of—Better title to be shown by person not in possession.*

A gift made in contemplation of death and intended to operate only after the donor's death is inoperative and void.

A person not in possession ought to show a better title to the property from which he seeks to eject the person in possession. **L. B.** MAUNG PO YIN *v.* MG. NI, 8 BUR. L. T. 72 888

Grant—Kayam patta—*Construction—Surrounding circumstances and conduct of parties.*

Grant—concld.

Where a grant under the heading *kayam patta* was made in 1857 and the grantees dealt with their tenants as if they were entitled to permanent rights and in compensation for acquisition of land for public purposes the grantee and grantor both shared and evidence proved that the grantor regarded the grant in the terms of neighbouring villagers as a permanent grant:

Held, that a heritable permanent grant was conveyed in those terms.

Wallis, C. J.—*Prima facie* the words "*kayam patta*" mean 'perpetual lease.' But a long course of decisions have held that these words and the words "*istimrari mokurari*" and "*kayam sasvata*" do not *prima facie* convey more than life-estates. When land or interest in land is intended to be transferred hereditarily, it is usual to indicate that intention by the use of the words 'from son to grandson' or 'from generation to generation' or the like. In construing grants one has to look to the surrounding circumstances and to the conduct of the parties to see what their real intention was in the grant.

Coutts-Trotter, J.—In *Tulshi Pershad Singh* v. *Ram Narain Singh*, 12 C. 117; 12 I. A. 205; 9 Ind. Jur. 433; 4 Sar. P. C. J. 646, the Privy Council have expressly used those words to leave the Courts free to give the fullest effect to the circumstances of each case and to avoid laying down any hard and fast rule of construction. **M.** VENKATARAMANNA *v.* VENKATAPATHI NAYANI VARU, 17 M. L. T. 269; 28 M. L. J. 510; (1915) M. W. N. 313 **188**

——— *Occupancy right, if acquired after grant—Bengal Tenancy Act (VIII of 1885)—Eviction—Only occupancy raiyat protected by law.*

If at the date of the grant of a permanent interest there was no occupancy right which had matured, an occupancy right cannot be acquired after the date of the grant.

It is not every *raiyat* who is protected from eviction but only an occupancy *raiyat*, under the Bengal Tenancy Act, VIII of 1885. **C.** AKHIL CHANDRA SEN *v.* TRIPURA CHARAN **563**

Grove—*Custom—Tenant, right of, to cultivate—Payment of rent—Landlord, right of, to get rent assessed.*

A tenant is not entitled to bring a grove land under cultivation and to hold it free from payment of rent. The land-holder is entitled to have rent assessed on such land. **U. P. B. R.** BHARAT INDU *v.* MISRI **34**

——— *Fruit orchard or timber grove—Tenant—Occupancy rights, acquisition of—Land—Agra Tenancy Act (II of 1901), s. 11.*

Where a fruit orchard or timber grove has been planted, the grove-holder cannot be ejected as a tenant from year to year so long as the land maintains its character as a grove. Nor can he acquire occupancy rights so long as it remains a grove, because in either case, land is not land within the meaning of the Tenancy Act in which only occupancy rights can accrue. It becomes land after the disappearance of the grove. **U. P. B. R.** MUHAMMAD ABDUL HAFIZ KHAN *v.* RAM RATAN LAL **20**

——— Improvement **410**

———, *mortgage of—Mortgagor dying without heirs—Mortgagee, whether can be ejected—Grove, if constitutes improvement.*

Grove—concld.

A tenant who had acquired occupancy rights over certain land subsequently planted a grove over it and mortgaged the same usufructuarily. Upon the death of the tenant without heirs, the *zemindar* sued the mortgagee for ejectment on the ground that he was a non-occupancy tenant of less than 12 years' standing:

Held, that as the transfer of the grove by mortgage was a valid transfer and the rights of the mortgagor passed to the mortgagee, the mortgagee could not be ejected.

Held, further, that the order of ejectment in such cases implies the confiscation of existing valuable rights under a law which is entirely irrelevant and is, therefore, so serious a mistake of law as to amount to an illegality.

Held, also, that the grove having been planted before the Tenancy Act is not an improvement for which compensation can be allowed to the mortgagee and an order of his ejectment passed. **U. P. B. R.** PAYAG CHOWBEY *v.* BIJIANAND **560**

Grove-holder—Grove brought under cultivation—Grove-holder, whether becomes a tenant *ipso facto*—Wrongful dispossession **447**

Guardian ad litem, appointment of—Consent of proposed guardian, necessity of—*Ex parte* decree against minors, when liable to be set aside **579**

——— ——— ——— ——— *Mother acting as such—Decree, validity of—Mother not defending suit, if sufficient ground to set aside decree.*

The father of the plaintiff was murdered leaving his widow and the plaintiff, a minor, him surviving. The motive of the murder was to take possession of property which belonged to the plaintiff's father. Suits had to be brought in the name of the minor. The mother of the minor borrowed on mortgages on behalf of the plaintiff as his guardian for the expenses of the suit. Suits were thereafter brought on these mortgages and decrees were obtained. The plaintiff sued to set aside these decrees:

Held, that the mother was a fit and proper person to be his guardian *ad litem* in the proceedings in the Civil Court and that if the decrees were fairly and properly obtained against the minor as represented by his mother, the decrees were binding and the Court could not go behind them.

Held, further, that the mere fact that the mother did not defend the suits on the mortgages would not make the decrees invalid. **A.** COLLECTOR OF MEERUT *v.* UMRAO SINGH, 13 A. L. J. 437 **220**

Guardians and Wards Act (VIII of 1890)—*Custody of child, suit for, maintainability of—Jurisdiction, objection as to, when taken.*

The Guardians and Wards Act (VIII of 1890) forbids proceedings being taken in the ordinary way touching the guardianship of infants. A suit for custody of a child must be brought under the Guardians and Wards Act which Act gives jurisdiction to the District Court over minors ordinarily resident in the District.

An objection as to jurisdiction can be raised at any stage of the proceedings. **L. B.** ARUNACHALLAM PILLAY *v.* IYAMA, 8 BUR. L. T. 128 **768**

——— ——— ——— ——— **s. 9** **890**

Guardians and Wards Act—contd.

——— ——— ——— **ss. 12, 25**—*Guardian of minor's person—Court's power to put minor in possession of guardian.*

Where a person has been appointed guardian of the person of a minor, the proceedings cannot be regarded as complete until the guardian has obtained effective possession of the person of the ward. If the guardian is not in such possession, the Court should take action under section 12 of the Guardians and Wards Act (VIII of 1890) to place the minor in his possession. **A.** UTMA KUAR *v.* BHAGWANTA KUAR, 13 A. L. J. 742 **416**

——— ——— ——— **ss. 17, 19**—*Father marrying second wife, whether sufficient ground to deprive him of his children's guardianship—Guardianship of husband and father and of other relations, distinction between.*

The fact that the father has married a second wife is not a sufficient ground for holding that he is unfit to be the guardian of his children.

A distinction exists between the guardianship of a father or a husband and that of other near relations. The former could be deprived of the right of guardianship only *when he is found to be unfit to be the guardian of children or wife* and the latter, when it does not conduce to the welfare of the children. **M.** AUDIAPPA PILLAI *v.* NALLENDRAN PILLAI, 28 M. L. J. 442; (1915) M. W. N. 330; 17 M. L. T. 389 **4**

——— ——— ——— **s. 17 (1)** **890**

——— ——— ——— **s. 19** **4**

——— ——— ——— **s. 19**—*Minor, appointment of guardian for—Father available—Other person, when appointed guardian.*

Where a father is available as guardian no other guardian can be appointed unless he is in the Court's opinion unfit for appointment. **M.** SUBRAMANYA PILLAI *v.* AMMAYEE AMMAL, (1915) M. W. N. 414, 2 L. W. 531 **740**

——— ——— ——— **s. 19 (b)** **890**

——— ——— ——— **s. 25** **416**

——— ——— ——— **ss. 29, 31**—*Permission to guardian to sell ward's property—Power of Court to stop sale if detrimental to ward—Specific Relief Act (I of 1877), ss. 38, 41—Plaintiff repudiating transaction must restore benefits received only if other party acted in good faith—Defendant not to restore benefits.*

The Legislature did not intend that a Court should give permission to a guardian to sell the ward's property without fixing at least an approximate price and without clearly ascertaining what is to be sold and the value of it.

Even if a Court has given sanction under section 29 and section 31 (1) it is not beyond the power of that Court to intervene and stop the sale, if it finds something detrimental to the ward's interest is contemplated.

If a plaintiff sues to undo a transaction entered into by his guardian in his name during his minority, then *if the other party has acted in good faith and the plaintiff or his estate has actually received benefit*, the plaintiff must, as a condition precedent to the undoing of the said transaction, restore the said benefit. If, however, the minor or *quondam* minor is the *beatus possidens* and is being sued by the other party, a claim against the minor for refund of the benefit would fail. **P.** SULTAN SINGH *v.* HASHMAT ULLAH, 119 P. W. R. 1915 **804**

——— ——— ——— **s. 31** **804**

Hakim performing operation on eyelids—Ordinary precautions not taken—Acting rashly and negligently—Hurt—Offence—*Hakim* giving himself out as skilled operator, liability of **69**

High Courts Act. *See* CHARTER ACT.

Hindu Law—Adoption—Datta homam *ceremony, when unnecessary—Same gotra, effect of—Pleadings—Fraud, coercion, misrepresentation and undue influence should be separately and specifically pleaded—General allegations insufficient—Evidence Act (I of 1872), ss. 33, 145, 157—Previous statements, when and how to be used—Civil suit—Procedure—Documents to contradict witnesses—Witness to be given opportunity to explain.*

Where the child to be adopted belongs to the same *gotra* as that of the adoptive father, the celebration of the ceremony of *datta homam* is not an essential to the legal validity of an adoption, that is to say, within the same *gotra* the ceremony is unnecessary.

Allegations amounting to fraud, misrepresentation, coercion and undue influence should not be mixed together, as these are all separate and separable categories in law, though it is true that they may overlap or may be combined.

Fraud, misrepresentation, coercion and undue influence cannot be imported into a case by suggestions but must be specifically and distinctly pleaded.

With regard to fraud if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice.

A civil cause must be conducted in the ordinary and regular way and judged of by the evidence led therein.

Unless it is proved that a "witness is dead or cannot be found, etc." the evidence given by such witness in a previous judicial proceeding is irrelevant for the purpose of proving in a subsequent proceeding the truth of the fact which it states, nor can it be used for the purpose of either contradicting or discounting the evidence of the witness in the subsequent proceeding unless the particular matter or point had been placed before the witness as one for explanation in view of its discrepancy with the evidence then being tendered.

If a witness is under cross-examination, he should be given the opportunity, if any documents are to be used against him, to tender his explanation and to clear up the particular point of ambiguity or dispute. This rule must be particularly enforced where a witness's reputation and character are at stake. **P. C.** BAL GANGADHAR TILAK *v.* SHRI SHRINIWAS PANDIT, 13 A. L. J. 570; 19 C. W. N. 729; 17 BOM. L. R. 527; 22 C. L. J. 1; 29 M. L. J. 34; 18 M. L. T. 1; (1915) M. W. N. 484; 2 L. W. 611; 42 C. 739; 39 B. 441 **639**

——— **Adoption**—*Suit by presumptive reversioner to set aside adoption—Death of plaintiff—Right of next presumable reversioner to continue suit—Suits to impugn validity of transactions by Hindu females—Plaintiff in such suits represents all reversioners—Right of contingent reversioners to join as plaintiffs—Abatement of suit—Substitution—Limitation Act (IX of 1908), Sch. I, Arts. 118, 125, distinction between—Civil Procedure Code (Act V of 1908), O. I, r. 1.*

A suit brought by a presumptive reversioner for a declaration that an alleged adoption is invalid is brought by him in a representative capacity and on behalf of all the reversioners, and on the death, therefore, of the presumptive reversioner the next presumable reversioner is entitled to continue the action begun by the deceased plaintiff.

The two classes of cases covered by Article 118 and Article 125 of Schedule I of the Indian Limitation Act (IX of 1908) are distinct in their scope and character and differ widely in their language. The former Article relates to status and involves the adjudication of a right *in rem*, and the latter raises the question of mere justifiable necessity. In both "the right to sue" is based on the danger to the inheritance common to all the reversioners which arises from the nature of their rights.

A remote reversioner is not precluded from joining or asking to be joined in the action brought by the presumptive reversioner, or even obtaining the conduct of the suit on proof of laches on the part of the plaintiff or collusion between him and the widow or other female whose acts are impugned. **P. C.** VENKATANARAYANA PILLAY *v.* SUBBAMMAL, 28 M. L. J. 535; 17 M. L. T. 435; 21 C. L. J. 515; 17 BOM. L. R. 468; 19 C. W. N. 641; 2 L. W. 596; 38 M. 406; (1915) M. W. N. 555 **298**

——— ——— ——— , *suit to set aside—Plaintiff and his mother living together—Knowledge of plaintiff's mother, whether knowledge also of plaintiff—Limitation Act (IX of 1908), Sch. I, Art. 118.*

Where both the plaintiff and his mother live together in the same house, his mother's knowledge as to the date of a certain adoption is also his knowledge for purposes of Article 118 of the Limitation Act (IX of 1908). **M.** VEMOORU AUDI NARAYANIAH *v.* PANCHAGNULA SREERAMULU **785**

——— ——— ——— *Testamentary direction to adopt a certain boy given to widow—Death of adoptee—Second adoption, whether valid.*

A Hindu embodied in his Will a direction to his widow to adopt a certain boy and to put him in possession of all property at the end of her life. The widow did adopt the boy who, however, having died, she adopted another. The reversioners of the first adoptee sued to set aside the second adoption:

Held, Per *Sankaran Nair, J.*—(1) that the question whether the Will authorised a second adoption on the death of the first adoptee was one of intention to be gathered from the terms of the Will and the surrounding circumstances.

An authority to adopt expressed in a Will must be construed with reference to the presumption that a Hindu testator always intends the perpetuation of his family and that authority to adopt one specific child should, in case of that child's death, be held to warrant the adoption of another unless there is something in the Will itself to show that the testator did not desire any other adoption to be made.

Per *Oldfield, J.* (*dissenting*).—A Hindu testator who authorises an adoption generally must be presumed to do so with the primary intention that his widow shall secure his posthumous representation by an adopted son and make successive adoptions until that object is secured.

Where there is a conflict between the general presumption as to a testator's intention and the explicit or implied restriction contained in the Will itself the proper course is to attempt to ascertain with reference to the testator's own words and without reference to the general presumption whether he meant to restrict the authority he was conferring; and to have recourse to that presumption only after such attempt has failed.

Where the terms of the Will are clear and express it is not open to Court to add to those terms.

Where the Will contains a provision that the estate should pass on the widow's death to the adopted son and does not at the same time make a provision as to its succession on the death of the adopted son, it is clear that the testator was either indifferent or content to leave his widow to adopt with the consent of the *sapindas*. An intention to confer on the widow, authority to make successive adoptions cannot be inferred from that act of his. **M.** CHENGA REDDI *v.* VASUDEVA REDDI, 2 L. W. 562 **770**

——— **Adoption**—*Widow, whether can validly adopt her brother's son to her deceased husband—Authority given by husband—Duty of lower Court to follow decision of High Court—Practice.*

A widow who has the express authority of her deceased husband to adopt as a son to him her brother's son, can validly do so.

A subordinate Court is bound to follow the decision in law of a Bench of the High Court to which it is subordinate, unless the decision of the Bench has been overruled by a decision of a Full Bench of that Court or unless it has been overruled expressly or impliedly on an appeal to His Majesty in Council or unless the law has been altered by a subsequent Act of the Legislature. **P. C.** PUTTU LAL *v.* PARBATI KUNWAR, 19 C. W. N. 841; 13 A. L. J. 721; 17 BOM. L. R. 549; 18 M. L. T. 61; 29 M. L. J. 63; 22 C. L. J. 190; 37 A. 359 **617**

——— ——— ——— *Widow, whether can adopt in presence of natural son—Invalid adoption—Ceremonies, effect of—Maintenance—Performance of declaration during negotiations, value of.*

In the presence of a natural son of a deceased Hindu, his widow cannot be presumed to have any authority from him to adopt, and if she does adopt a boy, the adoption will be invalid.

A boy whose adoption is found to be invalid, has no right to be maintained out of the estate of the adoptive family. The mere fact that ceremonies were properly performed and that the widow thought that she had authority to adopt would not affect the question.

A declaration or statement marking a stage in the negotiations as to the proposed amicable settlement between the parties, while admittedly

Hindu Law—contd.

document giving effect to the declaration or statement was to be executed later on, is an undertaking, which, unless completed, may be broken off at any time by either side. **B.** DALPATSINGJI *v.* RAISINGJI NAHARSINGJI, 17 BOM. L. R. 566 **943**

———— **Alienation**—*Absolute alienation of joint family property in lieu of maintenance, whether legal.*

An absolute alienation of joint family property to a maintenance-holder in lieu of maintenance is not necessarily illegal. **M.** SUNDARAM AIYAR *v.* SUBBAMMAL **23**

———————— **by widow**—*Legal necessity—Knowledge and consent of next heir—Construction of deeds—Guiding principle.*

Deeds and contracts of the people of India ought to be liberally construed. The real meaning of the parties ought to be given effect to rather than the literal sense.

Where, therefore, in order to pay off some existing ancestral debts and some others contracted by her for necessity, a Hindu widow sold a house with the knowledge of her daughter, whose husband attested the deed of sale, and the debts were, as a matter of fact, paid out of the purchase-money and the recitals in the deed of sale contained a detailed account of the circumstances under which the house was being sold, and the vendor purported to convey all her own existing right, title and interest in or belonging or appertaining to the houses including easements, and declaring that the vendee shall be full owner and proprietor of the house sold:

Held, that the widow intended to convey absolute property in the house to the vendee and the daughter could not challenge the alienation. **P. C.** THAKUR VASONJI MORARJI *v.* CHANDA BIBI, 19 C. W. N. 873; 17 BOM. L. R. 556; 18 M. L. T. 31; (1915) M. W. N. 449; 2 L. W. 676; 22 C. L. J. 180; 37 A. 369; 29 M. L. J. 130 **781**

———————————Necessity—Payment of debt due by husband—Payment of barred debt—Payment out of income of property **780**

———————————*Attestation of deed by reversioner, whether amounts to consent of reversioner—Attestation, when assent—Question of fact—Existence of daughter, whether bar to suit for declaration by reversioner.*

The presence of a daughter is no bar to a suit for declaration, by a reversioner to the estate of a Hindu widow that an alienation made by her is void.

Mere attestation of an instrument by a reversioner does not necessarily import concurrence by him. It may, no doubt, be shown by other evidence that when the reversioner became an attesting witness, he fully understood what the transaction was and that he was a concurring party to it, but from the mere subscription of his name that inference does not necessarily arise.

The question whether the attestation of a document should be held to be simply assent is a question of fact and must be determined with reference to the circumstances of each case. **A** LAKHPATI *v.* RAMBODH SINGH, 13 A. L. J. 616; 37 A. 350 **218**

Hindu Law—contd.

———————— **Gift** *by Hindu widow to her husband's niece after consummation of latter's marriage, whether valid—Improvements, bona fide, by donee—Compensation.*

A Hindu widow has no right to make a gift, even of a reasonable portion of her husband's property, to a lady born in her husband's family after the consummation of that lady's marriage.

Where the donee or her representatives effect, during the period they are in possession, *bona fide* improvements on the property they are entitled to claim compensation for the same and a decrée in ejectment should not be passed until the value of such improvements is paid to them. **M.** KALAVAGUNTA SINGARA CHARLU *v.* SREEMAN GUDIMALLA **269**

———— — **Impartible estate** - *Right of a junior member to maintenance—Co-parcenary right—Pittapur* Zemindari—*Maintenance grant.*

The *Zemindari* of Pittapur is an impartible estate governed by the *Mithakshara* Law and descending by lineal primogeniture.

The plaintiff's father was adopted by the late *zemindar* who by a Will and an agreement gave him a maintenance. On the *zemindar's* death the plaintiff's father sued to recover the *zemindari* on the ground that the Will was invalid and that the defendant was not the Raja's natural son. The Will was upheld and the suit was dismissed. The plaintiff seeking maintenance from the defendant but denying his co-parcenary relationship with the defendant:

Held, that the plaintiff was not entitled to any maintenance.

As the agreement with the plaintiff's father for maintenance did not expressly state that it was for the plaintiff's father and his heirs, it could not be construed to have made a permanent provision for the grantee and his descendants.

Prima facie, a provision for maintenance by a grant of money allowance is temporary. Grants to be construed as permanent provisions must be supported by unambiguous language or by a course of conduct and enjoyment by the grantee's descendants for a very long time.

Though an impartible estate may be for some purposes spoken of as joint family property, the co-parcenary in it, which under the *Mithakshara* Law is created by birth, does not exist. The right to maintenance cannot, therefore, be a right which arises out of the co-parcenary interest of the property or which arises out of any community of interest acquired by birth. The right to get maintenance is not evidence of any community of interest which the members of the family acquire by birth.

A junior member of the family of the holder of an impartiable *zemindari* is, therefore, entitled to maintenance only as in a *Dayabhaga* family on account of his relationship and not on account of any interest in the property.

Where the plaintiff bases his claim to maintenance on no relationship, there is no community of interest and the property is not burdened with his maintenance in the hands of a donee. **M.** RAMA ROW *v.* RAJAH OF PITTAPUR, (1915) M. W. N. 369; 28 M. L. J. 624 **356**

Hindu Law—contd.

——— **Joint family**—*Act of trespass committed by one member—Benefit to other members—Presumption.*

Under Hindu Law it must not be presumed that one member of a joint undivided Hindu family prescribes also for the benefit of his other co-parceners. **M.** VENKATACHELAPATI RAO *v.* JAYARAMAYYA **455**

——— ——— *Alienation by father—Attestation by major son—Legal necessity—*Karta*—Suit by minor son to set aside alienation, maintainability of—Consent—Attestation.*

P and his two sons *G* and *R* constituted a joint Hindu family, *G* being major and *R* minor. *P* alienated joint family property and the sale-deed was attested by *G*. In a suit by *R* to set aside the alienation:

Held, that there being no legal necessity for the sale, the son could contest the alienation and that though the powers of a Hindu father as manager of a joint family were extensive, they did not extend to the alienation of joint ancestral family property otherwise than for legal necessity and that it was doubtful whether consent could rightly be inferred from mere attestation in the absence of other evidence. **A.** PACHKAURI RAUT *v.* RAM KHELAWAN CHAUBE **749**

——— ——— ——— Alienation of joint family property—Suit by minor member after attaining majority against vendee for possession of his share in immoveable property—Limitation **199**

——— ——— *Dancing sisters living together—Property standing in name of one of them—Presumption of jointness—Statements by deceased mortgagor in mortgage-deed as to ownership of property—Evidence Act (I of* 1872), *s.* 32 (7).

The ordinary presumption, that property standing in the name of one member of a Hindu co-parcenary is the property of all, does not apply to dancing sisters living together, as their mode of acquisition of property and life, are entirely distinct and different

Statements in mortgage-deeds made by a deceased mortgagor as to the ownership of the property comprised in the mortgage are admissible in evidence under section 32 (7) of the Indian Evidence Act and can be acted on if corroborated by other oral evidence in the case.

Quære.—Whether an adoption by a dancing girl is valid? **M.** VISALAKSHI AMMAL *v.* DORASINGA PILLI **974**

——— ——— *Gift in favour of one member of family—Property treated as joint property—Burden of proof—Donee's marriage expenses met out of joint funds—Lien on gifted property.*

Prima facie a property acquired under a gift by one member of a joint Hindu family belongs exclusively to him; if other members of the family allege that it was treated as joint family property it is for them to prove it.

The fact that the expenses of the marriage of that member of the family, in whose favour the gift had been made, were met out of the joint family funds, gives the joint family no lien on the gifted property. **A.** GHASI RAM *v.* DEBI **190**

Hindu Law—contd.

——— **Joint family**—Suit by minor—Managing member acting as next friend—Managing member, right of, to withdraw money—Security, deposit of—Court, duty of **475**

——— ——— ——— *Suit against all adult members—Subsequent suit by a minor member to set aside decree on ground that he was no party to former litigation—Burden of proof—Legal necessity.*

A suit was brought against all the adult male members of a Hindu joint family on the basis of a mortgage-deed executed by all the adult male members and a decree was obtained. In execution of the decree, the mortgaged property was foreclosed and the decree-holder obtained possession of it. Subsequently, a minor member of the family brought a suit to set aside the decree on the ground that he was not a party to the suit in which the decree had been obtained:

Held, that he was fully represented in the former litigation; that he was not entitled to any relief on the mere ground that he was no party to the former suit and that it was necessary for him to prove in the present case that the loan was not taken for a family necessity. **A.** KATWAROO SINGH *v.* DHARAM DEO SINGH **926**

——— ——— **Maintenance** *to widow provided for by agreement in writing—Subsequent unchastity—Rights, if forfeited—Starvation allowance, when allowed.*

The rule that by subsequent unchastity a Hindu widow forfeits her right to maintenance, applies even where that right is secured to her by an agreement in writing.

An unchaste Hindu widow, if she repents of her conduct and leads a moral life on the date of suit, is entitled to at least a starvation allowance. **M.** SATHYABHAMA *v.* KESAVACHARYA, 18 M. L. T. 28; 29 M. L. J. 87 **397**

——— ——— **Mortgage** *of family property—Liability of sons and grandsons—Legal necessity.*

The sons and grandsons of a Hindu mortgagor mortgaging the family property are not bound under the mortgage in respect of that part of the consideration, which was paid in cash at the registration office but not required for legal necessity. **A** KUNNU MAL *v.* TARA CHAND **152**

——— ——— ——— Mitakshara—*Mortgage by father—Debt neither antecendent nor for family purposes, nor immoral—Suit against sons—Limitation Act (IX of* 1908), *Sch. I, Arts.* 120, 132.

The decision of the Full Bench in the case of *Luchmun Dass* v. *Giridhur Chowdhry*, 5 C. 855; 6 C. L. R. 474; 3 Shome L. R. 143, has not been overruled by the Privy Council, nor has it been superseded by subsequent legislation, inasmuch as, where the mortgage is not operative as such against the sons, no question can arise as to the effect of section 85 of the Transfer of Property Act (now re-placed by rule 1 of Order XXXIV of the Code of Civil Procedure, 1908).

A suit upon a mortgage effected by a father governed by the *Mitakshara* Law for a debt which is neither antecedent nor for family purposes and not proved to be immoral, brought after the death of the father against the sons, some of whom were adult and some minors, at the time of the mortgage

Hindu Law—contd.

is governed by Article 120 of the first Schedule to the Indian Limitation Act, and not by Article 132, as there is no charge on immoveable property enforcible against the sons. **C.** BIDYA PROSAD SINGH *v.* BHUPNARAIN SINGH, 21 C. L. J. 543; 19 C. W. N. 849 **629**

——— **Partition** *between father and son—Grandmother, whether entitled to share.*

At a partition between a father and his sons, the grandmother is not entitled to a share under the *Mitakshara* Law. **A.** CHUMMUN PRASAD CHOUBE *v.* PRANPAT CHOUBE **166**

——— ——— ——— Mitakshara — *Joint family property—Lunatic co-parcener—Lunacy not congenital but subsequent—Right of such co-parcener to share on partition.*

Where the plaintiff, a lunatic, sued through a next friend for partition of the family estate of which he would, if sane, be certainly entitled to a share, and it was found that the lunacy was not congenital but subsequent:

Held (per *Crouch, A. J. C.*), that there was nothing in the *Mitakshara* from which could be deduced a clear rule of law that a man who on birth entered into a joint family holding joint property, lost that interest on becoming lunatic.

Per *Fawcett, acting J. C.*, (dissenting).—That the *Mitakshara* intended the rules relating to 'exclusion from inheritance' to apply to both cases of inherited, as well as joint family property; that the principle on which the disqualification is based, *viz.*, the inability to perform sacrifices, applied equally to cases other than congenital; and that the plaintiff being insane at the time of the proposed partition was excluded from any participation in the joint estate.

Held (per *Pratt, J. C.*), that under the *Mitakshara*, which is the paramount Hindu Law authority in Sind, the disqualifications relating to 'exclusion from inheritance' apply not only to cases of obstructed but also to cases of unobstructed heritage, but in the case of the latter in joint family property they must apply at the time of birth for that is the time when the rights would accrue if there were no disabilities; that to hold otherwise would necessitate the divestment of rights already vested, which is contrary to the general rule of Hindu Law; and that, therefore, subsequent lunacy could not divest the plaintiff of his right to the joint family property. **S.** HOTCHAND GULABRAI *v.* MANGHANMAL GULABRAI, 8 S. L. R. 279 **42**

——— ——— ——— *not by metes and bounds, effect of—Tenants-in-common—Adverse possession—Relinquishment—Ouster—Evidence of exclusion—Limitation Act (IX of 1908), Sch. I, Art. 127.*

Where the members of a joint undivided Hindu family are divided in status, but do not effect a division by metes and bounds, they are tenants-in-common and the possession of one such tenant enures to the benefit of another, unless such another is shown to have renounced his share of the property in possession of the tenants-in-common or there has been something amounting to his ouster.

Where no ouster is proved there cannot be said to be an "exclusion" from joint family property within the meaning of Article 127, Schedule I of the Limitation Act.

Hindu Law—contd.

Where one of the members of a co-parcenary was shown to be in possession of the house site and he erected upon it a superstructure, the proper decree to be passed is to allow him to retain the house site and direct him to pay its price to the other co-sharer who claims a share in the house site alone. **M.** DEVARASU VENKATACHALA DWARAKA NADHA RAO *v.* DEVARASU VENKATARAO PANTULU, 17 M. L. T. 361 **183**

——— **Partition**—*Provision in partition deed that on death of one brother without male issue his share should pass to survivors—Provision, whether illegal—Transfer of spes successionis—Restraint upon alienation.*

A provision in a partition-deed among brothers, that on the death of any one of them without male issue his share must pass to the survivors who should divide it rateably among themselves, is not illegal; it is not a transfer of a *spes successionis* within the meaning of section 6 (*a*) of the Transfer of Property Act, nor is it a restraint upon alienation.

Per *Wallis, C. J.*—Where a contract to dispose of property by Will is upheld there is no reason why a similar contract to dispose of it by settlement during one's life-time cannot also be given effect to.

Per *Seshagiri Ayyar, J.*—A contract to devise lands can be enforced by persons claiming under the party who makes the contract.

A settlement unless it alters the line of succession, should be upheld.

Agreements not to divide property are enforceable although they would not preclude a party entering into such an agreement from alienating it.

Parties who are entitled to divide a property can waive their rights but they cannot, by such an arrangement, alter the mode of succession. **M.** MUTHURAMAN CHETTIAR *v.* PONNUSWAMY UDAYAR, (1915) M. W. N. 405; 2 L. W. 533; 18 M. L. T. 124; 29 M. L. J. 214 **549**

——— **Stridhanam**—*Property acquired by a woman without aid from funds from her husband or third party—Devolution—Daughter preferential heir to son.*

Where a woman purchased certain immoveable property and paid the purchase-money by mortgaging the same and subsequently redeemed it:

Held, that the property was acquired by her wits and was her *stridhanam* property and, therefore, devolved on her daughter in preference to her sons. **M.** TADIBOYINA PEDA PUNNAYYA *v.* DEBBAKUTTI KATTAMMA, 17 M. L. T. 363; 28 M. L. J. 495; 2 L. W. 415 **184**

——— **Dayabhaga**—*Succession, principle of—Great-grandfather's son's daughter's son and maternal uncle, contest between.*

In a contest between the great-grandfather's son's daughter's son and the maternal uncle regarding succession under the *Dayabhaga* School of Hindu Law, the great-grandfather's son's daughter's son is the preferential heir. **C.** KEDAR NATH *v.* HARIDAS GHOSE, 19 C. W. N 1181 **790**

——— **Widow**—*Adoption with consent of reversioner, if invalid for want of authority—Authority, when can be presumed—Illatom adoption—Quantum of proof—Charge created by widow—Necessity—Burden of proof—Nature of evidence.*

Hindu Law—contd.

An adoption made by a Hindu widow with the consent of the nearest reversioner is not bad for want of authority.

In the absence of anything to show that a reversioner was actuated by any representation of a widow that her husband had given her authority to adopt, a Court is entitled to presume that the reversioner, in giving his son to be adopted by the widow, was fully conscious of what he was doing and was mindful of all those considerations which he, as a reversioner, ought to take into account in such circumstances.

The claim that a person has been taken as *illatom* son-in-law must be proved by very reliable evidence.

The onus of proving that a charge created by a Hindu widow is binding on the reversioners lies very heavily upon the persons who claim the benefit of the transaction.

Where the only evidence let in as to the existence of necessity was that a series of documents executed by a widow and an alleged *illatom* son-in-law (which *illatom*, however, was found against) were attested by the reversioners and that the widow had been maintaining in her house a large number of persons related to her but not belonging to her husband's family:

Held, that the evidence was insufficient to prove the existence of necessity and that the onus was not discharged. **M.** PANDA PATYYA *v.* PANDA VENKAMMA, 2 L. W. 455; 17 M. L. T. 393 **54**

——— **Widow**—Res judicata—*Hindu widow, suit by, for maintenance—Subsequent suit by her for residence in family house, whether barred—Evidence Act (I of 1872), s. 115—Estoppel—Subsequent contention negativing a prior one—Estoppel.*

The plaintiff, a Hindu widow, lived outside her husband's house in his life-time and received a maintenance allowance awarded to her under section 488, Criminal Procedure Code. Her husband died in 1897 and in 1898 she took up her residence in one of his houses which was not a family residence. She continued receiving her maintenance allowance from the defendants (heirs of her husband) which was subsequently stopped. In 1908 she filed a suit for maintenance and obtained a decree against the defendants. The defendants filed another suit in 1908 against her for ejectment and obtained a decree, which was confirmed on appeal, ejecting her from the house occupied by her on the ground that she had a right of residence in the family house, but not the house in that suit. Thereupon she brought the present suit to establish her right of residence in the family house which the defendants contended was barred by reason of her prior suit for maintenance wherein no relief for residence had been sought:

Held, that the suit was not barred by her prior suit for maintenance as that maintenance allowance was fixed at a time when she had a residence in one of the defendants' houses and that her subsequent ejectment therefrom gave her a cause of action to demand that the maintenance should be supplemented by provision for her residence in the family house;

that the defendants having ejected plaintiff from the house she was occupying on the ground that it was not the family residence, were now estopped from denying her right to a residence in the family house. **S.** LADHIBAI *v.* ISARMAL, 8 S. L. R. 306 **25**

Hindu Law—concld.

——— **Widow,** *right of, to continue family trade—Debts incurred by her to continue such business—Legal necessity—Reversioner, right of, to question such debts—Minority—Representation as major—Consent by reversioner—Estoppel.*

Where a reversioner himself was a consenting party to a fraud, put forward a minor as a major and on the faith of such representation, induced third parties to enter into a transaction, it is not open to him afterwards to impugn the transaction as invalid and avoid it on the ground that the widow was a minor on the date of the transaction.

Per *Sadasiva Aiyar, J.*—A trade and its good-will are valuable property and when they are inherited by a widow, she has power to manage that particular business as heir in the same manner as she has authority to manage a *zemindari* estate inherited by her from her husband.

Debts incurred on re-drafts to carry on a family business are debts of necessity binding on a reversioner.

Consent by a reversioner to an alienation made by a Hindu widow, by itself makes the transaction valid, and is not merely presumptive and rebuttable evidence of necessity. **M** SOUTH INDIA EXPORT CO., LTD. *v.* T. R. SUBBIA, 28 M. L. J. 696; (1915) M. W. N. 488 **957**

——— ——— ——— Khojas—Khoja *widow's right to maintenance.*

As in matters of succession and inheritance *khojas* are governed by the the Hindu Law a *khoja* widow is entitled to claim maintenance from the person succeeding to her husband's estate, as this right is an essential part of the Hindu Law of inheritance and succession. **S.** ALLAHBAKHIO *v. Musammat* NANJI, 9 S. L. R. 15 **928**

——— ——— **Will** *executed by widow—Reversioner's suit for declaration, whether maintainable.*

A suit by a reversioner for a declaration that a Will executed by a Hindu widow in respect of her husband's property is void and not binding upon him, is not maintainable, as there is no alienation by the widow. **A.** UMRAO KUNWAR *v.* BADRI, 13 A. L. J. 551 **302**

Hindu Widows' Re-marriage Act (XV of 1856), s. 2 **399**

——— ——— ——— **S. 2**—*Alienation by widow of her deceased husband's property after her re-marriage—Suit by reversioner—Limitation Act (IX of 1908), Sch. I, Arts. 141, 143.*

The re-marriage of a Hindu widow extinguishes her estate in the property of her deceased husband and the presumptive interest of the reversioners vests under section 2 of the Hindu Widows' Re-marriage Act.

A suit by the reversioners to set aside an alienation by the widow of her deceased husband's property brought more than 12 years after her re-marriage is barred under Articles 141, 143 of the first Schedule of the Limitation Act. **N.** NATHU *v.* NAI BAHU, 11 N. L. R. 86 **612**

Homestead land, *recovery of possession of—Landlord, dispossession by—Occupancy* raiyat—*Bengal Tenancy Act (VIII of* 1885), *s.* 182, *Sch. III, Art.* 3—*Limitation.*

Where the plaintiff bought only the house and the homestead land of a person (who had a *raiyati* holding and some homestead land and house in a certain village) and the plaintiff was dispossessed by the landlord, who claimed the house through some other tenant, and the plaintiff sued to recover possession of the homestead land:

Held, that as the plaintiff did not claim to recover possession either as a settled *raiyat* or as an occupancy *raiyat* and did not occupy the disputed plot of homestead land for 12 years and the land was not alleged to be the subject of an occupancy right transferable by custom, the two years' rule of limitation laid down in Article 3, Schedule III, of the Bengal Tenancy Act was not applicable. **C.** ABDULLA *v.* KUTBAN, 21 C. L. J. 473 . **859**

Hundi not paid at maturity—Interest—Trade usage **346**

Illatom adoption. *See* HINDU LAW.

Immoveable property—Standing timber **16**

Impartible estate. *See* HINDU LAW.

Improvement. *See* COMPENSATION.

——— ———Grove **410**

——— ———Grove, if constitutes improvement **560**

Inam land—*Presumption as to whether land or land revenue is granted, applicability of, to Civil Courts.*

It is not the Revenue Courts alone but the Civil Courts should also presume that an *inam* grant is of land revenue only and not of land, until the contrary is proved. **M.** GOVINDA REDDI *v.* RAVI KESAVAL NAIDU **1003**

Indemnity bond. *See* RAILWAY.

Inherent power of Court—Abuse of Court's process—Court, power of **580**

Inheritance. *See* BURMESE BUDDHIST LAW; CUSTOM.

Injunction. *See* INTERLOCUTORY INJUNCTION.

——— —, grant of—Circumstances **248**

Insolvency—*Insolvency Act,* 1848, 11 *&* 12 *Vict. C.* 21, *ss.* 26, 86, 7, 21—*After-acquired property of insolvent, vesting of, in Official Assignee—Possession of insolvent for over* 12 *years, if adverse against Official Assignee—Limitation Act (IX of* 1908), *applicability of, to proceedings in insolvency—Claims relating to properties in hands of insolvent and his representatives—Jurisdiction of Court to decide on application.*

One *B* was adjudicated an insolvent in 1890 and he died in July 1913 and his sons and widow were found to be in possession of a house and considerable moveable property. The house was purchased in the year 1894 in the name of his mother who died in 1897 and after her death the registry of the house was transferred in the name of his wife. The Official Assignee claimed all the said property as the self-acquired property of the insolvent and made an application under section 26 of the Insolvency Act of 1848 for a declaration accordingly and for possession thereof. The sons and the widow of the insolvent pleaded, among other things, that the claim of the Official Assignee was barred by limitation and that the Insolvent Commissioner had no jurisdiction to try the claim on an application, but the Commissioner referred the Official Assignee to a regular suit only in regard to moveables and tried the claim as to the house:

Held, that the Insolvent Commissioner had jurisdiction to adjudicate the claim on an application as that was the only and proper procedure to be followed.

Held, further, that the after-acquired property of the insolvent vested from the date of its acquisition in the Official Assignee and it was not necessary to have a judgment entered up under section 86 of the Insolvency Act of 1848; and

that the claim of the Official Assignee was not barred by adverse possession.

Per *Sadasiva Aiyar, J.*—When jurisdiction is given by Statute to a Court sitting as an Insolvency Court to decide a case in proceedings taken in a particular form and when there is no special reservation of the remedy by a suit to be filed in another Court or in the same Court in its ordinary original civil jurisdiction, the special procedure pointed by the legislature in respect of the decision of those particular questions ought to be brought to their natural and intended conclusion by the Court which is directed to try those questions and the Court has no jurisdiction to refer the applicant to resort to another mode of seeking the same reliefs.

An insolvent, from the time of his adjudication as insolvent until his final discharge, by the force of the statutory provisions of the Insolvency Act, holds the position of an express trustee for his creditors and he cannot plead adverse possession against the Official Assignee.

Per *Napier, J.*—The Limitation Act has no application to the case. It provides periods with reference to suits, appeals and applications, the last being matters arising out of suits, and under the Insolvency Act the insolvent becomes subject to the peculiar jurisdiction of the Insolvency Court and the High Court has no jurisdiction to entertain any suit by the Official Assignee against the insolvent in the exercise of its original civil jurisdiction.

Quære:—Whether the doctrine of agency can be applied as between the Official Assignee and the insolvent though it may be resorted to in regard to the relations between the insolvent and third parties? **M.** RATNA BAI *v.* OFFICIAL ASSIGNEE, 17 M. L. T. 347 . **168**

Insolvency Act (11 & 12 Vic., c. 21), ss. 7, 21 **168**

——— ——— **s. 46,** *scope of—Leave to appeal—Concurrent jurisdiction of High Court with District Judge—District Judge refusing leave to appeal—High Court, power of, to grant leave to appeal.*

A High Court has concurrent jurisdiction with the District Judge to grant leave to appeal under section 46 of the Insolvency Act and if the District Judge refuses leave to appeal, the High Court is not debarred from granting it. **C.** MADHU SUDAN PAL *v.* PARBATI SUNDARI DASSYA, 19 C. W. N. 760 **406**

——— **s. 86** **168**

Interest—Arrears of rent, stale claim for—Interest, rate of, allowable—Interest, when allowable on arrears of rent 386

——— Compound interest, stipulation of, when a penalty 843

——— Deposit of mortgage amount, when valid —Interest, when ceases to run 145

——— Hundi *not paid at maturity—Trade usage —Creditor, whether entitled to appropriate payment towards interest.*

It was proved as a well-recognised rule in the city of Rawalpindi that if interest was charged on a *hundi* and such *hundi* was not paid at maturity the same rate of interest continued to be payable:

Held, that plaintiffs were entitled to appropriate all payments made by the defendants towards the interest, whenever the amount of such interest due at the time of any payment absorbed the sum paid. **P.** KHIALIA SHAH *v.* HANSARI MAL-NATHU MAL, 24 P. R. 1915 346

——— *, payment of, when saves bar of limitation—Evidence to prove such payment* — Pattis *Debtor —Party to such arrangement—Limitation Act (IX of 1908), s. 19—Contract of guarantee—Consideration—Actual release of claim necessary and not mere promise.*

A creditor cannot by a mere unilateral act of payment of interest by the debtor save the bar of limitation.

Where an agreement between a debtor and the creditor, that a credit in the latter's book of a certain amount in favour of the former should be treated as "payment of interest" by the debtor, is relied on to save the bar of limitation, the evidence must show that the debtor was a party to the arrangement and the accounts charging interest sent to the debtor from time to time were accepted by him.

The release of a claim against one person is a consideration for guarantee of payment by another only when that claim is given up, and not when there is a mere promise. **M.** NAGAPPA CHETTY *v.* RAMANATHAN CHETTY 422

Interlocutory injunction — *Holding of market—Principle to be followed - Equitable grounds —Discretion of Court—No general rule—Substantial question to be investigated—Balance of convenience—Delay without satisfactory reason—Court's duty.*

The only thing to be considered by the Court in cases of interlocutory injunctions in aid of the legal right is, if the case is so clear and free from objection on equitable grounds that it should interfere without waiting for the legal right to be established. No general rule can be laid down on the subject by which the discretion of the Court should in all cases be regulated. It is quite sufficient if the Court finds a case showing that there is a substantial question to be investigated and that matters should be preserved in *status quo* until the final disposal of that question.

Where the plaintiff fails to prove that the damage he might sustain if the injunction is refused and he should ultimately turn out to be right, is likely to be greater than the damage which the defendants would suffer if the injunction were granted and they should finally turn out to be right, the balance of convenience is against the grant of an injunction.

A plaintiff making considerable delay without sufficient reason is not to be assisted at the expense of the defendant. **C.** KRISHNA CHANDRA SAHA SARDAR *v.* HEM CHANDRA RAI, 21 C. L. J. 469 855

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Irregularity—*Admission of evidence, when writing judgment—Charge of theft, assertion of right in answer to*—Bona fides, *how negatived.*

A Magistrate cannot, after a trial is closed and while he is writing his judgment, admit in evidence a document without giving the accused an opportunity of raising objections to its relevancy or admissibility.

There cannot be a *bona fide* assertion of right in answer to a charge of theft when the accused knew that he had no possession of the property and gathered a produce grown by the complainant thereon. **M.** VAYALAPPRA KELAPPAN NAIR, *In re*, 16 CR. L. J. 458 90

——— ——— Sessions Judge dismissing appeal on reasons given in a theft case—Offence under section 430, Penal Code 670

Issues—Fraud, plea of—Allegations, mere, not sufficient 482

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——— *, new, raising of, in Appellate Court*—De facto *landlord, possession as—True owner, suit brought by, for ejectment—Encroachment of land by tenant—Presumption.*

It is always dangerous to allow a new issue to be raised at the appellate stage.

Where a person has been in possession of a particular estate or a particular portion of an estate as *de facto* landlord, *raiyats* settled by him on the land would have a good answer to a suit for ejectment brought by the true owner.

Where a tenant of *A* encroaches on the adjoining land of *B*, as between *A* and his tenant, there is a presumption that the encroachment enures to *A*'s benefit, and becomes an accretion to the tenant's holding under *A*.

A tenant will ordinarily hold the land upon which he has encroached as tenant of his landlord and in that case the landlord may perhaps be described as his *de facto* landlord.

But that would not prevent the true owner of the land encroached upon from bringing a suit for the purpose of recovering his possession. **C.** TEPU MUHAMMAD *v.* TEFAYIT MAHAMMAD, 19 C. W. N. 772 216

Joint family. *See* ALAYASANTHANA LAW; HINDU LAW.

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——— ——— ——— ——— *, consent of parties whether can give where Court has none—Arbitration—Award—Decree in terms of award—Both parties consenting to appeal being heard against such decree, effect of.*

A decree passed in the terms of an award not being appealable, the parties to the decree cannot, by giving consent to an appeal being heard and the case being decided again on the merits, give the Appellate

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Court jurisdiction to entertain an appeal against such decree. **A.** RAM HARAKH PATHAK *v.* RAM SARAN PATHAK **408**

———————*District Judge, power of, to transfer particular case to Additional Judge—Bengal, N.-W. P. and Assam Civil Courts Act (XII of 1887), s. 8, sub-sec. (2)—Letters of Administration.*

Under section 8, sub-section (2) of the Bengal, N.-W. P. and Assam Civil Courts Act it is competent to a District Judge to transfer a particular case to an Additional Judge. **C.** RUP KESHWAR LAL *v.* JAIJAI BIBI, 21 C. L. J. 437; 19 C. W. N. 791; 42 C. 842 **935**

———————Criminal Procedure Code (Act V of 1898), ss. 195, 467, 471—Execution proceeding—Sanction to prosecute for offences—Appeal to District Judge **540**

——— ——— ———*Ex parte* decree against some of the defendants—Appeal by others—High Court, power of, to entertain application to set aside *ex parte* decree **458**

———————*Foreign Court—Submission to its jurisdiction—Objection taken in Court of first instance but not persisted on in Appellate Court—Inference—Question, whether can be re-opened afterwards.*

The fact that an objection to the jurisdiction of a foreign Court was taken in the Court of first instance in the foreign territory but was not persisted on in appeal, is a clear proof of a submission to jurisdiction of the foreign Court and, therefore, the question cannot be re-opened again in execution of that decree in the British Courts. **M.** PATINJARA MANAKAL PARAMESHWARAN *v.* SUBRAMANIA PATTAR **456**

———————Imperfect partition — Proprietary title—Civil Court **222**

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———————Provincial Small Cause Courts Act (IX of 1887), s. 25—No objection taken before lower Court—High Court, discretion of, to interfere **567**

——— ——— ———, objection as to, when taken **768**

——— ——— ———Occupancy holding—Suit for declaration of title between rival tenants—Landlord not party to suit—Civil or Revenue Court **568**

———————Power of Assistant Collector to order prosecution—Civil Procedure Code (Act V of 1908), s. 70—Local Government Rules under section 70, rr. 30, 31, 32—Execution—Penal Code (Act XLV of 1860), s. 182 **89**

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——— ——— ———Revenue Court's duty as to fair rent—Suits in Civil Court, bar of—Revenue and Civil Courts, jurisdiction of—No forfeiture for mistake in selecting one Court for another **122**

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——— ——— ——— Subordinate Judge empowered to entertain appeals—Sanction for prosecution given by lower Court—Subordinate Judge, whether can revoke **71**

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——— ——— ——— **of Court**—Waiver—Consent **796**

——— ——— ——— **of Civil Courts**—Upper Burma Land and Revenue Regulation, s. 53 (2) (*ii*), whether *ultra vires*—Suit regarding State lands between private individuals **736**

——— ——— ——— **of Civil or Revenue Court**—Litigation between private persons—Eviction of a squatter by a squatter or of a sub-lessee by a lessee—Encroachment by lessee, whether can enure for benefit of lessor **872**

———————*Suit for joint possession—Shamilat land*—Muafi—Ala lambardar—*Occupancy rights not in question—Pleadings—Adverse possession and tenancy inconsistent.*

A suit for joint possession of *shamilat* land made over to the defendant as *ala lambardar* and in *muafi*, the *ala lambardari* and *muafi* having come to an end without touching the question of defendant's title to occupancy rights, is cognisable by the Civil Courts.

All questions of title to occupancy rights in the land are quite outside the case so framed.

A man cannot be allowed to plead in the same case that he is an owner by adverse possession against a plaintiff and that he is a tenant by contract under that plaintiff. **P.** SHAMIR KHAN *v.* GHULAM FATIMA, 44 P. R. 1915; 100 P. W. R. 1915 **655**

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Kayam patta. *See* GRANT.

Khorposhdar, interest of, limited—Leases, liability to pay rent under—Sub-soil rights—*Khorposh* grants, heritable, when determinable **429**

Khojas. *See* HINDU LAW.

Lambardar collecting rent—Right to eject **569**

——— ———, power of, to eject **35**

——— ———, right of, to eject *qua lambardar* **297**

Land acquisition—*Land acquired by Government—Apportionment of compensation amount between landlord and tenant*—Muchilika *by tenant before Madras Estates Land Act giving up claim to compensation, effect of—Madras Estates Land Act (I of 1908), s. 6 (1).*

A *ryot* in occupation of "*ryoti* land" on the date the Estates Land Act came into force can also claim compensation in respect of the occupancy right conferred upon him by section 6 (1) of the Act when that land is acquired by Government under the Land Acquisition Act. A *muchilika* executed by a tenant prior to Madras Estates Land Act, relinquishing his claim for compensation, does not estop him from

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making the claim in view of the new right conferred upon him by the passing of the Estates Act.

Where there are distinct interests in the land, compensation awarded must be for both and not in respect of one alone. **M.** HOTHA VIRABHADRAYYA *v.* REVENUE DIVISIONAL OFFICER **8**

Landlord and tenant—*Forcible dispossession—Subsequent re-entry by tenant—Effect of dispossession on tenant's estate—Madras Regulation XXV of* 1802, *s.* 4—*'Small quit-rent', meaning of—Permanent Settlement*—Sanad, *construction of—Lessor and lessee—Forfeiture, if incurred by lessee describing his holding as independent and permanent at a fixed rent—Resumption, when permissible—Service, whether includes attendance on ceremonial and indefinite occasions.*

Where a *zemindar* wages war against his feudatory and forcibly seizes his estate, but, later on a descendant of the said feudatory gets back possession of the same, the intermediate possession of the *zemindar* does not affect the right of the feudatory and change the character of the tenure.

Where a *sanad* which was granted to a *zemindar* at the time of the Permanent Settlement contained the following clause: "Alienated lands, paying a small quit-rent, which quit-rent, unchangeable by you, is included in the assets of your *zemindari*"; and where it was contended that under the above clause the *zemindar* was not entitled to enhance the rent of under-tenures granted by the *zemindar* prior to the said Permanent Settlement:

Held, that the words 'small quit-rent' in the above clause, which corresponded to section 4 of the Madras Regulation XXV of 1802, meant a favourable rent; that only permanent grants should be understood as coming within the mischief of the word 'alienated' therein; that there was no warrant in authority or practice for applying it to mere temporary leases, not understood by parties to be permanent, however long their currency might be; and that the clause in question prohibited only enhancements imposed by the *zemindar* and not those to which the lessee consented.

A lessee does not repudiate the title of his landlord and incur forfeiture by describing his holding as independent and permanent at a fixed rent.

A resumption of an estate is permitted to a *zemindar* only when the estate has been included in the assets of his *zemindari* at the Permanent Settlement and the grant is for service in lieu of wages (in which case the right of resumption is absolute), or is burdened with service (in which case the right can be exercised only if the grantee is unwilling to perform the service, even though the same might be obsolete or unnecessary).

Where the obligations on the part of a tenant, the non-performance of which was alleged to give rise to the exercise of the right of resumption by the *zemindar*, were to attend (1) with 500 *paiks* at Dusserah, the occasion of the annual festival and Durbar, and (2) whenever such attendance was directed, when the tenant went on Sircar business:

Held, that the attendance required was on indefinite and ceremonial occasions and could not be deemed a condition of the holding, that it was at the most analogous to that of copy-holders in England to do

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suit in the Court of their manor and that the default in question did not entail a forfeiture of the holding.

No forfeiture is incurred unless there is non-performance on the part of the tenant of a subsisting obligation for service and that service is connected with his title. **M.** MAHARAJA OF JEYPORE *v.* RUKMINI PATTAMHADEVI, 2 L. W. 483; (1915) M. W. N. 346 **365**

——————— *Jungly and uncultivated land—Presumption—Limitation Act (IX of* 1908), *s.* 22, *applicability of.*

Where the land in a *zemindari* is waste land and uncultivated, the presumption is that the *zemindar* is the owner of both *melvaram* and *kudivaram* rights. In such a case the burden is on the *ryot* to show that he owns the *kudivaram* interest.

Per *Seshagiri Aiyar, J.*—Section 22 of the Limitation Act applies only to cases where the added or substituted plaintiff wants to litigate a right for himself independently of the right of the original plaintiff. Where, therefore, a plaintiff is added in consequence of the assignment of the rights of the original plaintiff, his right to a decree is not affected by section 22 of the Limitation Act. **M.** ARUNACHELLA AMBALAN *v.* R. G. ORR **634**

——————— *Possession by tenant of parti land for tying cattle and other agricultural purposes—Presumption—Adverse possession, question of, if arises.*

Where a tenant is in possession of a *parti* land at a short distance from the site of his house for the purposes of keeping his cattle troughs, cattle-shed and sugar-cane press, the presumption is that the land was given to him for purposes ancillary to agriculture, and if he builds a house on the land for the stalling of cattle and storing of the implements of husbandry, the *zemindar* cannot get the house demolished so long as he remains a tenant.

No question of adverse possession arises in such a case. **A.** PADARATH TEWARI *v.* BAZ SINGH **264**

——————— *Sale of holding for arrears of rent—Merger of occupancy rights—Notice to quit, effect of.*

Where a *raiyat* under the landlord mortgaged the property to a third person, who got possession and inducted the present defendants on the land, and the landlord brought a suit for rent against the heirs of the *raiyat* and bought up the holding at a sale for arrears of rent:

Held, that the occupancy holding still continued to exist even after the purchase by the landlord.

Where the landlord sold, thereafter, the permanent *raiyati* right to another who also took a lease from the landlord and then sold it to the plaintiff, who intending to eject the defendant served him with notice:

Held, that the defendant, having been duly served with notice to quit, must be ejected. **C.** EAKUF ALI *v.* MEAJAN **686**

——————— *Suit for arrears of rent—Previous decree, whether proves landlord's title—Presumption as to continuance of relationship—Evidence Act (I of* 1872), *s.* 114, *ill.* (d).

In a suit for arrears of rent a decree for rent obtained by the landlord in a prior suit against the

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same defendants is not merely an item of evidence, but is conclusive as to the relationship between the parties at the time to which the previous suit referred.

Section 114, illustration (*d*) of the Evidence Act does not compel, but certainly permits, the Court to make a presumption as to the continuance of the state of things. **C.** HIRANMOY KUMAR SAHA *v.* RAMJAN ALI DEWAN **694**

——— ——— ——— ——— *Tanks in villages, ownership in—Presumption—Entry in papers on basis of possession—Evidence of permission to make tanks—Burden of proof.*

There is no persumption of law or custom that the ownership in the tanks situate in a village vests in the *zemindar*. They belong to the proprietor if he has made them, or to the tenant if he has made them. Entry in the papers must be made on the basis of possession and a tenant should not be asked to give in every case evidence of the *zemindar's* permission to make it. **U. P. B. R.** GAURI SHANKAR *v.* AMBIKA PRASAD **11**

Lease *of house at Mussoorie for "season", when terminates.*

In the absence of evidence to the contrary a lease of a house at Mussoorie for the 'season' continues to the end of the year. **A.** OLD, F. S. *v.* SHAIL J. A., 13 A. L. J. 647 **437**

——— *Evidence, documentary and oral, admissibility of—*"Putra poutradhi kramay", *meaning of—Lease, perpetual—Tenancy, proof of.*

Where there is a document as evidence of the transaction of a lease, oral evidence in the shape of admission relating to the transaction of the lease is not admissible.

It is not sufficient, to prove the plaintiff's tenancy, to show that he was in possession of other lands covered by the lease.

The expression "*putra poutradhi kramay*" in a document signifies that the lease is a perpetual one. **C.** KARTIC MANDAL *v.* BAMA CHARAN MANDAL **502**

———, liability to pay rent under—Sub-soil rights —*Khorposh* grants, heritable, when determinable—Title-deed, forged, effect of **429**

Leave to appeal—Concurrent jurisdiction of High Court with District Judge—District Judge refusing leave to appeal—High Court, power of, to grant leave to appeal **405**

Leave to appeal to Privy Council—Letters Patent (Mad.), cls. 10, 39—Orders in exercise of disciplinary jurisdiction—Leave to appeal to Privy Council, whether to be granted **879**

Legal necessity. *See* ALIENATION; HINDU LAW.

——— ——— — Payment of Government demands **181**

Legal Practitioners Act (XVIII of 1879), ss. 27, 28—*Legal Practitioner, fees recoverable by, from his own client—Suit for remuneration for work done - Discretion of trying Court not to be interfered with—"Costs of suit," meaning of —Limitation Act (IX of 1908), Sch. I, Art. 84.*

The Legal Practitioners Act does not impose any limitation upon the fees which are recoverable by practitioners from their own clients.

Section 27 of the Act refers only to the fee which is to be paid to the adversary Pleader.

Where the fees are not settled before hand, and the suit is one for remuneration for work done, the Court in assessing the amount, performs the functions of the Taxing Officer in England and when he assesses the remuneration at a certain amount, having regard to the local conditions and the nature and responsibility of the work done by the Pleader, an Appellate Court should be very slow to interfere with his discretion.

Such a suit is governed by Article 84, Schedule I of the Limitation Act (IX of 1908). The word "costs" in that Article is not confined to "out of pocket expenses alone" of the Practitioner but includes also the remuneration payable to him. **M.** MAHARAJAH OF VIZIANAGARAM *v.* NARASINGA RAO **763**

——— ——— ——— **s. 28** **763**

——— ——— ——— ——— **s. 28,** *scope of—Agreement with client for fees—Amount of fees and manner of payment—Reasonable remuneration, implied promise of—Suit maintainable.*

Where a party employs a Pleader without any agreement as to the amount of fees or the manner of payment thereof, the Pleader is entitled to recover on an implied promise of reasonable remuneration, and his suit to recover a reasonable sum as his remuneration is not touched by the principle embodied in section 28 of the Legal Practitioners Act.

In the absence of an agreement a Pleader is entitled to a *quantum meruit*, which ought to be determined with reference to all the circumstances of the case. **C.** SIR KISHORE GHOSH *v.* MANIK CHANDRA NATH, 21 C. L. J. 618 **453**

Lessor and lessee—Forfeiture, if incurred by lessee describing his holding as independent and permanent at a fixed rent—Resumption, when permissible—Service, whether includes attendance on ceremonial and indefinite occasions **365**

Letters Patent (Mad.), cls. 10, 39—*Orders in exercise of disciplinary jurisdiction—Leave to appeal to Privy Council, whether to be granted.*

Orders passed in proceedings in exercise of the disciplinary jurisdiction of the High Court under section 10 of the Letters Patent are not appealable under clause 39 of the Letters Patent and no special leave to appeal to the Privy Council can be granted. **M.** A VAKIL OF HIGH COURT *v.* PRESIDENT OF VAKILS' ASSOCIATION, 29 M. L. J. 6 **879**

——— ——— ——— — ——— **cl. 15**—*Criminal trial—Revision—Appeal, if competent.*

An order passed by a single Judge of the High Court in the exercise of its criminal revisional jurisdiction is one passed in a criminal trial if the proceedings which gave rise to the revision were a criminal trial, and no appeal lies under clause 15 of the Letters Patent against such an order. **M.** ADAPALA VENKATA NARASA, *In re*, 2 L. W. 363; 16 CR. L. J. 464 **96**

Letters Patent (Mad.)—concld.

——— ——— ——— ——— **s. 15** — *High Courts Act* (24 & 25 *Vic*, *C.* 104), *s.* 13—*High Court exercising jurisdiction under s.* 25 *of Provincial Small Cause Courts Act* (*IX of* 1887)—"*Appellate jurisdiction*"—*Judgment*—*Appeal against such order, if maintainable*—*Discretionary power given to Subordinate Courts*—*Appellate Court, power of, to interfere.*

A single Judge of the High Court, when disposing of an application to exercise the High Court's revisional jurisdiction over a subordinate Court under section 25 of the Provincial Small Cause Courts Act (IX of 1887), exercises "appellate jurisdiction" within the meaning of section 13 of the High Courts Act and his order is a judgment even when the Judge merely declines to interfere in revision, and it is immaterial whether before such refusal the records were called for or notice issued to the other side, and an appeal lies from such an order under section 15 of the Letters Patent.

In matters of discretion the Court will not ordinarily interfere in appeal, though it has jurisdiction to do so. **M.** SRINIVASA IYENGAR *v.* RAMASWAMI CHETTIAR, 29 M. L. J. 12; 18 M. L. T. 46 **846**

——— ——— ——— ——— **cl. 39** **879**

Lien. *See* TRANSFER OF PROPERTY ACT, 1882, s. 53.

———*Contract Act* (*IX of* 1872), *ss.* 171, 217, 221—*Barrister*—*Equitable lien*—*Money paid into Court*—*Protest, nature of.*

In satisfaction of a decree a large sum was paid into Court, through a Barrister, under protest saying that owing to a mistake in the decree more money was deposited than was actually due under it. This sum was afterwards attached in execution of another decree against the judgment-debtor in the first decree. The Barrister claimed a lien over portion of the sum deposited:

Held, that the Barrister had no lien against the sum under sections 171, 217 and 221, of the Contract Act;

that the rule of Solicitor's equitable lien in England did not apply to the case, the Barrister having obtained no decree in favour of his client, and there being not fruits to obtain a lien on;

that as the Barrister had parted with the possession of the money without making any reference to his lien for fees, the amount of fees could not be regarded as having been paid in under protest. **L. B.** ROBERTSON *v.* KO CHEIK, 8 S. L. R. 70 **870**

Limitation—*Appeal filed with delay*—*Sufficient cause*—*Objection by respondent at hearing*—*Companies Act* (*VI of* 1882), *s.* 169—*Appeal*—*Notice to respondent*—*Limitation period, expiring during vacation*—*Extension of limitation period*—*Right of Official Liquidator to recover by summary process from creditor of Bank who realized his debt by suit before passing of winding-up order and after suspension of payment by Bank*—*Companies Act* (*VII of* 1913), *s.* 284.

The period of three weeks prescribed by section 169 of the Companies Act may be extended by Appellate Court, when it is satisfied that the appellant showed due diligence but failed on account of circumstances beyond his control, such as the Court being closed on account of the vacations.

Limitation—concld.

No extension can be claimed on the ground that the Pleader for the appellant wrongly believed that section 284 of the Companies Act, 1913, was applicable to the case, for the section clearly lays down that Act of 1882 applied to cases in which proceedings were pending when the Act of 1913 came into force.

A respondent is entitled to contest an *ex parte* order extending the period of three weeks prescribed by section 169 of the Companies Act, 1882.

An Official Liquidator is not entitled by summary order to a refund of money realized by a creditor of the Bank before the order of winding-up was passed but after the Bank had passed a resolution stopping payment of debts. The Liquidator has to file a regular suit like other claimants to recover the amount realized by such creditor of the Bank. **P.** TARA CHAND *v.* OFFICIAL LIQUIDATORS, PEOPLE'S BANK OF INDIA, LTD., 90 P. L. R. 1915; 46 P. R. 1915; 71 P. W. R. 1915 **265**

——— ——— Instalments, recovery of—Mistake **399**

———*Pre-emption*—*Starting point of prescribed period*—*Land in possession of vendee at date of sale*—*Mutation of names.*

The vendor in 1906 sold three fields by three sale-deeds, by transferring each one-third share out of each of the three fields to vendees who were father and son. Two of the fields were at the date of sale in the possession of the father vendee under a mortgage and the third he cultivated as a *tenant* before 1906 and in 1907-08 and in subsequent years. In 1906 the mutation was refused on the ground that the vendor had not transferred possession to the vendees. Subsequently mutation having been sanctioned in 1912 the plaintiffs brought the present suit for pre-emption:

Held, that since the vendees did not take possession of any portion of the land *under the sale* the period of limitation for the suit commenced from the date of mutation.

The taking of possession under a sale is an overt act fixed as the terminus *a quo* for limitation because it constitutes a publication of the transfer. **P.** IMAM-UD-DIN *v.* KHUDA BAKHSH, 88 P. L. R. 1915; 63 P. W. R. 1915 **146**

———*Suit or proceeding, limitation applicable to.*

The law of limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding, unless there is a distinct provision to the contrary. **C.** RISWESSOR SEN *v.* IMAMUDDI **833**

— — — Time within which proceedings under section 476, Criminal Procedure Code, should be taken **97**

Limitation Act (IX of 1871), s. 10 **292**

Limitation Act (XV of 1877), Sch. II, Art. 134 **337**

Limitation Act (IX of 1908), applicability of, to proceedings in insolvency **168**

——— ——— ——— ——— **s. 4** **449**

——— ——— ——— ——— **s. 10** **292**

——— ——— ——— ——— **s. 12** **680**

——— ——— ——— ——— **s. 12 (2)** — *Appeal*—*Exclusion of time requisite for obtaining copies.*

The judgment of the first Court was delivered on the 15th May, and the decree was signed late on

Limitation Act—(1908)—contd.

that day. The Courts were closed, except for copying purposes, from the 16th May to the 15th June, inclusive. The defendant applied for copy on the 16th June, received it on the 18th, and filed the appeal to the District Judge on the 19th *idem*:

Held, that the appeal was within time. **N.** KASHIBAI v. KANNOO, 11 N. L. R. 104 **833**

——— ——— ——— ——— **s. 12 (4)**—*Suit to set aside award—Application for copy—Time requisite for obtaining it, whether deducted.*

In an application to set aside an award filed in Court the time requisite for obtaining a copy of the award may be taken into account under section 12 (4) of the Limitation Act in calculating the period of limitation provided the attention of the Court is drawn to this. **M.** SUBRAMANIA AIYAR v. POOPPARAM LALA **860**

——— ——— ——— **s. 19** **422**

——— ——— ——— **s. 19**—*Acknowledgment of debt—Partnership firm—Receiver, acknowledgment by, how far affords starting date for fresh period of limitation.*

The acknowledgment of a debt of a partnership firm by its Receiver, appointed for collecting its outstandings and doing all things necessary for the realization and preservation of its assets, does not afford a fresh start for limitation, as it does not come within the power to collect outstandings or to realize assets; it may have been otherwise if the powers of managing the partnership business had been conferred on the Receiver.

Payment of interest and giving of acknowledgment of a debt are two different things. **L. B.** S. M. A. CHETTY v. M. L. R. M. A. CHETTY **27**

——— ——— ——— **s. 19**—*Promise to pay amount due—Acknowledgment of liability—Appellate Court, powers of, to decide points of limitation.*

An Appellate Court can decide questions of limitation, if no further facts than those before it, are necessary for that purpose.

A promise to remit money due under a particular document is "an acknowledgment" within the meaning of section 19 of the Limitation Act, sufficient to save limitation. **M** RAMASWAMI PATTER v. TIRUCHA MANNADIAR **36**

——— ——— ——— **s. 22** **634**

——— ——— ——— **s. 23** **385**

——— ——— ——— **s. 25**—*Instalment bond—Hindi date mentioned in bond—True test as to when limitation begins to run.*

A mortgage bond executed on the 24th of July 1892 provided that the money due under it should be paid in eight yearly instalments. Each instalment had to be paid on *Magh Sudi Puranmashi* of each year. The last payment was to be made on *Magh Sudi Puranmashi*, 1956 corresponding to 14th of February 1900:

Held, that a suit on the bond brought on the 19th of July 1912 was barred by limitation, and that section 25 of the Limitation Act did not apply to the case.

The true test in a case of this kind is on what date was the plaintiff entitled to demand his money, if payment was not made of any instalment fixed in the bond. **A.** DWARKA PRASAD v. RAJA RAM, 13 A. L. J. 486 **980**

Limitation Act—(1908)—contd.

——— ——— ——— **s. 29** **797**

——— ——— ——— **s. 30** **337**

——— ——— ——— **s. 31 (2)** **605**

——— ——— ——— **s. 91** **199**

——— ——— ——— **s. 148** **403**

——— ——— **Sch. I, art. 11** **731**

——— ——— ——— **art. 12** **314**

——— ——— ——— **art. 14** **490**

——— ——— ——— **arts. 44, 91**—*Hindu Law—Joint family—Alienation of joint family property—Suit by minor member after attaining majority against vendee for possession of his share in immoveable property—Limitation.*

The plaintiff's brothers during his minority sold the joint family land to the defendant including the share of the plaintiff. After expiry of three years from the date of plaintiff's attaining majority he sued for his share of the land. The suit was dismissed as barred by limitation under Article 44 of the Limitation Act. On second appeal it was contended for the respondents that the suit was rightly dismissed and that it was in any case barred under Article 91:

Held, that the suit was not barred, that neither Article 44 nor 91 was applicable to the case and that the plaintiff had 12 years to sue for possession of the land.

That the sale must be regarded as one made by the adult members of the family on behalf of the entire co-parcenary body including themselves and their youngest brother. The alienation could not be viewed as one made on behalf of the minor by his guardian to make Article 44 applicable, for a minor's undivided share in joint family estate is not property which can be dealt with by his guardian.

That Article 91 is not intended to apply to suits for possession of immoveable property alienated by managers of joint families and endowments or by Hindu widows or other persons whose powers are restricted. In such cases if the person who executes the document had no authority in law to execute it, the plaintiff need not sue to set it aside. An express prayer in the plaint for the cancellation of such an instrument may be treated as not an essential part of the plaintiff's relief. **P.** RADHU RAM v. MOHAN SINGH, 84 P. L. R. 1915; 96 P. W. R. 1915 **199**

——— ——— ——— **arts. 62, 120**—*Debt due to deceased received by one of his heirs—Suit by other heirs to recover their share—Limitation.*

A suit by one of the heirs of a deceased person to recover his share of the debt due to the deceased, which had been realized by another heir holding succession certificate, is governed by Article 62, and not Article 120 of the Limitation Act. **A** ABDUL GAFFAR v. NUR JAHAN BEGUM, 8 A. L. J. 686 **347**

——— ——— ——— **art. 62**—*Principal and agent—Receipt of money after termination of agency—Money had and received.*

Where an agent receives money due to the principal after the termination of his agency, a suit to recover the same must be brought within three years from the time of the receipt as money had and received. **A.** HANSRAJ v. RATNI, 13 A. L. J. 494 **986**

——— ——— ——— **art. 84** **763**

Limitation Act—(1908)—contd.

——— ——— **Sch. I, arts. 85, 88**—*Mutual, open and current account explained—Defendant residing outside original jurisdiction—Accounts submitted within jurisdiction—Jurisdiction of High Court—Factor, definition of.*

Where under an agreement between the plaintiff and the defendant the defendant submitted to the plaintiff his account in the plaintiff's shop in Madras, the High Court in its original side does not cease to have jurisdiction over the suit merely because the defendant resides in a place outside such jurisdiction.

Different sums were advanced by the plaintiff to the defendant at different times. They were treated under an agreement as a consolidated debt commencing from the date of the agreement and a promissory note was executed by the defendant the same day about the consolidated items. A suit on the basis of the dealings was held to fall under Article 85, Schedule I, Limitation Act, 1908, and not under Article 88.

A factor is an agent entrusted with the possession of goods for sale.

Therefore where in the contract and dealings between the parties something outside the mere entrusting of the goods for sale is found (*e. g.*, advances from time to time by the plaintiff to the defendant and credit for the goods sold on defendant's behalf), these elements are quite sufficient to bring the case under Article 85 for the balance due on a mutual, open and current account, and Article 88 has no application. **M.** BAPU SAHIB YOUSUFF SAHIB *v.* ISAC ISMAIL CO., (1915) M. W. N. 519 **462**

——— ——— ——— **art. 88** **462**
——— ——— ——— **art. 89** **748, 848**
——— ——— ——— **art. 91** **62**

——— ——— ——— **arts. 91, 120**—*Cancellation of document—Limitation, from when begins to run.*

The limitation for a suit for declaration that a mortgage deed executed by the plaintiff was without valid consideration and ineffectual and that the defendant had no right under it, begins to run from the date of the execution of the document. **A.** *Mirza* QASIM BEG *v.* MUHAMMAD ZIA BEG, 13 A. L. J. 913 **968**

——— ——— ——— **arts. 91, 124**—*Suit to recover possession of trust properties—Management of temple transferred under agreement—Agreement found to be void—Suit to recover possession—Suit to set aside agreement, whether to be brought within three years—New issue framed at close of case—Fresh evidence, production of, right of—Expenditure incurred by de facto trustee during management, whether ground for retaining possession until payment of expenses.*

The Limitation Act merely prescribes within what periods suits must be brought, and cannot be construed as of itself creating an obligation to sue where none exists.

Sales which are *ab initio* void cannot become valid if not set aside within three years by suit.

A suit to recover possession of a temple from the managers, in whose hands its management was vested under an agreement, is in time if brought within 12 years and more than three years from the date of the agreement, though no suit to set aside the agreement was brought under Article 91, Schedule I of the Limitation Act.

Mere permission to raise an issue at a late stage of the case does not imply that the party on whose behalf it is raised is at liberty to let in evidence on issues already closed.

In the case either of public or private charities the Court is not bound to leave the trust estate in possession of a person not entitled to the character of a trustee, merely because he expended money on it while acting as trustee. On the other hand, it is the duty of the Court, especially in the case of public charitable trust to take the trust property out of the possession of persons not entitled to hold it, while making due provision for any claims which they may have in respect of the expenditure incurred in connection therewith.

Where a plea as to improvements is raised merely as a pretext to keep back possession, effect ought not to be given to such plea. The proper course is to direct the defendants trustees to deliver possession, and then direct accounts to be taken as between the *de facto* trustee and the temple in order to ascertain the amount to be allowed to him for expenses incurred by him in the course of such management. **M.** NARAYANAN CHETTIAR *v.* LAKSHMANAN CHETTIAR, 28 M. L. J. 571 **I**

——— ——— **Sch. I, art 95** **62**
——— ——— ——— **art. 113** **898**
——— ——— ——— **art. 116** **797**
——— ——— ——— **art. 118** **785**
——— ——— ——— **art. 120** **62, 275, 347, 629, 968**

——— ——— ——— ——— **arts. 120, 125**—*Custom—Alienation by widow—Occupancy rights, creation of—Suit for declaration that creation of occupancy rights by widow was invalid—Limitation, starting point of.*

Article 125, and not Article 120, of the Limitation Act, applies to a suit for a declaration that a creation of occupancy rights by a widow is invalid as against reversionary rights of the plaintiff and the period of limitation for such a suit begins when occupancy rights are created.

A subsequent and belated objection in partition proceedings as to the partition of the occupancy holding does not give a fresh period of limitation. **P.** HIRA *v. Musammat* GHATHU, 115 P. L. R. 1915 **789**

——— ——— ——— ——— **art. 124** **I**
——— ——— ——— ——— **art. 125** **789**
——— ——— ——— ——— **art. 127** **183**
——— ——— ——— ——— **art. 132** **629**

——— ——— ——— ——— **art. 132**—*Suit on mortgage for principal and interest—Mortgagee entitled to sue for arrears of interest—Waiver, omission to sue, whether amounts to.*

A mere omission to sue is not sufficient proof of waiver of the right to sue.

Where a mortgage-bond dated 11th August 1890 provided that the interest on the mortgage-money would be paid yearly and the mortgagee could recover arrears of interest by suit and after 10 years, if the land was not redeemed, he could recover principal and interest by suit and get the land attached and sold in execution, and only a small sum having been paid towards interest in the early years of the mortgage the mortgagee sued the mortgagor:

Limitation Act—(1908)—contd.

Held, that, inasmuch as the plaintiff held the option of suing every year, the suit was governed by Article 132 of the first Schedule of the Limitation Act and the plaintiff could not recover interest that had become due 12 years before the institution of the suit. **P** JAHAN KHAN *v.* CHANDI SHAH, 122 P. W. R. 1915 **854**

——— **Sch. I, arts. 134, 148** - *Mortgage Mortgagee selling absolute interest in mortgaged property—Redemption—Limitation*

A mortgagor's right to redeem subsists until it has been extinguished by act of parties or order of a Court. Act of parties means act of parties to the mortgage transaction. No assertion of adverse title on the part of a mortgagee during the continuance of a mortgage can set time running against the mortgagor so as to deprive the latter of his right to redeem within a period of sixty years.

If a mortgagee sells the mortgaged property out-and-out to a third person, the possession of the vendee does not become adverse against the owner of the equity of redemption from the date of the sale, and a suit for redemption would lie under Article 148 of the Limitation Act. **A.** PANNA LAL *v.* RAMESHAR SAHAI **403**

——— **art. 137** **841**

——— **art. 141**—*Suit by reversioner—Alienation by widow of her deceased husband's property.*

A suit by the reversioners to set aside an alienation by the widow of her deceased husband's property brought more than 12 years after her re-marriage is barred under Articles 141, 143 of the first Schedule of the Limitation Act. **N.** NATHU *v.* NAI BAHU, 11 N. L. R. 86 **612**

——— **arts. 142, 144**—*Suit for possession—Plaintiff, what must prove—Adverse possession pleaded—Possession within 12 years, proof of—Defendants' inability to prove possession continuously for 12 years—Presumption—Possession under illegal order, effect of.*

In a suit for possession the plaintiff must prove not only that he is entitled to the property but also (if and in so far as that is contested) that he has not been out of possession during the whole of the 12 years preceding his suit. The facts that the defendants are not able to establish affirmatively that they have been continuously in possession for the said period of 12 years under Article 144 of the Limitation Act does not necessarily entitle the plaintiff to succeed unless the requirements of Article 142 are also satisfied.

In calculating the said period of 12 years, possession under an illegal order should not be taken into account. **M.** KALIAPERUMAL KEERUDAYAN *v.* CHIDAMBARAM THANJIRAN **10**

——— **art. 143** **612**

——— **art. 144** **10, 275, 731, 976**

——— **art. 164** **476, 975**

——— **art. 166** **314**

——— **art. 170** **1003**

——— **art. 178** **49**

——— **art. 182** **237**

Limitation Act—(1908)—concld.

——— **Sch. I, art. 182**—*Civil Procedure Code (Act V of 1908), O. XXI, r. 12—Execution—Inventory of property attached not annexed to application—Application, whether in accordance with law.*

Where a decree-holder fails to annex to the application for execution of his decree an inventory of the property to be attached with a reasonably accurate description of the same, as required by Order XXI, rule 12, of the Code of Civil Procedure, the application is not in accordance with law within the meaning of Article 182 of the Limitation Act, 1908, and cannot save limitation when it is dismissed for non-compliance with an order for amendment. **A.** ABDUL RAFI KHAN *v.* MAULA BAKHSH, 3 A. L. J. 706 **479**

——— **art. 182**—*Limitation, saving of—Application only necessary—Return of application for amendment and failure to re-present, immaterial.*

Article 182 of Schedule I of the Limitation Act only requires that there should be an application. The fact that an application was returned to the decree-holder for amendment and was not re-presented, would not affect limitation. **M.** GURRALA SESHAYYA *v.* YEDIDA VENKATASUBBIAH, 28 M. L. J. 494; 2 L. W. 540 **16**

——— **art. 182 (7)** **274**

——— **art. 183** **237**

Lower Burma Towns and Village Lands Act (IV of 1898), s. 41—*Jurisdiction of Civil or Revenue Court—Litigation between private persons—Eviction of a squatter by a squatter or of a sub-lessee by a lessee—Encroachment by lessee, whether can enure for benefit of lessor.*

Where private persons litigate concerning claims to land not held under grant or lease from Government or under a license from the Revenue Officer, but which is at the disposal of Government, the jurisdiction of the Civil Court is not barred by section 41 (*a*) of the Lower Burma Towns and Village Lands Act.

Under the said Act the eviction of a squatter by another squatter, or of a sub-lessee by a lessee is not a matter that 'is to be determined by the Revenue Authority', and there is nothing in the Act to oust the jurisdiction of the Civil Courts in cases which do not involve the decision of any rights as against Government.

The benefit of an encroachment by a lessee on a neighbour's land enures for the benefit of the lessor.

Though section 108 *B* (*d*) of the Transfer of Property Act is not in force in Wakema, the principle embodied therein should be followed. **L. B.** SIT YIN *v.* MA SHIN, 8 L. B. R. 71 **872**

Lunatic co-parcener, right of, to share on partition. *See* HINDU LAW.

Lurking house trespass. *See* PENAL CODE, s. 456.

Madras Civil Courts Act (III of 1873), s. 8 **71**

Madras Civil Rules of Practice, r. 14 **449**

——— **r. 161A** **119**

Madras Estates Land Act (I of 1908) 601

——— ——— ——— ss. 3 (5), 77, 194—*Suit for rent—Tenant disputing title of plaintiff as land-holder—Court, duty of, in such cases—Court, when to decide the question by itself.*

Where a *ryot* disputes the title of the plaintiff to collect rent, no decree can be passed for the rent until that question has been decided in favour of the plaintiff.

Where, in a suit under section 77 of the Madras Estates Land Act for recovery of rent, the tenant disputes the title of the plaintiff as a land-holder and sets up the title of a third person, there are three courses open to a Court, *viz.*, the Court may, by itself, determine who the land-holder is who should collect rent, or it may direct the plaintiff to apply to the Collector to declare him to be the land-holder or may apply section 194 of the Madras Estates Land Act and if it finds there has been no *bona fide* payment of rent to a third person, it may give the tenant the option of paying the same into Court. Where the parties themselves are before the Court, the proper course is for the Court before which the suit is filed to make the inquiry itself. **M.** SONA ALAGA KUDUNBAN *v.* SIVARAMA AIYAR 31

——— ——— ——— s. 6 (1) 8

——— ——— ——— ss. 42 (2), 112, *applicability of—Survey and Boundaries Act (IV of 1897), s. 20 (3)—Contribution, recovery of*

Section 42 (2) of the Madras Estates Land Act applies to cases in which the area of a holding has been determined under the Survey and Boundaries Act.

Section 112 of the Madras Estates Land Act also applies to proceedings for the recovery of contribution of survey charges apportioned under section 20 of the Survey and Boundaries Act. **M.** BANGARUSAMI REDDI *v.* KUPPANNA GOUNDEN, 28 M. L. J. 377 595

——— ——— ——— s. 77 31

——— ——— ——— s. 112 595

——— ——— ——— s. 186—*Collector's certificate—Objections of petitioner, not illegal—Court not bound to call for evidence.*

A Collector's certificate, granted under section 186 of the Madras Estates Land Act is not conclusive.

An order of a District Court under section 186 of the Madras Estates Land Act, based not merely upon the certificate of the Collector but also upon other materials raised on behalf of the *ryot*, is not illegal.

Quære.—Whether a District Court is bound to call for evidence when none is offered by the *ryot* himself before acting upon the Collector's certificate? **M.** MEENAKSHI AMMAL *v.* ORR, R. G., (1915) M. W. N. 421 457

——— ——— ——— s. 192—*Plaint, valid presentation of—Limitation Act (IX of 908), s. 4—Officer authorized to receive plaints absent from head-quarters—Court, whether closed—Madras Civil Rules of Practice, r. 14, applicability of.*

A plaint under the Madras Estates Land Act (I of 1908) presented to the Head Clerk of a Collector is not validly presented, if he is not appointed to receive plaints.

A Court is not closed within the meaning of section 4 of the Limitation Act, if the officer authorized to receive plaints is absent from head-quarters and is in camp.

Rule 14 of the Madras Civil Rules of Practice does not apply to proceedings before a Revenue Court. **M.** RECEIVER OF THE N. AND M. ESTATES *v.* SURAPARAZU, 38 M. 295 449

——— ——— ——— s. 194 31

Madras Regulation (XXV of 1802), s. 4 365

Madras Rent Recovery Act (VIII of 1865), s. 11 (3)—*Madras Estates Land Act (I of 1908)—No retrospective effect*

No retrospective effect should be given either to section 11 (3) of the Madras Rent Recovery Act or to its corresponding provision of the Madras Estates Land Act. **M.** ZEMINDAR OF PAMUR TALUQ *v.* MALAKONDAYYA NAIDU 601

——— ——— ——— s. 12—*Tenancy from year to year—Oral notice to quit—Wrongful ejectment—Suit for possession—Damages.*

A notice of ejectment under the Madras Rent Recovery Act (VIII of 1865) must be in writing.

Where there was merely an oral notice to quit and the tenant was wrongfully dispossessed the tenancy being from year to year:

Held, that he was entitled to be in possession for a year after the period when he was ejected and was entitled to one year's mesne profits as damages in lieu of possession. **M.** GOTTIMUKKALA CHINA *v.* SRIMAT SURANGAM NALLANI 574

Madras Survey and Boundaries Marks Act (IV of 1897), s. 13—*Order as to possession—Starting point of limitation.*

Where an original order of a Survey Officer, adverse to the plaintiff, was dated 31st October 1908 but both parties' cross-appeals were heard together and disposed of by a single order dated the 18th January 1909:

Held, that the date of the latter order was the starting point of limitation for the plaintiff's suit for possession. **M.** VEERARAGHAVA CHARIAR *v.* KRISHNAMACHARIAR 907

——— ——— ——— s. 20 (3) 595

Mahant, *appointment of—Absence of rules and practice prescribed by founder—Custom or usage—Practice—Suit for possession of* math *and its property—Burden of proof—Election*—Dasnam bhik, *election of* mahant *by, when valid.*

In case the founder of a *math* prescribes no rules or practice to be followed in the selection and appointment of the future *mahants*, the selection and appointment of a person to be the *mahant* of the *math* on a vacancy occurring in the *mahantship* must depend on the custom or usage and the practices which have prevailed in the appointment of *mahants* of that *math*.

The plaintiff sued the defendant for the possession of a temple and the properties appertaining to it alleging that he was the only *sadhak* (disciple) of the deceased *mahant* and that he was duly elected *mahant* and was appointed with the usual ceremonies. The defendant who was the general attorney and storekeeper of the deceased *mahant* also claimed to have been duly elected *mahant* in succession to the

Mahant—concld.

deceased *mahant* and was in possession of the temple and of the property appertaining to it:

Held, that it was for the plaintiff to prove his right to the *mahantship* which, if proved, would carry with it the right to possession of the temple and of the property appertaining thereto, and that as the plaintiff failed to prove that he was the duly elected *mahant* of the *math*, his suit would fail and it would be immaterial to consider whether the defendant was or was not the *mahant* of the *math* or whether he had or had not any better title to the temple and the property appertaining to it than a title of mere possession.

An election by *dasnam bhik* of a *mahant* to be a valid and effectual election must be by a majority of the *dasnam bhik* assembled for that purpose. A separate election by a faction of the *dasnam bhik* is not a valid and effectual election. **P C.** LAHAR PURI *v.* PURAN NATH, 19 C. W. N. 718; 21 C. L. J. 499; 17 BOM. L. R. 475; 18 M. L. T. 39; 29 M. L. J. 75; 2 L. W. 589; 37 A. 298; (1915) M. W. N. 526 **724**

Maintenance. *See* CRIMINAL PROCEDURE CODE, s. 488.

——— ——— **grant.** *See* HINDU LAW.

——— ———, right of, transfer of **251**

Majority Act (IX of 1875), s. 2, applicability of **587**

Malabar Compensation for Tenants' Improvements Act (I of 1900) **286**

——— ——— ——— **s. 5**—*Decree determining tenancy and directing payment of compensation—Non-payment of compensation—Continuance of tenant on land—Improvements subsequent to decree—"Tenant" entitled to claim compensation under Act.*

A tenant continuing in possession pending receipt of compensation holds subject to the terms of the previous lease, that is, holds as a tenant and retains that status until his improvements are paid for.

The fact that no rent was paid by the tenant or that the decree determining his tenancy credited the value of improvements towards the arrears of rent due, does not alter his position. He is, therefore, a "tenant" under the Act entitled to claim compensation for the improvements effected by him subsequent to the decree. **M.** CHOWAKKARAN KELOTH *v.* KARUVALOTE PARKUM, 29 M. L. J. 144 **559**

Malabar Law—Kanomdar, *right of, to claim compensation for improvements—Malabar Compensation for Tenants' Improvements Act (Mad. Act I of* 1900).

A *kanomdar* is entitled to claim compensation for conversion of jungle lands into *parambas*, notwithstanding any provision to the contrary in the deed of mortgage.

A tenant is entitled to claim compensation for improvements according to the Malabar Compensation for Tenants' Improvements Act, 900, if then the terms of the mortgage agreement are less favourable to him than the provisions of the Act. **M** ABDULLA ROWTHAN *v.* VASUDEVA RAVI VARMA, 29 M. L. J. 316 **286**

Malabar tarwad—*Properties given to member in lieu of maintenance—Restraint on alienation except by way of lease—Member's interest, whether attachable—Civil Procedure Code (Act V of* 1908), *s.* 60 (1) (n).

Where certain properties are given to a member of a Malabar *tarwad* in lieu of maintanance under a *karar* which prohibits alienation except by way of lease, his interest in the properties is not exempt from attachment under section 60 1) (*n*) of the Civil Procedure Code. **M.** KOTHAL MAMMAD HAJI *v.* PYDAL NAIR **578**

Malice, proof of—Malicious prosecution **12**

Malicious prosecution—*Damages, suit for—Proof—Conviction of plaintiff in lower Court, effect of.*

In a suit for damages for malicious prosecution the plaintiff must prove the following four things:—

(1) that he was innocent of the crime alleged against him;

(2) that his innocence has been pronounced by a competent tribunal;

(3) that there was a want of reasonable and probable cause for the prosecution; and

(4) that the proceedings against him had been initiated in a malicious spirit.

A conviction in the lower Court of the plaintiff to a suit for damages for malicious prosecution although reversed on appeal is fatal to his suit for malicious prosecution save in very exceptional circumstances. **L. B.** PADASHIN *v.* MAUNG LUN, 8 BUR. L. T. 69 **883**

——— ——— ——— ——— *Want of reasonable and probable cause—Malice, proof of—Complaint false to the knowledge of defendant—Plaintiff guilty of some dishonest act—Defendant not justified in making false allegations.*

In a suit for damages for malicious prosecution, not only want of reasonable and probable cause but also malice is proved if the complaint was false to the knowledge of the complainant. The fact that the plaintiff was guilty of some other dishonest act will not justify the defendant in making allegations against his conduct false to his knowledge. **M.** KHADER UNNISSA BEGAM *v.* MUHAMMAD MUSTAN ALI BADSHA, 2 L. W. 428; 17 M. L. T. 91 **12**

Manbhum Kismats, *nature of, guided by the rule of primogeniture—Maintenance grants to younger branches of family*—Khorposhdar, *interest of, limited—Leases, liability to pay rent under—Sub-soil rights*—Khorposh *grants, heritable, when determinable—Title-deed, forged, effect of.*

In the Nawagarh *zemindari* in Manbhum, Chota Nagpur, *kismats* descend, by the rule of primogeniture, on the eldest sons, maintenance grants being made to the younger branches of the family. Each *kismat* is, to all intents and purposes, regarded as an impartible estate.

The interest of a *khorposhdar*, though more than an interest for one life, is nevertheless a limited interest, liable to be defeated at any time by the failure of heirs, and, therefore, resumable by the proprietor for the time being.

Where the plaintiff's lessors have no title whatever to the sub-soil and are thus incapable of conferring such a title on the plaintiff, he cannot get possession of the land demised in any form.

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Moneys paid by compulsion of legal proceedings cannot be recovered even if paid within the period of limitation.

Khorposh grants are heritable in the male line and determinable only on the failure of male heirs.

Where it was found that the leases to the plaintiff were only of sub-soil rights, the surface rights being expressly reserved to the lessors:

Held, that the leases conveyed nothing whatever to the plaintiff.

Where it is found that the title-deed on which the plaintiff's suit is based is a forgery:

Held, that the plaintiff's suit must necessarily fail. **C** JAGANNATH MARWARI *v.* GIRIDHARI SINGHA, 19 C. W. N. 102 **429**

Map—Survey map and *thak* map distinguished—Map drawn for different purpose, how far affects right of property **156**

Marriage. *See* BUDDHIST LAW; MUHAMMADAN LAW.

———————Contract Act (IX of 1872), s. 23—Divorce—Custom—Payment to caste—Repugnant to Hindu Law **952**

Master and servant—*Criminal acts of servants—Master, liability of, conditions of—Forest Act (VII of 1878), s. 25 (d), applicability of—Licensee under Forest Act, liability of, for agent's acts—Statute, construction of—"Intention of the Legislature," meaning of.*

A master is not criminally responsible for the acts of his servants, unless he expressly commands or personally co-operates with them or unless the criminal liability is imposed by Statute upon him as regards the acts or omissions of his servants.

In the cases where a master is held liable for the criminal acts of his servants under a Statute, the question is whether upon the true construction of the Statute in question, the master is intended to be made criminally liable for the acts of his servants done within the scope or in the course of their employment.

A licensee under the Indian Forest Act (VII of 1878) would be liable *criminaliter* for every act of his agent, done in carrying on the business delegated to him, which amounts to a breach of the condition of the license made criminally punishable by the Act or any rule thereunder.

Where the owner of a certain number of cattle entrusted them to a grazier who took them into a forest reserve to afford them better pasturage:

Held, that the owner was not criminally liable, though he was civilly liable.

Held, further, that the words of section 25 (*d*) of the Indian Forest Act (VII of 1878) clearly apply only to the person who does any of the acts mentioned therein.

Semble. Statutes passed for the benefit of the public health and sanitation are construed in the same way as licensing Acts.

Nothing is to be regarded within a Penal Statute which is not clearly and intelligibly described in the very words of the Statute itself.

The phrase "intention of the Legislature" cannot be extended to cover a speculative opinion as to what the Legislature probably would have meant although there has been an omission to enact it. **N.** SAIYYAD RAHIM *v.* EMPEROR, 11 N. L. R. 76; 16 CR. L. J. 485 **325**

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————————*Termination of contract of service—No special custom or stipulation—Reasonable notice—Bombay District Municipal Act (Bombay Act III of 1901), s. 167, whether applicable to suit on contract.*

If no custom nor stipulation as to notice exists and if the contract of service is not one which can be regarded as a yearly hiring, the service is terminable by reasonable notice.

What is "reasonable notice" is a question which varies with the circumstances of the case.

Section 167 of the Bombay District Municipal Act, 1901, does not apply to an action brought on a contract.

Having regard to the standard generally adopted in England for "clerks in superior position" a Municipal Secretary in India is entitled to three months' notice. **S.** MUNICIPALITY OF TATTA *v.* ASSANMAL CHANDOOMAL, 8 S. L. R. 294 **597**

Math, whether can acquire occupancy rights—*Mahant—Chela*—Succession **407**

Merger. *See* MORTGAGE.

————*Mortgage—Hypothecation bonds—Account settled—Agreement to sell certain portion—Suit on bonds, maintainability of—Remedy of plaintiff.*

The defendants mortgaged certain properties to the plaintiffs and also hypothecated the same for certain sums on different dates. On a suit on the hypothecation bonds it was found that a settlement of accounts between the parties had been arrived at and it had been agreed that a certain portion of the property should be sold for the amount due to the plaintiffs. The defendants were still ready to perform the agreement:

Held, that the suit was not maintainable as under the circumstances the only course open to the plaintiff was to sue for specific performance of the contract to sell. **M.** ELICHI USSACK *v.* RAMASWAMI IYER, 28 M. L. J. 662 **982**

Mesne profits. *See* MADRAS RENT RECOVERY ACT, s. 12.

————————, claim for, essence of **195**

————————**or damages,** *suit for—Civil Procedure Code (Act V of 1908), s. 11, O. XX, r. 12, scope of—Title derived from a party, nature of—No issue raised or tried—No bar—Co-defendants.*

Section 11 of the Civil Procedure Code, 1908, contemplates a case where a party derives title from a party to the previous litigation subsequent to the previous litigation.

There is nothing in section 11 of the Code of Civil Procedure to suggest that where the plaintiff has derived no title subsequent to the previous suit, the subsequent suit should involve the consequence of being dismissed.

Where no issue was raised or tried in the former suit between the parties to the new suit:

Held, that the claim was not barred by section 11 of the Code of Civil Procedure.

Order XX, rule 12, does not contemplate anything except the relation between the plaintiff and the

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defendant in a previous suit. There is nothing in Order XX, rule 12, to suggest that it applies between co-defendants. **C.** SURENDRA NARAYAN MITRA *v.* DEJINDRA PROSAD MITRA **464**

Mischief. *See* PENAL CODE, s. 378.

Misrepresentation. *See* CONTRACT ACT, s. 19.

Mortgage—*Agreement to redeem on certain date and in default to leave mortgagee in undisturbed possession, validity of—Subordinate Court, duty of, to follow rulings of its Superior Court—Practice.*

A person mortgaged his land before the Transfer of Property Act came into force by way of usufructuary mortgage for Rs. 800 and agreed to redeem it on a certain date after seven years for Rs. 850 and in default, the mortgagee might take possession. The mortgagor failed to redeem on the due date but sued to redeem a year later:

Held, that there was nothing unconscionable in the contract of the parties and that it is in accordance with equity, justice and good conscience to keep parties to their agreements made voluntarily and with full knowledge when those agreements are themselves reasonable.

It is the duty of a Subordinate Judge to follow the decision of its Superior Court which is binding on it and leave it to the Superior Court to take such action with regard to the conflict of the opinion as it may be advised. **L. B.** MA THIN HTON *v.* MA HNIN THET **709**

——— *Transfer of Property Act (IV of 1882), ss. 88, 89—Application for order absolute—Application in execution—Limitation—Limitation Act (IX of 1908), Sch. I, Arts. 182, 183—Civil Procedure Code (Act V of 1908), s. 48—Order absolute—Fresh starting point of limitation.*

A preliminary decree in a mortgage suit passed under section 88 of the Transfer of Property Act is executable and in order to obtain an order absolute under section 89 steps have to be taken in execution; and Article 182 or 183 of the Limitation Act will apply to such applications if the decree happens to be passed by a Mofussil Court or by the original side of the High Court.

A decree-holder will have 12 years under section 48 of the Civil Procedure Code to perfect the preliminary decree and another 12 years under the same section if he gets an order absolute within the first 12 years.

Where a preliminary decree in a mortgage suit was passed on the 7th October 1901 and the first application to obtain an order absolute was made on 6th April 1904 and subsequent applications were made in 1907, 1910 and 1912 all within the three years of the immediately preceding application and all the applications were dismissed without granting the relief prayed for, and the present application was made on the 15th April 1912:

Held, that the application was not barred by limitation. **M.** MAHAMMAD HUSAIN *v.* ABDUL KAREEM, 17 M. L. T. 424 **237**

——— ——— Benamidar *mortgagee, right of, to sue—Mortgagor, whether can object to mortgagee's right—Civil Procedure Code (Act V of 1908), s. 100—Evidence Act (I of 1872), s. 92.*

Mortgage—contd.

A *benamidar* has a right of suit on a mortgage of immoveable property in his favour and it is not open to the mortgagor to raise any question as to the right of the *benamidar* to recover the mortgage debt. **L. B.** MA TUN *v.* MA WAING THA **692**

——— ——— *Construction—Good-will and stock-in-trade mortgaged—Stock acquired after mortgage, if effected.*

A certain person mortgaged the good-will and the stock-in-trade of his business. A list of the stock-in-trade was scheduled to the mortgage-deed. There was a clause in the deed that the stock-in-trade would not be transferred. The scheduled stock was as a matter of fact, subsequently, sold and was re-placed by another:

Held, that the stock-in-trade which was acquired after the mortgage was not affected by the mortgage. **A.** ANDERSON *v.* BANK OF UPPER INDIA, LTD., 13 A. L. J. 489; 37 A. 390 **984**

——— ——— *Decree, sale under—Fraud, allegation of—Execution, who may come in in—Party having no interest in property when decree passed, right of.*

Where the plaintiffs had no interest in the property at the time the mortgage-decree was passed and the property was not ancestral:

Held, that they could not come in in execution to set aside the decree. **C.** NAGESUR PERSHAD SINGH *v.* BINDESHWARI PROSAD SINGH **402**

——— ——— *Endowed property—Mortgagee from trustee—Limitation—Limitation Act (IX of 1908), s. 10, Sch. I, Art. 134—Limitation Act (IX of 1871), s. 10.*

A suit for possession of an endowed property against a person who has been holding it as a mortgagee from the trustees of the property for over 12 years, prior to the coming into force of the Limitation Act IX of 1871, on the ground that the alienation was null and void, is barred by limitation. **A.** AMIR SHAH *v.* TULA PANDE, 13 A. L. J. 612 **292**

——— ——— Enhanced Government revenue, whether payable by mortgagor or mortgagee **386**

——— ——— *Equity of redemption purchased by mortgagee—Merger—Incumbrances in favour of mortgagee, effect on—Extinguishment of mortgage—Transfer of Property Act (IV of 1882), s. 101, scope of—Question of intention in each case—Proof of intention.*

A purchase by a mortgagee of the equity of redemption extinguishes the mortgage, unless circumstances exist at the time of the purchase which show an intention to prevent the merger.

A mortgagee-purchaser of the equity of redemption of his mortgage can use his previous mortgage only as a shield if there are mesne incumbrances and only in respect of the properties which are covered by such incumbrances, but he is not entitled to sue upon his mortgage.

Per *Wallis, C. J.*—The word 'absolutely' in section 101 of the Transfer of Property Act, cannot mean that there are no mesne incumbrances.

Per *Seshagiri Aiyar, J.*—In cases where a subsequent clause in a deed is inconsistent with the operative portion of it, the cardinal principle of construction which should guide Indian Courts is to ascertain the intention of the parties. Technical rules of construction should, as far as possible, be avoided.

Section 101 of the Transfer of Property Act leaves untouched the general rule of law that when a mortgagee purchases the equity of redemption, the incumbrance in his favour is extinguished. It only

Mortgage—contd.

enacts that where there are other mortgages on the property, an intention will be imputed to the mortgagee-purchaser that he intended to keep alive his own mortgage as a protection against subsequent claimants. M. ARUMUGASUNDARA *v.* NARASIMHA IYER, (1915) M. W. N. 397; 2 L. W. 642; 18 M. L. T. 110 **916**

——— Equity of redemption, sale of—Purchaser, right of, to redeem **305**

——— executed in order to defeat creditors, if void—Consideration paid in part—Suit to enforce mortgage security—Lien **690**

——— by father—Hindu Law—Debt neither antecedent nor for family purposes, nor immoral—Suit against sons—Limitation Act (IX of 1908), Sch. I, Arts. 120, 132 **629**

——— *of fixed-rate tenancy—Mortgagor dying heirless—Ejectment of mortgagee without redemption—Revision.*

If a fixed-rate tenant mortgages his holding usufructuarily and then dies without leaving an heir the land-holder cannot eject the mortgagee in possession without paying off the mortgage-money.

An order wrongly directing the ejectment of a mortgagee in possession deprives the mortgagee of his legal rights and is, therefore, a serious error of law which justifies interference in revision. U. P. B. R. NAND KISHORE PANDE *v.* MUHAMMAD HASAN **555**

——— Grove, mortgage of—Mortgagor dying without heirs—Mortgagee, whether can be ejected—Grove, if constitutes improvement **560**

——— ——— Merger—Hypothecation bonds—Account settled—Agreement to sell certain portion—Suit on bonds, maintainability of—Remedy of plaintiff **982**

——— ——— Mortgage-decree making judgment-debtor personally liable for deficiency—Sale of other properties belonging to him—Application by decree-holders for rateable distribution—Order, whether appealable—Execution application praying for specific reliefs—No final orders passed—Madras Civil Rules of Practice, r. 167 **231**

——— ——— *Mortgage for Rs.* 105 *unregistered but known to subsequent purchaser, proof of, if necessary—Evidence Act* (*I of* 1872), *s.* 58—*Subsequent purchaser, right of.*

Where the purchaser of certain lands admitted previous knowledge of a mortgage of part of the lands in possession of the mortgagee:

Held, that it was unnecessary to prove the mortgage in a suit for possession by the purchaser against the mortgagee and that the fact that the mortgage-deed was for Rs. 105 and was unregistered was immaterial.

Held, further, that the purchase being subject to the mortgage, the purchaser could not recover the land without paying the mortgage-money.

An admission made by a party when examined as a witness comes within the purview of section 58 of the Evidence Act. U. B. NGA TUN LU *v.* NGA SHWE CHIN, 8 BUR. L. T. 18 **698**

——— Mortgagee selling absolute interest in mortgaged property—Redemption—Limitation **403**

——— ——— *Mortgagor, payment by, to one mortgagee—Endorsement on mortgage-deed, value of—Payment, whether amounts to discharge—Mortgagor, duty of—Probate and Administration Act* (*V of* 1881), *ss.* 4, 92—*Endorsement as to receipt of mortgage-money by one executor mortgagee, value of.*

Two of the sons of a deceased testator were made executors of his Will. The two sons invested the moneys they had in their hands in mortgages. One of the brothers alone sued to enforce the mortgage security making the other brother-defendant. The mortgagor pleaded payment of certain amounts to the other brother, as evidenced by endorsement on the mortgage bond, and claimed to be credited for the amounts:

Held, that notwithstanding that the money in fact formed a portion of the estate of the deceased, it did not vest in the executors as such under section 4 of the Probate and Administration Act, but vested in them by virtue of the bonds which were given to them by the mortgagor and that, therefore, the endorsement did not amount to a discharge under section 92 of the Act.

Held, further, that the money was lent on a joint account and it was the duty of the defendant mortgagor in making re-payment to see that he made the payment to, and obtained a receipt from, a person entitled to give him a discharge. C. CHANDRA MOHAN BANERJEE *v.* SATYA KRIPAL **139**

——— ——— *Occupancy holding and fixed-rate holding mortgaged together for lump sum—Whole transaction, if illegal.*

Where an occupancy holding and a fixed-rate holding are mortgaged together for a lump sum, and the contract is one and indivisible the whole transaction is void. *f.* JWALA PRASAD RAI *v.* RAM SARUP RAI **923**

——— ——— *Non-transferable occupancy holding—Rent-sale, effect of—Civil Procedure Code* (*Act V of* 1908), *O. XXI, r.* 89, *scope of—Decretal amount, who may deposit in Court.*

Where the mortgagee of a non-transferable occupancy holding, which was brought to sale in execution of a rent-decree and purchased by the landlord decree-holder, sought to deposit in Court the decretal amount and compensation under Order XXI, rule 89, Civil Procedure Code:

Held, that the mortgagee had not any interest under the rule in question, and so his deposit could not be accepted by the Court. DENO NATH DEY SARKAR *v.* KALI KUMAR ROY **916**

——— ——— *Representation*—Mitakshara *family—Redemption, equity of, member of* Mitakshara *family having interest in—Failure to produce that member before Court, effect of—Transfer of Property Act* (*IV of* 1882), *s.* 85, *scope of.*

The principle laid down by the Judicial Committee in the case of *Sheo Shankar Ram* v. *Musammat Jaddo Kunwar*, 24 Ind. Cas. 504; 18 C. W. N. 968; 16 M. L. T. 175; (1914) M. W. N. 593; 1 L. W. 695; 12 A. L. J. 1173; 16 Bom. L. R. 810 (P. C.); 20 C. L. J. 282; 36 A. 383, is to be applied in preference to that adopted in *Lala Suraj Prosad* v. *Golab Chand*, 28 C. 517; 5 C. W. N. 640, in cases where the doctrine of representation is properly applicable to the facts and where the mortgagee is found to be not aware of the existence of a member of a joint *Mitakshara* family as interested in the equity of redemption and

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so does not bring him before the Court in the mortgage suit. **C.** RAGHORAM SINGH *v.* RAJANI KANTA BANERJEE, 21 C. L. J. 452 **752**

——————Several mortgagees—Payment by mortgagor to one mortgagee, if valid **956**

——————, simple, whether *rehan* **554**

——————of *sir* before 1901—Sale of equity of redemption in 1905—Mortgagors minors—Ex-proprietary rights claimed by mother of minors—Mother's claim wrongly disallowed—No appeal preferred—Subsequent suit for declaration of ex-proprietary rights **675**

——————*of* sir *land before the passing of the Agra Tenancy Act (II of* 1901), *effect of, on* sir *land.*

A mortgage with or without possession before the 1st day of January 1902 has no effect whatever upon *sir*. **U. P. B. R.** GANGA PRASAD PANDE *v.* TUNDI AHIR **565**

——————*Subrogation—Purchaser of mortgaged property, right of—Partial payment of mortgage-money.*

The purchaser of a mortgaged property cannot claim the right to subrogate as against a puisne incumbrancer when he has paid only a portion of the mortgage-debt. **M.** BESINATH KARUMANI *v.* DEVI DOSS **511**

——————*Subsequent mortgagee, made party to suit on prior mortgage—Failure to appear—Right to raise afterwards plea of payment of prior lien—Test.*

A subsequent mortgagee who has been made party to a suit on a prior mortgage but who has failed to appear cannot afterwards raise the plea that he had paid off a prior lien and was, therefore, in the position of a prior mortgagee.

The test in all such cases is, was the defendant impleaded as a puisne mortgagee and, therefore, a necessary party, if he was, he is bound to set up his prior mortgage as well as his subsequent mortgage. **C.** HANKAR RAI *v.* KAMTA PROSHAD SAHU, 19 C. W. N. 947 **875**

——————Usufructuary and simple mortgage in favour of same person—Mortgagee purchasing some of mortgaged property—Suit on simple mortgage—Liability of property purchased to rateable contribution **124**

——————**Redemption**—*Redemption decree—Failure to pay within time fixed—Payment before decree absolute—Mortgagor if entitled to redeem.*

In a redemption suit the mortgagor decree-holder who fails to pay the redemption money upto the date fixed for payment but pays it before the decree is made absolute, is entitled to redeem the property on such payment. **A.** AMBIKA PERSHAD *v.* SALAMAT KHAN **438**

——————*Redemption decree — Time fixed for payment of money—Appellate Court extending time and fixing another date, effect of—Interest.*

In a redemption suit a certain date was fixed in the decree for payment of the money and it was provided that up to that date the mortgagor would pay interest at the contractual rate. The plaintiff appealed to the High Court. The High Court confirmed the decision of the Court below and, extending the period for payment of the money, fixed another date:

Held, that the effect of the extension of time by the Appellate Court was to substitute the date fixed by that Court for that fixed by the first Court, and that the mortgagee was entitled to interest at the contract rate up to the date fixed by the Appellate Court. **A.** RAM NARAIN *v.* GOBIND PERSHAD **289**

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——————*Husband's mortgage, if widow can redeem unconditionally.*

In a case where the wife wants to recover the property which is found to have been mortgaged by her husband for debts for which her husband's property in her hands would be justly liable:

Held, that to allow her to recover her property without any condition is not equitable. **C.** SANATAN CHAKRAVARTI *v.* KAURI MANI DASI **925**

——————, *right of—Plaintiff, whether compelled to set up prior mortgage against his Will.*

One *K S* was the owner of a certain *zemindari*. One of the four sons of *K S* mortgaged a one-fourth share to the father of *R*, the defendant, on the 7th of December 1877. On July 27th, 1877, the whole property was usufructuarily mortgaged by the four sons to *Z*. The entire consideration of *Z*'s mortgage went towards satisfying a decree for sale obtained on a previous mortgage of 1872. The plaintiffs, having acquired certain shares in the equity of redemption from some of the descendants of *K S*, redeemed the entire mortgage from *Z*. *R* brought a suit on her father's mortgage and she impleaded only the son of her mortgagor and also *Z*, but not the present plaintiffs. She obtained a decree for sale of the one-fourth share and purchased it herself. The plaintiffs then brought the present suit for redemption of the mortgage of December 7th, 1877:

Held, that the plaintiffs were entitled to redeem the mortgage of the 7th of December 1877 and that whatever rights *Z* or the plaintiffs, as her successors-in-interest, might hold in respect of the mortgage of 1872, these were not rights which the plaintiffs could be compelled to set up or to exercise against their will and that the possible existence of such rights did not affect the position of the plaintiffs as mortgagees subsequent to the defendant.

Held, further, that *R* as auction-purchaser of the equity of redemption, had a right of redemption. **A.** RAM PIARI *v.* RAGHUNATH SINGH **794**

——————, *suit for—Civil Procedure Code (Act V of* 1908), *s.* 66, *applicability of—Old Code and new Code compared.*

In a suit for redemption where it is found that an execution sale and a *benami* purchase took place in 1895, long before the passing of the present Code in 1908, and that at that time and afterwards and until the passing of the present Code the plaintiff had a vested right of redemption:

Held, that it ought not to be assumed, in the absence of any express words to that effect, that that right was taken away from him by the provisions of section 66 of the Code of Civil Procedure.

Under the old law section 66 was only applicable to the certified purchaser, but as it is now

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amended it applies also to persons standing in the shoes of the purchaser. **C.** ASAD ALI *v.* BUJRUS MEHER BIBI **716**

———————, *suit for—Mortgagee, whether can question mortgagor's title—Equity of redemption, vesting of—Attornment of mortgagee to superior landlord, effect of.*

A mortgagee cannot be permitted to resist a claim for redemption on the ground that the mortgagor had no title to the property included in the mortgage.

But the mortgagee may establish that the title of the mortgagor has expired since the creation of the mortgage; in other words, that the equity of redemption is no longer vested in him so as to entitle him to redeem the mortgage.

As between a mortgagor and a mortgagee the attornment by the latter to the superior landlord cannot in any way prejudice the rights of the former. **C.** ABHURAM SIL *v.* HARA CHAND DAS **746**

Mortgage-bond, *suit on, for recovery—Hard and unconscionable bargain—Contract Act (IX of 1872), s. 16—Security, if ample, effect of—Undue influence, presumption of—Rate of interest, excessive, effect of—Personal loans—Compound interest, stipulation of, when a penalty—English Money Lenders' Act compared—English Judge's dicta to be followed.*

The Courts have ample powers under the amended Contract Act to go behind hard and unconscionable bargains on the ground that where there is ample security, the exaction of excessive and usurious interest in itself raises a presumption of undue influence which it requires very little evidence to substantiate.

The attempt to conceal the real rate of interest by describing it as one pice in the rupee per mensem or, as in the present case, Rs. 5 per mensem is evidence of an intention to get the better of the debtor, and the law seems to be that there must be a footing of complete equality between debtor and creditor and they must be, so to speak, at arm's length to make a bargain, which is in itself harsh and unconscionable enforceable at law.

Under the amended section 16 of the Contract Act the question of a harsh and unconscionable bargain can only be considered in reference to undue influence.

Where there is ample security an excessive rate of interest has been held to be anything over 10 per cent. Where there is no security, no rate of interest can be considered excessive. There can be no standard rate on personal loans.

Where the parties are reasonably on terms of equality, a Judge cannot do better than adopt what they themselves have agreed on.

A presumption of undue influence could arise from the fact that a security of over Rs. 3,000 with mortgage already on it for a much smaller amount was given for a loan of Rs. 80.

Where a contract is for a temporary accommodation, the stipulation that interest is to run at Rs. 5 a month is one which necessitates the payment of interest not at 60 per cent. per annum but at Rs. 5 in each month, and a stipulation that in default of 12 months' instalments of interest compound interest would begin to run at 60 per cent. is in the nature of a penalty.

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It is the duty of the Courts in India to enforce the letter of the law against obviously harsh and unconscionable bargains of this nature.

Excess of interest or charges may itself be evidence of a harsh and unconscionable bargain and particularly, if it is unexplained. If no justification be established the presumption hardens into a certainty.

The amendments in the Indian Law of Contract go further in the direction of relief against harsh and unconscionable bargains than those of the English Money Lenders' Act and, therefore, the dicta of English Judges under that Act might be accepted.

Where it is found that there is technically a penalty in the bond, Judges should go behind the contract, which is one and indivisible, as to interest and refuse compound interest altogether. **C.** ABDUL MAJID *v.* KSHERODE CHANDRA PAL, 19 C. W. N. 809; 42 C. 690 **843**

Mortgage-decree making mortgagor "personally liable for balance due under the decree" after sale of mortgaged property, whether a decree for "payment of money" on a certain date—Twelve years to be calculated from date of decree or from date when sale-proceeds prove insufficient to satisfy decree—Decree against estate managed by Court of Wards—Decree not transferred to Collector for execution—Mortgagee, whether entitled to benefit of exclusion of period of management by Court of Wards **556**

——————— **or sale**—*Transfer of Property Act (IV of 1882), ss. 54, 59, 55 (6) (b)—Transaction without registered document when transaction compulsorily registrable, effect of.*

Where the defendants were put into possession of two plots of plaintiffs' land, five or six years before the suit, without any registered document on payment of Rs. 100 in respect of each plot and where the transaction was either an abortive mortgage (according to the plaintiffs) or an abortive sale (according to the defendants):

Held, that in either case the plaintiffs were entitled to possession upon payment of Rs. 200 as under the provisions of sections 54 and 59 of the Transfer of Property Act an oral transfer could effect neither a mortgage nor a sale and the defendants were entitled only to a charge on the land under section 55 (6) (*b*) for the purchase-money paid by them. **L. B.** MAUNG YEIK *v.* MAUNG PE TO, 8 BUR. L. T. 70 **886**

——————— **suit,** *decree in, application for order absolute for sale of—Limitation—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 5.*

An application for an order absolute for sale in a mortgage-suit is a proceeding in execution and must be made within the time prescribed by the Limitation Act. **C.** KRISHNA BAR *v.* RANAMOYI DEBI, 19 C. W. N. 470 **120**

——————— ———————*Money-decree — Purchase by prior mortgagee — Subsequent mortgage by heir—Suit for sale by subsequent mortgagee—Suit for declaration that house was not saleable by prior mortgagee, maintainability of.*

A creditor of a deceased Muhammadan cannot follow his estate into the hands of a *bona fide* purchaser for value to whom it has been alienated by an heir-at-law, whether the alienation had been by an absolute sale or by a mortgage.

Mortgage suit—concld.

One *A* mortgaged a house to the predecessor-in-title of the plaintiff. On *A's* death, his widow, *J*, mortgaged the same house to the defendant. The plaintiff brought a suit on his mortgage impleading the present defendant as a subsequent mortgagee, but he got only a simple money-decree in execution of which he put the house to sale and purchased it on 23rd June 1913. In the meantime the defendant had brought a suit upon his mortgage and obtained a decree for sale of the house on the 24th September 1912. The plaintiff then brought the present suit for a declaration that the house was not saleable in execution of the defendant's decree:

Held, that the plaintiff, by his auction purchase, acquired no title to the house which could override the rights of the defendant under his mortgage or under his decree. **A.** KAZMI JAN *v.* SHIB CHARAN **757**

Mortgagee—Tenant—Rent-paying grove mortgaged—Suit for arrears of rent against mortgagor—Mortgagee not made party—Ejectment of mortgagee **676**

Mortgagor and mortgagee—*Occupancy holding, mortgage of—Void mortgage—Mortgagor, if can eject mortgagee without paying mortgage-money—Landlord and tenant, relation of, if exists between.*

A mortgagor of an occupancy holding who has put the mortgagee in possession cannot eject him from the holding, on the ground merely that the mortgage is void under the Tenancy Act, without re-paying the mortgagee the money which he has received from him.

The relation of landlord and tenant does not exist between the mortgagor and the mortgagee, where rent is not payable by the mortgagor nor is there any contract, express or implied, but for which it would be payable. **U. P. B. R.** RUP SINGH *v. Musammat* BEERA **490**

Muhammadan Law. *See* PRE-EMPTION.

Divorce—*Wife, right of.*

Muhammadan Law does not give a wife any authority, except possibly in accordance with a contract entered into at the time of the marriage, to prevent her husband divorcing her by the pronouncing of *talak*. **U. B.** HASAN CHANEA *v.* MI SIN, U. B. R. 1915, II, 53; 16 CR. L. J. 531 **659**

Dower—*Father, whether can be made liable for dower-debt of his son—Majority Act (IX of 1875), s. 2, applicability of.*

Section 2 (*a*) of the Indian Majority Act provides that nothing in that Act shall affect the capacity of any person to act in the matter of dower and the fact that a Mussalman is a minor at the time of his marriage does not take away his liability to pay the dower of his wife.

Where the son was not a minor under the Muhammadan Law at the time of his marriage, his father, in the absence of a contract of guarantee, cannot be made liable for the dower payable by his son simply on the ground that the son has no property. **M.** SAYABKHAN SANDOJAI *v.* BEEBEE KHATHOO **587**

Muhammadan Law—contd.

Fosterage—*Natural son and foster daughter, marriage between, if legal—Relations of girl, if can question validity of marriage—*Factum valet, *principle of, how far applicable.*

Under Muhammadan Law the prohibition regarding marriage attaching to a woman's natural son and foster-daughter is absolute, and not conditional upon the birth of the one and the suckling of the other occurring within any limited period.

It is not lawful for a female to marry any of the sons of the woman who has suckled her, because they are her brothers by fosterage.

Where the paternal relations of a girl brought a suit questioning the validity of the girl's marriage within four months of the marriage, and it appeared that the guardian of the girl had been abusing his position as guardian:

Held, that there was no error in granting the plaintiffs' prayer and allowing the plaintiffs to question the validity of the marriage.

The principle of *factum valet* does not render good in law a marriage which ought not in law to have been celebrated. **C.** JANAB ALI MIA *v.* NAZAMADDIN PRADHANIA, 19 C. W. N. 897 **871**

Gift — *Necessity for delivery of possession—Minor, donee—Donor, de facto guardian—Gift of land—Delivery of possession how to be proved—Transfer of Property Act (IV of 1882), ss. 6 (a), 43—Transferor representing himself to be an absolute owner when he is not—Subsequent acquisition of title by inheritance—Transfer, validity of.*

Where the transferor represents himself to be absolute owner of the property transferred, when he is not, and on a date subsequent to the transfer, acquires title to such property by inheritance, the transfer is not a transfer *spes successionis* and invalid under section 6 *(a)* of the Transfer of Property Act but is one under section 43 of the Transfer of Property Act and is enforceable against the transferor.

The principle of section 43 of the Transfer of Property Act applies equally both to sales and mortgages.

Under Muhammadan Law, it is essential for the validity of a gift that there should be a transfer both of ownership and possession. What this possession is, is a question of fact in each case. Where the donor is the *de facto* guardian of the minor donee, a mere declaration of intention to hold the property on behalf of the minor is quite sufficient. But it is necessary that the person in whose possession the property is must be in a position to act on behalf of the owner; where he is not, the declaration would be of no effect. Everything depends upon the intention with which possession was held by the donor subsequent to the gift.

Where the property gifted is land, which can be enjoyed by receipt of its produce, possession will be deemed to be in the minor, only when it is shown, that after the gift, he was in receipt and enjoyment of such produce also.

In order that a gift in favour of a minor should be valid, it is not necessary that possession to complete his title must be given to his guardian alone; it is sufficient if there is a trustee who can act on his behalf.

Muhammadan Law—contd.

Where the donor himself is in possession of the property gifted, there must be some act of his, which must show that he intended to hold the property on behalf of the minor; where there is no such act the presumption is that he never intended to make any gift.

It would be inequitable to allow the visible means of a man to be narrowed down by a transaction not evidenced by a contract. **M.** ALAMANAYAKUNIGARI NABI SAB *v.* MURUKUTI PAPIAH **439**

——— **Marriage**—*Apostasy, effect of—Motive, immaterial.*

Under the Muhammadan Law the fact of either or both of the parties to a Muhammadan marriage renouncing the Muhammadan religion has the effect of dissolving the marriage *ipso facto.*

If the apostasy is an accomplished fact and if it is not proved to be a colourable transaction, the Court cannot decline to give effect to it because the underlying motive was not a proper one. **P.** GHAUS *v.* FAJJI, 123 P. W. R. 1915 **857**

——— *Betrothal contract—Girl breaking betrothal on attaining majority—Non-liability of her guardian for damages.*

A Muhammadan girl, after attaining the age of majority, is at perfect liberty to marry any man she likes; and if she then breaks her betrothal contract made by any of her guardians during her minority, neither the guardian nor his representative-in-interest is liable for any damage on account of the breach. **P.** IMAM DIN *v.* KAMAL, 82 P. W. R. 1915; 168 P. L. R 1915 **750**

——— *between a* Hanafi *and a* Shafi *girl—Girl's father not consenting—Marriage, if valid*—Siyeeba.

Where the marriage ceremony between a *Hanafi* and a *Shafi* girl was hurriedly and clandestinely gone through with the knowledge that the girl's father did not and would not consent to it, and to satisfy the Mullah, should that be necessary, the story of her conversion to the *Hanafi* sect was invented:

Held, that the circumstances under which and the manner in which the so-called marriage was performed were such that the usual presumption in favour of its validity could not be made;

that it was invalid for want of consent of the girl's father;

that under *Shafi* Law a woman who under any circumstances had connection with a man became *Siyeeba*. **L. B.** FAHIMA BI *v.* MAHAMED SALEH, 8 L. B. R. 54 **866**

——— **Succession**—*Heirs deceased Muhammadan—Tenants-in-common—Heir, one, right of, when barred—Adverse possession—Knowledge—Execution suit for share—Limitation Act (IX of 1908), Sch. I, Arts. 120, 144, when applicable.*

To a suit brought by one of the heirs to recover his share of the estate left by a Muhammadan who died intestate, Article 144 of the Limitation Act is applicable if the property is immoveable, but if it is moveable, Article 120 is applicable.

The heirs of a deceased Muhammadan take as tenants-in-common and the right of one heir to a share will not become barred, unless and until the other heirs set up an adverse right to the knowledge of that heir. Mere intention on their part will not affect the character of possession, nor is the heir bound to inquire whether there has been an adverse dealing with his property.

Where the other heirs are in entire charge of property, the heir sought to be excluded is not bound to assure himself that he is not excluded from inheritance and that his interests will not be looked after by them.

The right of an heir to claim interest arises only from the date when he makes a demand and that is met by a refusal. **M.** MARIAN BEEVIAMMAL *v.* KADIR MEERA SAHIB TARAGAN **275**

——— **Waqf property**—Mutawalli, *right of, to partition—Arrangement between* Mutawallis *as to enjoyment of* inam *lands—Right to question arrangement—Proper course—No* Mutawalli—*Court, jurisdiction of, how exercised—Suit for possession, maintainability of—Civil Procedure Code (Act V of 1908), s. 92, applicability of.*

There is no power in the *mutawalli* of a mosque to effect a partition of the land belonging to a mosque and where he purports to do this, his act is illegal.

Where there is an alienation of the *waqf* property anybody interested in its due administration may question it, though he is not the *mutawalli* and not entitled to be put into possession of the property.

The texts of Muhammadan Law ordinarily contemplate only one *mutawalli*, but when two or more persons are appointed with the intention that they should jointly administer a single *waqf*—and there is nothing to prevent such an appointment—their position would be similar to that of any other body of co-trustees. A "partition" between them would not affect their legal position or joint responsibility.

Where there is a *waqf* and no person is lawfully administering it, the Court can designate a person who, in accordance with the terms of the dedication, is entitled to act as *mutawalli* or, if there is no *waqfnamah*, it can appoint somebody as *mutawalli* and for the proper administration of the *waqf* can remove a *mutawalli*.

Such jurisdiction can be exercised only by "directions necessary for the administration" of the trust.

A person without instituting a suit under section 92 of the Civil Procedure Code cannot seek to oust from possession, persons who claim to hold as trustees. **M.** MAHOMED GHOUSE *v.* MOIDEEN SIDDIKH, 18 M. L. T. 48 **849**

Murder. *See* PENAL CODE, ss. 299, 300.

Mutation—*Oudh* taluqa—*Law of primogeniture—History of estate—Will of doubtful validity—Stranger—Male collateral.*

An Oudh *taluqa* had always descended, until the death of one *S*, strictly according to the law of primogeniture to the nearest male relative. Under a Will of *S*, at first his mother and upon his mother's death his daughter succeeded to the *taluqa*. Upon the daughter's death her husband claimed the estate under an alleged Will of his deceased wife:

Held, that having regard to the past history of the estate it should not be mutated in favour of an utter stranger on the basis of an alleged Will, until its validity was established in a Civil Court

Mutation—concld.

but should be mutated in favour of the nearest male collateral of *S*, who appeared to be the person best entitled to the property. **U. P. B. R.** SITLA BUX SINGH *v.* GAJRAJ SINGH **651**

Mutwalli, right of. *See* PARTITION.

——— *Civil Procedure Code (Act V of 1908), s. 92, scope of reliefs under*—Mutwalli, *appointment of, by founder*—Mutwalli, *when and how can resign* mutwalliship—*Appointment by founder, how far affects original deed of* wakf.

Where the plaintiff does not claim any of the reliefs under section 92 of the Code of Civil Procedure and does not ask the Court to appoint him a *mutwalli*, but only asks to declare that he is the rightful *mutwalli*, and where the defendant is not sued for recovery of possession:

Held, that the suit is incompetent.

A *mutwalli* who is not himself the appropriator cannot renounce and appoint another *mutwalli*.

If the *mutwalli* appointed by the founder says, "I resign my *mutwallishíp*," this declaration has no effect unless it is made in the presence of the founder or the *Cadi*, who would thereupon remove him.

An appointment of *mutwalli* by the founder cannot enure against the express terms of the original deed of *wakf* and must terminate with the life of the *wakif*. **C.** ABDUL GHAFOOR MIAH *v.* ALTAF HOSAIN **423**

Negotiable Instruments Act (XXVI of 1881), ss. 9, 32, 56, 59—*Promissory note, maker of, liability of—Continuing security—Indorsements, effects of—Fraud, person liable for.*

The maker of a promissory note undertakes and is bound to pay at its maturity according to its apparent tenor.

A promissory note payable on demand is regarded as a continuing security.

Indorsements of payment may be made on a negotiable instrument under section 56 of the Negotiable Instruments Act, (XXVI of 1881) and the note then becomes negotiable only for the balance due but if no indorsement is made, the note remains negotiable for the full amount expressed on it.

If the payee commits fraud by transferring the note for the full value without informing the indorsee that some payments have been made, the person to suffer by the fraud is the person who by his omission to insist on his payments being indorsed on the note enabled the fraud to be committed. **L. B.** VITHALDAS KHANDAS *v.* INDRAVELLU, 8 BUR. L. T. 161 **936**

——— ——— ——— *Material alteration—Promissory note—Finding—Revision.*

In a suit on a promissory note one of the defences was that the document had been materially altered and as such could not be the basis of a suit. The Small Cause Court Judge did not record any definite finding as to the note being materially altered and decreed the plaintiff's suit on the ground that even if the note was executed on the date alleged, the suit was within time by reason of the payment of interest within time:

Held, that as the promissory note was not payable to the plaintiff or his order, it was not a negotiable instrument within the meaning of section 87 of the

Negotiable Instruments Act—concld.

Negotiable Instruments Act and justice having been done between the parties, it was not proper for the High Court to interfere in revision and remand the case for a finding as to material alteration. **A.** MAKHDUM BAKHSH *v.* SHAUKAT ALI, 13 A. L. J. 683 **1008**

——— ——— ——— **s. 32** **936**

——— ——— ——— **s. 37**—*Pro-note—Joint promisors, liability of—Evidence Act (I of 1872), s. 92—Contract Act (IX of 1872), ss. 44, 134.*

The executants of a pro-note should be regarded as principal debtors under section 37 of the Negotiable Instruments Act, 1881, in the absence of a contract to the contrary. In such a case section 44 of the Contract Act applies and the plaintiff's relinquishment of his claim against one does not involve a discharge of the other. **L. B.** VELLIAN CHETTY *v.* WOOMIDY VIRAMAH **760**

——— ——— ——— **s. 56** **936**

——— ——— ——— **s. 78**—*Promissory note—Suit by beneficial owner, whether maintainable.*

A person who is entitled to the possession of a promissory note in his own name is alone entitled to sue upon it whether the instrument be negotiable or not. **A.** DORI LAL *v.* SEWAK RAM, 13 A. L. J. 695 **988**

——— ——— ——— **s. 87** **1008**

——— ——— ——— **s. 359** **936**

Non-transferable occupancy holding—Sale of, effect of **734**

North-Western Provinces Rent Act (XVIII of 1873)—*Compensation—Improvements*—Thekadar, *whether a tenant*—Thekadar's *right to make improvements and claim compensation.*

The appellant held certain land as a *thekadar* under a lease of 1859, which provided that he should make *bandhis* and establish hamlets. The *zemindar* brought the present suit for ejectment and the *thekadar*-appellant claimed compensation for improvements made by him before 1880:

Held, that the claim was governed by the provisions of the N.-W. Provinces Rent Act, XVIII of 1873, which allowed compensation for improvements to a tenant, but did not define the term 'tenant', and that it not being clear whether a '*thekadar*' was entitled to get compensation under that section, his claim must be dismissed. **U. P. B. R.** DILAWAR BUX *v.* DATA DIN **478**

Notice. *See* CENTRAL PROVINCES MUNICIPAL ACT, s. 66 (5); OUDH RENT ACT, s. 107E (*b*).

Occupancy holding, mortgage of, validity of—Mortgagor, if can eject mortgagee without payment of money **490**

——— ——— ——— *—Mortgage before Agra Tenancy Act (II of 1901)—Relinquishment after Act, effect of.*

Where an occupancy holding was usufructuarily mortgaged for good consideration before the passing of the Agra Tenancy Act and where the mortgagor after passing of the Act relinquished the holding to defeat the mortgagee's rights:

Held, that the relinquishment was ineffectual against the mortgagee. **A.** BIRJ KUMAR LAL *v.* SHEO KUMAR MISSIR, 13 A. L. J. 649 **215**

Occupancy holding—concld.

——— ——— ———, *if can be sold—Co-sharer landlord decree-holder, position of Holding not to be sold, if* raiyat *objects—Transfer, involuntary, of whole or part of holding, how far valid.*

An occupancy holding which is not saleable by custom or usage cannot be sold in execution of a decree obtained by a co-sharer landlord for his share of the rent, and in this respect a co-sharer landlord is in the same position as an ordinary executing creditor.

A *raiyat* is entitled to have a sale of his holding in execution of a money-decree set aside after it takes place, and the holding cannot be sold in execution of such a decree where the *raiyat* objects to the sale before it takes place.

A non-transferable occupancy holding is not a saleable property.

The principle deducible from the decision in *Dayamoyi* v. *Ananda Mohan Roy Chowdhury*, 27 Ind. Cas. 61; 20 C. L. J. 52; 42 C. 172; 18 C. W. N. 971 (F. B.), is applicable to an involuntary transfer of the whole as well as of a part of the holding.

A co-sharer landlord is not entitled to sell the whole or part of the occupancy holding of the *raiyat* in execution of a decree obtained by him against the *raiyat*. **C.** BADARENNESSA *v.* ALAM GAZI, 19 C. W. N. 814; 21 C. L. J. 650 **877**

——— ——— ———*Suit for declaration of title between rival tenants—Landlord not party to suit—Civil or Revenue Court—Jurisdiction.*

A suit between rival claimants to an occupancy holding, to which the landlord is no party, for a declaration of title or in the alternative for possession is cognizable by a Civil Court. **A.** INAYAT-UN-NISSA *v.* SALIM-UN-NISSA **568**

Occupancy right, acquisition of. *See* AGRA TENANCY ACT, s. 11.

——— ——— ———, non-transferability of. *See* BENGAL TENANCY ACT, s. 49.

——— ——— ——— in accretion, acquisition of—Limitation **37**

Oudh Rent Act (XII of 1881), s. 9—*Agra Tenancy Act (II of* 1901*), s.* 22*—Male occupancy tenant dying while Rent Act in force—Succession by widow—Widow dying after Tenancy Act came in force—Succession—Brother's right to succeed without proving sharing in cultivation.*

The plots in suit along with other plots were the joint holding of three brothers *R, J* and *K*, who separated in the life-time of *K* and a division of holding took place. *K* died while the Rent Act was in force and was succeeded by his widow who died after the coming into force of the Tenancy Act. Upon the widow's death, *R* and the son of *J* who had died claimed the holding.

Held, that the widow having died while the new Act was in force, succession was governed by section 22 of the Tenancy Act and not by section 9 of the Rent Act and that *R* was, therefore, entitled to succeed his brother *K* without any sharing in cultivation being proved.

But the son of *J* not having co-shared in cultivation with *K* at the latter's death could not succeed to the holding. **U. P. B. R.** RAMANAND RAI *v.* MUHAMMAD ABDUL BASHAR **548**

Oudh Rent Act (XXII of 1886), s. 5—*Occupancy rights—Mortgage, if loss of proprietary rights—Foreclosure, effect of—Loss of proprietary rights after annexation—Accrual of occupancy rights.*

Under section 5 of the Oudh Rent Act, occupancy rights arise only when there has been a complete loss of proprietary rights and do not arise when the proprietor retains part of his proprietary rights, as in the case of a mortgage. In the case of a mortgage, complete loss of proprietary rights occurs only when a decree for foreclosure is obtained.

Occupancy rights arise under section 5 of the Oudh Rent Act, XXII of 1886, not only in favour of those proprietors who have lost their proprietary rights before the date of annexation of Oudh (13th day of February 1856), but also in favour of those who have so lost their rights between that date and 24th day of August 1866. **U. P. B. R.** MATA PRASAD *v.* SHEO RAJ KUAR **401**

——— ——— **S. 5,** *occupancy rights, claim of, under—Proprietary rights—Inconsistent claims—Relinquishment of under-proprietary rights, effect of—Portion added to holding not insignificant part of holding, effect of.*

Occupancy rights cannot be decreed under section 5 of the Oudh Rent Act in favour of persons in whose favour is also decreed a *prima facie* claim to under-proprietary rights.

The mere fact that sub-settlement was refused with the ancestors of the appellants, does not affect their under-proprietary rights in the land held as *sir* or *nankar* but if they made a petition relinquishing all claims to the village and to *sir* and *nankar* the petition is fatal to the appellants' claim as under-proprietors but it cannot affect their claim to occupancy rights in land in which those rights have been established.

Selected Decision No. 2 of 1912 does not apply to cases where the portion added to a holding is not an insignificant part of the total, and when there is nothing to show that there has not been any alteration in the rent after it came under cultivation. **U. P. B. R.** BABOO RAM TEWARI *v.* BHAGWAN BUX SINGH **653**

——— ——— **S. 5**—'Qabzadari,' *meaning of—Right of occupancy.*

The word "*qabzadari*" in a decree made at the last Settlement is not to be invariably construed to mean *right of occupancy*. The meaning to be attached to the term must be ascertained from a careful consideration of the claim made before, and the judgment recorded by the Settlement Officer.

Where, therefore, the Settlement Officer's finding was that the appellant's ancestors were never the proprietors of the village but had been treated as proprietors on the strength of many years' possession of the village as lessees:

Held, that the appellant could not be deemed to possess a right of occupancy under section 5 of Oudh Rent Act. **U. P. B. R.** RAM DIAL *v.* BISHNATH SINGH **653**

——— ——— **S. 32 (1)**—*Application for appraisement of produce—Notice not issued, effect of—Award by* amin, *legality of.*

Where a Court receiving an application for the appraisement of produce ordered the *kurk amin* to appraise the crops without issuing to the opposite party the notice required by section 32 (1) of the Oudh Rent Act:

Oudh Rent Act—(1886)—contd.

Held, that the order of appraisement was illegal and consequently the award by the *amin* was null and void. **U. P. B. R.** MAHABIR *v.* RAMESHWAR BURE SINGH **475**

——— ——— ——— **ss. 33, 79**—*Tenant holding under a heritable, non-transferable lease—Enhancement or alteration of rent.*

Where a tenant holds a lease of *sir* land under a heritable but non-transferable lease, the rent of such a tenant cannot be enhanced under section 33 of the Oudh Rent Act, but it can be altered under section 79 of the Land Revenue Act at the time of Settlement. **U. P. B. R.** INDARDAWAN SINGH *v.* JAGDUTT SINGH **571**

——— ——— ——— **s. 55**—*Notice of ejectment—Proper rent not specified—Court-fee paid sufficient—Land from which ejectment sought, not specified—Notice, if defective.*

Where a notice of ejectment issued under section 55, Oudh Rent Act, 1886, did not specify the proper rent payable for the holding, but the Court-fee paid in respect thereof was sufficient to cover the proper and actual rent:

Held, that the notice was not defective, inasmuch as section 55 only requires that the notice shall specify the land from which the tenant is to be ejected. **U. P. B. R.** UDIT MISIR *v.* MUHAMMAD MEHDI ALI KHAN, 2 O. L. J. 298 **656**

——— ——— **s. 79** **571**

——— ——— ——— **s. 107A**, *applicabililty of—Land held at favourable rate of rent—Grant.*

Section 107A of the Oudh Rent Act does not apply to such lands as are held not under a grant, but in which the rate of rent is accidentally favourable to the tenant. **U. P. B. R.** RAGHUBAR *v.* THAKUR DIN **510**

——— ——— ——— **s. 107B** — *Rent-free grant—Judicial decision—Assessment of revenue.*

In a suit for assessment of revenue on a holding held rent-free in consideration of the surrender by the grantee of the previous proprietary rights there were upon record the judgments of 1865 of the Assistant Settlement Officer and Settlement Officer finding that the grantee was entitled to be maintained in rent-free possession of the land without payment of revenue:

Held, that the judgments were judicial decisions within the meaning of section 107B of the Oudh Rent Act, and that the grantee was entitled to hold the land rent-free. **U. P. B. R.** ZAIN ALI *v.* TASADDUQ RASUL KHAN **552**

——— ——— ——— **s. 107E (b)**—*Notice to resume land—Specific service not mentioned—Notice, defective, effect of.*

In a notice issued under section 107E (*b*), it is essential that the specific service which the proprietor no longer requires should be specifically mentioned, otherwise, the notice is defective and invalid. **U. P. B. R.** MAHARAJA OF BALRAMPUR *v.* PIRTHIPAL **547**

——— ——— ——— **s. 108 (5)**—*Contract Act (IX of 1872), s. 209—Agent—Accounts, suit for—Representative of deceased landlord, when can sue—Jurisdiction of Civil and Revenue Court.*

The representative of a deceased landlord can sue the agent employed by the former when alive for

Oudh Rent Act—(1886)—concld.

rendition of accounts of the period of his agency, and such a suit is cognizable by a Revenue Court. **U. P. B. R.** RAM SINGH *v.* INDER BAHÁDUR SINGH **679**

——— ——— ——— **ss. 108 (8), 126 (1)** **297**

——— ——— ——— **s. 126 (1)**—Lambardar *collecting rent—Right to eject.*

Where there is no specific and definite evidence on record to show that any co-sharer other than the *lambardar* collects rent of a definite portion of a holding, Selected Decision No. 2 of 1910 will not apply and the *lambardar* alone will be entitled to eject tenants by notice. **U. P. B. R.** BABU RAM *v.* JALPA SINGH **569**

——— ——— ——— **s. 129**—*Mortgage of* sir *before* 1901—*Sale of equity of redemption in* 1905—*Mortgagors minors—Ex-proprietary rights claimed by mother of minors—Mother's claim wrongly disallowed—No appeal preferred—Subsequent suit for declaration of ex-proprietary rights.*

The *sir* land in dispute was mortgaged before the passing of the Tenancy Act. In 1905 its equity of redemption was sold to one *D*, who applied for mutation in his favour. The mortgagors were four minor brothers and their mother on their behalf claimed ex-proprietary rights in the course of mutation proceedings. The Tahsildar rejected the claim in 1906, but his order was not objected to or appealed against and after that most of the land then claimed passed out of the possession of the four brothers. In 1913, two of the brothers on their own behalf as well as on behalf of the other two brothers who were still minors sued for a declaration of their ex-proprietary rights in the whole land:

Held, that inasmuch as the ex-proprietary rights arose in 1905 at the time of the sale of the equity of redemption and on their being disallowed by the Tahsildar, though wrongly, his order was not appealed against, the present claim was barred by section 129 of the Oudh Rent Act.

Obiter dictum.—Section 36 (3) is not very clear when it says that a case shall be referred to the Collector when ex-proprietary rights have been created, not where they have been claimed. **U. P. B. R.** PITAM SINGH *v.* DEBI PRASAD **675**

Partition. *See* HINDU LAW.

——— ——— *Common land*—Tirni *or grazing dues payment of, by person not proprietor paying land revenue—Proprietary right, if conferred.*

The payment of *tirni* (grazing dues) by a person who is not a proprietor paying land revenue does not confer upon him any right to share in the *shamilat* or common land of a *patti*. **P. C.** BAGGA *v.* SALEH, 19 C. W. N. 1023; 29 M. L. J. 137; 2 L. W. 706 **1005**

——— ——— Co-parceners—One co-parcener in possession of house site—Proper decree **183**

——— ——— *Co-tenancy—Subordinate interest, acquisition of, by one co-tenant, effect of—Partition, meaning of.*

Where *A* and *B* are in joint possession as joint owners, each is ordinarily entitled to claim partition against the other, and it is no valid answer to a claim for partition by *A* that *B* has acquired a subordinate interest over the whole property.

Partition—concld.

Property held in co-tenancy may be partitioned by suit and the only essential is that the property sought to be partitioned is held in co-tenancy.

Partition is the process by which property held by two or more persons in co-tenancy is converted into estates in severalty and thereby divided among them, with the result that the land which before partition was held and enjoyed jointly, is after partition held and enjoyed by the different parties according to the allotments made by Court. **C.** KALI CHURN *v.* MOHANANDA DATTA **467**

———, *entries made in course of, binding effect of—Meaning of* 'ghair maurusi 13 *years' and* 'khud kasht 19 *years'*.

The parties to a partition are bound by the entries made in the course of partition. The entry *'ghair maurusi* 13 years' would not mean an occupancy tenure but a non-occupancy one as the emphasis is on the nature of the tenure. Similarly, *'khudkasht* 19 years' means a non-occupancy tenure and cannot mean an ex-proprietary tenure. **U. P. B. R.** MAR ASRA CHAUDHRI *v.* BISHAN CHAUDHRI **559**

———, *suit for—Collection of rent by one of defendants subsequent to suit—Account—Procedure—Civil Procedure Code (Act V of* 1908*), s.* 47 *(2).*

Where in a partition suit it is alleged that one of the defendants collected rents of houses, the subject of suit, subsequent to the suit and the application is made to include that amount in the accounts between the parties, the proper course is not to treat the application as one for execution of the partition decree, but to treat it as a suit under section 47 (2) of the Code of Civil Procedure and to levy additional Court-fee thereon and to direct the parties to submit a true and correct account of the rents and profits collected. **M.** GOVINDA CHETTY *v.* DORAISWAMI CHETTY **905**

——— **decree**—Execution—Division by casting lots, legality of—Equitable rule **245**

Partnership. *See* CONTRACT.

——— *Contribution, suit for—Co-partners, liability of, for debts—Contract Act (IX of* 1872*), s.* 43*—Second appeal—New defence, if can be set up.*

Though partners are jointly liable to third persons a partner who pays more than his share of the partnership debt, whether voluntarily or not, is entitled to contribution from his co-partners.

Where the plaintiff and the defendants, members of a partnership firm, borrowed money in their individual capacity and were sued as such by their creditor and the decree obtained by the latter was executed not against the partnership property, but against the private property of the plaintiff alone:

Held, that the payment by the plaintiff to the decree-holder really signified that he had in substance been called upon to supply the entire capital, although the initial arrangement between the parties was that the capital should be furnished by all the share-holders in equal proportion, and that, therefore, a suit for contribution was maintainable.

In second appeal a defendant cannot be permitted to make a new case which involves the investigation of facts. **C.** LABAN SARDAR *v.* CHOYEN MALLICK, 19 C. W. N. 768 **811**

Partnership—concld.

———, *dissolution of—Receiver, appointment of—Purpose.*

The usual way of guarding the divergent interests of the partners when they fall out is by appointing a Receiver and ordering the good-will of the business and stock-in-trade to be sold, the partners being at liberty to bid at the sale. **L. B.** DOVER, E. F. *v.* DOVER, E. S., 8 BUR. L. T. 57 **684**

———Sale of excisable articles—Contract, legality of **480**

——— **firm**—Acknowledgment of debt—Receiver, acknowledgment by, how far affords starting date for fresh period of limitation—Limitation Act (IX of 1908), s. 19 **27**

Party—Mortgage—Representation—*Mitakshara* family—Redemption, equity of, member of *Mitakshara* family having interest in—Failure to produce that member before Court, effect of—Transfer of Property Act (IV of 1882), s. 85, scope of **752**

Patents and Designs Act (II of 1911), ss. 26, 28—*Petition for revocation of patent—Burden of proof.*

In a petition under section 26 of the Patents and Designs Act (II of 1911) for revocation of a patent, the onus lies heavily on the petitioner to show that the respondent is not the true and first inventor of the invention. **P.** THAKAR DAS *v.* SHAH DIN, 74 P. W. R. 1915; 148 P. L. R. 1915 **904**

——— **s. 28** **904**

Penal Code (Act XLV of 1860), s. 59 **826**

——— **ss. 75, 59**—*Sentence—Transportation for life or for ten years.*

Under section 75 of the Indian Penal Code, the Court, if it awards a sentence of transportation, must sentence the convict to transportation for life.

In lieu, however, of such sentence it may sentence the convict to imprisonment of either description for a term which may extend to ten years, and under the provisions of section 59 of the Code, it may, in every case in which the offender is punishable with imprisonment for a term of seven years or upwards, instead of awarding sentence of imprisonment, sentence the offender to transportation for a term not less than seven years, and not exceeding the term for which under the Code such offender is liable to imprisonment. **P.** MUHAMMAD SHARIF *v.* EMPEROR, 14 P. R 1915 CR.; 16 CR. L. J. 554; 29 P. W. R. 1915 CR. **826**

——— **ss. 99, 141, 149**—*Right to defend immoveable property—Person in possession, whether can use force—Test of criminality—Resistance to aggressor, right of.*

Every person has a right, subject to the restrictions contained in section 99, Indian Penal Code, to defend his immoveable property.

Once a man is in possession of his own property, he is entitled to use force to defend it.

In cases where a free fight has taken place for the possession of certain property between two parties, the test of criminality is—was accused in possession or not in possession at the time when the alleged offence was committed.

Penal Code—contd.

It is no offence under section 149, Indian Penal Code, to resist an aggressor unless the aggression be in execution of the law or of some legal process.

Where the accused and his party were entitled to enter upon certain land and to reap the crop and the complainant with his party came upon the scene to remonstrate and (presumably also) to prevent them from reaping the crop, and a fight took place in which persons on both sides were injured:

Held, that the primary object of the accused party having been to retain possession of the land and to reap the crop, and not to obtain possession of any property or "to enforce any right or supposed right," they were not guilty of committing any criminal offence by the mere entry on the land or by defending the accused's property against aggression. **S.** LASHKARI KHAN *v.* EMPEROR, 8 S. L. R. 34"; 16 CR. L. J. 536 **664**

——— **ss. 109, 352**—*Inducing others to beat without taking part—Abetment.*

A person who merely says "beat" but does not take any part himself, can only be convicted of abetment of an offence under section 352 of the Penal Code. **M.** MIR HYDER SAHEB, *In re*, 16 CR. L. J. 456 **88**

——— **ss. 120A, 120B**—*Criminal conspiracy, person when guilty of.*

Sections 120A and 120B did not find a place in the Indian Penal Code, before the 27th March 1913, when Act VIII of 1913 became law; and, therefore, persons accused under section 120B cannot be convicted, unless the prosecution establishes that the accused were members of a conspiracy after the 27th March 1913. **C.** AMRIT LAL HAZRA *v.* EMPEROR, 21 C. L. J. 331; 19 C. W. N. 676; 16 CR. L. J. 497 **513**

——— **s. 120B** **513**

——— **s. 141** **664**

——— **ss. 148, 149**—*Members of unlawful assembly—Only one member possessed of gun—Persons not in possession of any gun, offence committed by—Several offences—Acquittal of some of them—Sentence, reduction of.*

Where of the several persons charged with rioting armed with a deadly weapon only one is proved to have been possessed of a gun, it is illegal to convict others who had no such dangerous weapon of an offence under section 149 of the Indian Penal Code.

Where there has been an acquittal of the accused of some of the offences of which they were convicted, there must be a proportionate reduction in the sentences also. **M.** CHOITANO RANTO, *In re*, 16 CR. L. J. 446 **78**

——— **ss. 149** **78, 664**

——— **ss. 149, 302**—*Assault—Death caused by assault—Common object—Offence.*

In an attempt to rescue certain cattle from being driven to the pound one of the persons of the accused party ordered the others to use their *lathis* and beat the other party. The *lathis* were at once used with the result that one of the opponents died:

Held, that the offence was committed in furtherance of the common object of the party and each one of the accused was guilty of an offence under section 302 of the Penal Code. **A.** RASUL KHAN *v.* EMPEROR, 13 A. L. J. 470; 16 CR. L. J. 459 **91**

Penal Code—contd.

——— **s. 182** **89**

——— **s. 189** **109**

——— **s. 209** **71**

——— **s. 215**—*Cow lost from grazing ground—Taking money and promising to return cow, whether constitutes offence.*

In order to constitute an offence under section 215, Indian Penal Code, it is necessary that the moveable property in question should have been taken out of the possession of some person by means of an offence punishable under the Code.

Where, therefore, the complainant's cow was lost from the grazing ground and the accused took Rs. 12 from him and promised to return the cow in ten days' time, but did not do so and subsequently refused to return either the cow or the money:

Held, that as there was no proof that any offence had been committed in respect of the cow, the accused could not be convicted under section 215, Indian Penal Code. **P.** SHARFA *v.* EMPEROR, 9 P. R. 1915 CR.; 16 CR. L. J. 541 **669**

——— **ss. 217, 411**—*Police Officer retaining property found in search for theft—Property not part of stolen property—Offence—Criminal Procedure Code (Act V of 1898), s. 523—Failure to report.*

A Police constable, who retained for himself a piece of gold found in a search for stolen property but not proved to be part of the stolen property and failed to report his possession to his superior officers under section 523 of the Code of Criminal Procedure, is guilty of an offence under section 217 of the Penal Code. **M.** B. DASAPPA, *In re*, 16 CR. L. J. 453 **85**

——— **s 283**—*Obstruction left on public road—Obstruction likely to be caused—Inference—Individual obstruction, proof of, necessity of.*

Where a *prabha* left lying in a public road could not fail to cause obstruction to any person who had occasion to pass along that road:

Held, that though obstruction to any individual was not expressly proved, it was a matter of necessary inference. **M.** VENKAPPA, *In re*, 38 M. 305; 16 CR. L. J. 560 **832**

——— **ss 299, 300 (3), 304**—*Murder, culpable homicide not amounting to—Injuries inflicted not sufficient but likely to cause death—Offence.*

Where the injuries proved to have been inflicted were found not sufficient in the ordinary course of nature to cause death, but quite likely to have produced death:

Held, that the offence committed did not amount to murder, but only to culpable homicide not amounting to murder. **S.** DARHOON *v.* EMPEROR, 8 S. L. R. 337; 16 CR. L. J. 472 **104**

——— **s. 300 (3)** **104**

——— **s. 300 (3)**—*Murder—Medical opinion based on misconception of facts, value of—Injury likely to cause death.*

A Medical Officer's opinion that the injuries inflicted were not serious, which is based upon a misconception

Penal Code—contd.

of facts, should be disregarded when the evidence shows that the injuries inflicted were one inch deep and they pierced the pleura, which, in the ordinary course of events, is sufficient to cause death. **M.** PUBLIC PROSECUTOR *v.* THANDAVAN CHETTY, 16 CR. L. J. 543 **671**

——— ——— **s. 302** **91**

——— ——— **s. 304** **104**

——— ——— **s. 307**—*Discharging loaded gun from short distance—Causing injuries which might have proved fatal—Offence.*

A person intentionally discharging a loaded gun at another from a short distance inflicting injuries which might have proved fatal is guilty of an offence under section 307 of the Indian Penal Code, and not merely of causing grievous hurt. **M.** PUBLIC PROSECUTOR *v.* KOLANGARET IMBICHIKUTTAM, 16 CR. L. J. 543 **670**

——— ——— **s. 307**—*Infliction of many incised wounds on head—Inference—Murderous intent—Benefit of doubt.*

A culprit who inflicts 10 incised wounds on the body of a person, most of which are aimed at his head, must be credited with murderous intent.

Where several persons profess to be eye-witnesses standing at a short distance from the scene of the crime but fail to explain satisfactorily why none of them did not come to the rescue of the injured man, the probability is that they did not see the assault. In such a case the evidence of the complainant should be accepted with reservations and the benefit of the doubt should be given to those against whom it is not sufficiently corroborated. **P.** GAYAN SINGH *v.* EMPEROR, 13 P. W. R. 1915; 132 P. L. R. 1915 **94**

——— ——— **ss. 323, 332**—*Excise Inspector searching house—Irregularities—Public servant—Discharge of duty—Hurt caused to Inspector—Offence.*

An Excise Inspector in searching the house of the applicant on the suspicion that he might find there cocaine committed a number of irregularities in conducting this search. He had no warrant authorizing him to make the search. He brought with him only one search witness and directed a constable to scale the outer wall of the house. The accused caused hurt to the Inspector and the constables:

Held, that the Inspector and the constables were not acting in the discharge of their duties as public servants and that, therefore, the accused were not guilty under section 332 but only under section 323 of the Penal Code. **A.** MUKHTAR AHMAD *v.* EMPEROR, 13 A. L. J. 439; 37 A. 353; 16 CR. L. J. 495 **335**

——— ——— **s. 332** **335**

——— ——— **ss. 337, 338**—Hakim *performing operation on eyelids—Ordinary precautions not taken—Acting rashly and negligently—Hurt—Offence*—Hakim *giving himself out as skilled operator, liability of.*

The accused, a *Hakim*, performed an operation on the outer side of the upper lid of the right eye of the complainant. The instruments used were a pair of scissors and a needle, which would be ordinarily used by a tailor and not by an eye-surgeon. The wound was sutured with an ordinary thread. The most ordinary precautions were entirely neglected. The operation was needless and was not in accordance with any recognized Indian method:

Held, that the accused acted so rashly and negligently as to endanger human life or the personal safety of another; that as there was not the permanent privation of the sight of either eye in consequence of the operation the accused was guilty of an offence under section 337, Indian Penal Code, and not under section 338, Indian Penal Code.

Where a *Hakim* gives out that he is a skilled operator and charges considerable fees, the public are entitled to the ordinary precautions which surgical knowledge regards as imperative. **B** GULAM HYDER PANJABI *v.* EMPEROR, 17 BOM. L. R. 384; 16 CR. L. J. 437 **69**

——— ——— **s. 338** **69**

——— ——— **s. 352** **88**

——— ——— **ss. 378, ills. (a), 425**—*Theft—Trees, cutting of, to annoy—Offence—Mischief.*

Theft of trees will be committed only when they were cut to remove them from the possession of the owner, and not when the cutting was merely to annoy him. The act will amount only to mischief. **M.** *In re*, KUTTIATH ODAYOTH VEETIL KOMAR NAMBIAR, 16 CR. L. J. 544 **672**

——— ——— **s. 379**—*Accused found in possession of skin of missing goat—Charge of theft—Identification doubtful—Verdict of Jury, when can be set aside—Criminal Procedure Code (Act V of 1898), s. 307 (3).*

When the accused was found in possession of two freshly flayed skins of a goat and kid within 24 hours of the theft and was charged under section 379 of the Penal Code:

Held (*Spencer, J., dissenting*), (1) that it was absolutely necessary for the prosecution to establish that the skins found on the accused were those of the goats recently stolen;

(2) that as the prosecution witnesses had not seen the skins for more than three weeks after the theft, the Jury were not wrong in holding that the identification was suspicious;

(3) that the accused was entitled to the benefit of the doubt and ought to be acquitted.

It is not necessary to show that the verdict of a Jury is perverse and manifestly unreasonable before the High Court can set it aside, but as the Jury are Judges of fact, before their verdict is set aside, it must be established that the conclusion come to by them does not follow from the evidence recorded in the case. **M.** *In re* IRULA SADAYAN, 16 CR. L. J. 440 **72**

——— ——— **s. 405** **671**

——— ——— **s. 409**—*Managing Director of Bank borrowing money in his own name—Subsequent transfer of liability to Bank, whether amounts to criminal breach of trust—Adequacy of motive.*

The accused, the Managing Director of the Hindustan Bank, executed in favour of the Amritsar Bank, four *hundis* for an aggregate sum of Rs. 5,000 payable six months after date and after deducting the discount he

Penal Code—contd.

received the balance Rs: 4,772-11 and got it credited in his floating account with the Hindustan Bank. Some months before due date the accused caused entries to be made in the books of the Hindustan Bank by which the liability for re-payment on the date of maturity of the *hundis* was transferred from himself to the Hindustan Bank:

Held, (1) that the prosecution had failed to prove that the accused was guilty of the offence of criminal breach of trust;

(2) that the motive for the crime was under the circumstances of the case wholly inadequate;

(3) that the evidence on the record led to the inference that the loan was contracted *ab initio* for the Hindustan Bank for meeting immediate or prospective demands. **P** DAULAT RAI *v.* EMPEROR, 24 P. W. R. 1915 CR; 162 P. L. R. 1915; 16 CR. L. J. 54 **86**

——— — **ss. 409, 477A**—*Debtor executing* hundi *in favour of Bank—Managing Director paying off his own debt in discounting* hundi, *whether amounts to criminal misappropriation—Falsification of document.*

A debtor of the Hindustan Bank executed in its avour certain *hundis* for Rs. 30,000 payable after six months. The Bank being in need of ready money the Managing Director, the accused in the case, asked the Co-operative Bank to discount the *hundis*. But the Bank refused to do so unless the Director cleared his own account with it. In order to secure ready money the accused brought forward his own son, who put in an application for a loan from the Hindustan Bank for the exact amount of the accused's debt to the Co-operative Bank. The accused sanctioned the loan as agent on the security of his own moneys in the hands of the Hindustan Bank and then cleared his debit balance with the Co-operative Bank. This transaction formed the subject of the charges under sections 409 and 477A of the Penal Code:

Held, (1) that the prosecution had failed to establish the charge of criminal misappropriation inasmuch as the accused, in his anxiety to secure ready money for his Bank, chose a method which could not be said to have injured it;

(2) that the prosecution had failed to prove that the application of the accused's son for loan and the accused's order thereon of sanction were really ante-dated and the charge of falsification of documents could not, therefore, be sustained. **P.** DAULAT RAI *v.* EMPEROR, 25 P. W. R. 1915 CR.; 164 P. L. R. 1915; 16 CR. L. J. 443 **75**

——— **ss. 409, 477A**—*Managing Director of Bank deceiving share-holders as to the real profits—Wrongful personal gain—Falsification of balance sheet—Balance sheet, whether a "writing" within the meaning of the section—Compensation to share-holders—Companies Act (VI of 1882), s. 214.*

Where the accused, the Managing Director of the Hindustan Bank, wishing the Bank to make a better show than the real facts of its working would warrant, in order to maintain the confidence of the share-holders and the public and so to make possible a project for increasing largely the Bank's capital, on the 17th December 1912 got his son to present a pro-note for Rs. 3,000 to the Bank, treated this Rs. 3,000 as a *pro tanto* addition to the profits for 1912 by reducing on paper to that extent his remuneration account for Rs. 4,050, which he had actually drawn, to Rs. 1,050 and thus deceiving the share-holders at their general meeting in the following March as to the real profits, induced them to declare a dividend of 6 per cent. instead of some 3 per cent. which would otherwise have been the most possible:

Held, (1) that the accused was guilty under section 409 of the Penal Code, because being entrusted with the property of the Bank, he dishonestly used and disposed of some of that property contrary to the Bank's Articles of Association causing the share-holders to declare a dividend larger than the profits warranted;

(2) that both the Managing Director and the Manager of the Head Office were guilty under section 477A of the Penal Code as they had "falsified" the balance sheet of 1912 and the books of the Bank by showing as profits Rs. 3,000 which were not profits, the falsification being nontheless complete because they had first manufactured pro-notes, etc., in order to give to the falsified balance sheet and books an appearance of correctness;

(3) that a Bank's balance sheet is a paper or writing belonging to the Bank; and

(4) that the Director was guilty of "misfeasance" "and breach of trust" and by inducing the share-holders to pay a dividend partly out of what was really capital he "misapplied" the Company's money and, therefore, could be compelled by the Court to contribute a reasonable sum by way of compensation. **P.** DAULAT RAI *v.* EMPEROR, 23 P. W. R. 1915 CR.; 167 P. L. R. 1915; 16 CR. L. J. 473 **105**

——— ——— **s. 411** **85**

——— ——— **s. 415** **65**

——— ——— ——— **ss. 420, 467**—*Current coin title to—Proceeds of cheating paid in satisfaction of debt—Right of creditors to retain money—Criminal Procedure Code (Act V of 1898), s. 517.*

Title to money which is current coin of the realm passes by mere delivery to a person who receives it in satisfaction of a lawful debt due to him.

Where, therefore, during the Police investigation of a case under sections 420 and 467 of the Penal Code, it appeared that the accused had delivered over a sum of Rs. 1,168 to his creditors, this money being part of the proceeds of cheating, and the Police recovered it from the creditors:

Held, that the creditors were entitled to the money and that it must be returned to them. **P.** EMPEROR *v.* BAIJ NATH, 1 P. R. 1915 CR.; 165 P. L. R. 1915; 16 CR. L. J. 460 **92**

——— ——— **s. 425** **672**

——— ——— ——— **s. 430**—*Intention to cause wrongful loss essential—Sessions Judge dismissing appeal on reasons given in a theft case—Irregularity.*

Where an accused is charged with an offence punishable under section 430, Indian Penal Code, his intention to cause wrongful loss is the essential element to be considered.

Where the Sessions Judge dismissed an appeal against a conviction under section 340 by referring to the reason given in the judgment in a connected case, in which the accused's conviction was upheld under section 379;

Penal Code—concld.

Held, that the Sessions Judge had acted irregularly in not taking into consideraton the intention requisite for constituting an offence under section 430. **M.** INDRA TALAVAR *v.* NARASIMHA RAU, 16 CR. L. J. 542 **670**

——— **s. 456**—*Lurking house trespass—Criminal intent—Burden of proof.*

The accused who was a complete stranger was found inside the complainant's house at 2 A. M. in the morning, having entered the house by a door which the complainant had taken care to secure at night. When arrested, the accused said that he had gone inside the house in connection with an illegal intimacy with the complainant's aunt, who was a widow:

Held, that the accused was guilty under section 456 of the Penal Code.

Held, further, that as the intent with which he went inside was a matter within the knowledge of the accused, the burden of proving that his intention was an honest intention lay on him. **A** MULLA *v.* EMPEROR, 13 A. L. J. 625; 37 A. 395; 16 CR. L. J. 435 **67**

——— **s. 467** **92**

——— ——— **s. 477A** **75, 105**

——— ——— **s. 500**—*Defamatory statement—Publication of libel.*

The accused made certain defamatory statements against a Government Official in her petition to the Lieutenant-Governor, and on inquiry she repeated the same statements before two Magistrates on different occasions:

Held, that the statements made before the two Magistrates were the publication of the original defamatory statements made in the memorial to the Lieutenant-Governor and the accused was guilty of three separate publications of the libel. **A.** JAI DEBI KUAR *v.* EMPEROR, 13 A. L. J. 681; 16 CR. L. J. 482 **322**

——— ——— **s. 504** **109**

Pension rules—Civil Service Regulations, Articles 458, 464, interpretation of—Officer removed from Government service, whether entitled to pension under Article 458 **252**

Pensions Act (XXIII of 1871), ss. 4, 6—*Assignment of Government revenue—Declaration—Power of Civil Court—Jurisdiction.*

A Civil Court is precluded from making any declaration that would in any way directly or indirectly affect the liability of Government to pay a grant of Government revenue to any person. **A.** SECRETARY OF STATE *v.* JWAHIR LAL, 13 A. L. J. 460; 37 A. 338 **146**

Permanent lease, *grant of, by* shebait—*Legal necessity—Limitation Act (XV of 1877), Sch. II, Art. 134, scope of—Limitation Act (IX of 1908), s. 30, applicability of—Usufructuary mortgage by* shebait, *effect of.*

The grant of a permanent lease without legal necessity is in excess of the powers of the *shebait* who grants the lease.

Article 134 of the second Schedule to the Limitation Act of 1877 only applies to the purchase of an absolute interest and not to the grant of a permanent lease.

Permanent lease—concld.

In the Limitation Act IX of 1908 the word "transferred" was deliberately inserted in place of the word "purchased", in view of the decisions on the meaning of the word "purchased" in Article 134, Schedule II, of the Limitation Act of 1877.

The grant of a permanent lease at a considerable annual rent is a transfer for valuable consideration.

Section 30 of the Limitation Act, 1908, only applies where there is a period of limitation "prescribed," both by the Act of 1877 and the Act of 1908. Where the plaintiff cannot bring his case under section 30 the suit is barred by limitation under Article 134 of the first Schedule to the Limitation Act of 1908.

In a usufructuary mortgage of a *debuttar* property in favour of the Raja of Pachete the validity of the mortgage was not questioned:

Held, that it was not open to the *shebait* to determine, without the Raja's consent, the lease to the defendants, the benefit of which had been expressly assigned by the *shebait* to the Raja in the usufructuary mortgage to him, and the receipt of rent by the Raja after the institution of the suit proved the existence of the lease at least in the mind of the Raja. **C.** RAMESHWAR MALIA *v.* JIU THAKUR, 19 C. W. N. 1082 **337**

Perpetuities, rule against. *See* TRANSFER OF PROPERTY ACT, s. 14.

Plaint, once admitted, whether can be rejected subsequently **410**

———, valid presentation of—Limitation Act (IX of 1908), s. 4—Officer authorized to receive plaints absent from head-quarters—Court, whether closed Madras Civil Rules of Practice, r. 14, applicability of **449**

Pleadings Adverse possession and tenancy together pleaded—Inconsistent **655**

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———Fraud, coercion, misrepresentation and undue influence should be separately and specifically pleaded—General allegations insufficient **639**

——— Inconsistent with title alleged in complaint, if allowed **865**

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Possession, constructive, if applies to wrongdoer **156**

———, *recovery of, suit for—Purchaser's duty to inquire—Civil Procedure Code (Act V of 1908), s. 66, scope and meaning of*—Benami *purchases*—Benamidar's *position and title - Real owner's powers.*

It is bad law to hold that though a purchaser is not bound to inquire whether his vendor is the *benamidar* for another man, he is bound to ascertain whether or not he is the *benamidar* of a woman.

Section 66 of the Civil Procedure Code is clearly aimed at *benami* purchases at execution-sales.

A real purchaser cannot base a suit against his *benamidar* on the fact of possession.

The clear intention of section 66 of the Code is to stop *benami* purchases by making it impossible for the real owner to question the *benamidar's* title. **C.**, HANUMAN PERSAD THAKUR *v.* JADUNANDAN THAKUR **78**

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— — — — — , *recovery of, suit for—Civil Procedure Code (Act V of 1908), O. IX, rr. 8 and 9, scope of —Former dismissal of suit, when bar to future suit.*

Where the dismissal of a suit takes place under the provisions of section 102 of the old Code (Order IX, rule 8, of the new Code), the plaintiffs are precluded under Order IX, rule 9, (section 103 of the old Code) from bringing a fresh suit on the same cause of action. **C.** KALYAN SINGH *v.* RAM GULAM SINGH **902**

— — — — , *suit for—Party interested in the equity of redemption not made party in suit on mortgage, right of—Decree to be conditional on payment of mortgage-money.*

Where, in a suit for recovery of possession by the plaintiffs, it appeared that they, being interested in the equity of redemption in the property, were omitted from the previous suit whereby the defendants enforced their mortgage:

Held, that the defendants were not entitled to so omit the plaintiffs but that the plaintiffs could not get a decree for possession without any provision as to payment of what may be due under the mortgage to the defendants. **C.** MOHESH CHANDRA MUKHERJEE *v.* UMESH CHANDRA GHOSAL **742**

— — — , *suit for, by person purchasing from one who had no right to sell—Judgment-debtor, right of, to remain in possession until legally evicted.*

A person in possession of land is entitled to retain possession of it until some one who can show that he has a good title sues him and gets a decree.

A judgment-debtor whose land has been sold in execution can continue in possession of it until removed by due process of law in execution of the decree. **L. B.** MOUNG TE *v.* MOUNG OH, 8 BUR. L. T. 127 **894**

Practice—*Criminal proceedings—Application for special leave to appeal—Staying execution of sentence of death—Jurisdiction.*

As the Judicial Committee of the Privy Council is not a Court of Criminal Appeal, the tendering of advice to His Majesty as to the exercise of his prerogative of pardon is a matter for the Executive Government and is outside the province of the Judicial Committee.

Their Lordships were, therefore, unable to make any order on an application to stay execution of a sentence of death while an appeal to the Board was pending. The Executive Government, if notified, would, said their Lordships, no doubt, give due weight to the fact that such an appeal was pending, and consider the circumstances, but the Board would express no opinion as to whether the sentence ought to be suspended. **P C.** BAL MOKUND *v.* EMPEROR, 19 C. W. N. 674; 17 M. L. T. 441; 21 C. L. J. 522; 17 BOM. L. R. 487; 2 L. W. 602; 16 CR. L. J. 494 **334**

— — Duty of lower Court to follow decision of High Court **617**

Order by a Judge—Successor of Judge, if bound by that order.

An order made by a Judge is binding on his successor till set aside in due course of law. **C.** *Mohunt* GOPAL DAS *v.* RAMESWAR SINGH, 21 C. L. J. 571 **966**

— — — Subordinate Court, duty of, to follow rulings of its Superior Court **709**

Pre-emption—*Finding of fact on evidence—Saharanpur District—Language of* wajib-ul-arz—*Second appeal.*

The entries in a *wajib-ul-arz* are *prima facie* to be regarded as referring to customs rather than to agreements. But this does not preclude the Court from taking into consideration, when considering the evidence as a whole, the language which is used in the *wajib-ul-arz* along with other evidence. If on a consideration of the entire evidence the Court is not satisfied that a custom exists, the finding is a finding of fact and the High Court cannot interfere in second appeal.

The High Court has never decided that a custom of pre-emption cannot exist in the Saharanpur District or that the *wajib-ul-araiz* in Saharanpur are not evidence of a custom. **A.** BARU MAL *v.* TANSUKH RAI, 13 A. L. J. 717 **1001**

— — — — Limitation—Starting point of prescribed period—Land in possession of vendee at date of sale—Mutation of names **146**

— — — *Muhammadan Law—Demand—When second demand unnecessary—Sale in lieu of dower-debt—Consideration.*

Where at the time when the sale came to the knowledge of the pre-emptor, the vendee as well as the witnesses were present, and the pre-emptor at once claimed his right of pre-emption invoking the witnesses:

Held, that it was not necessary under Muhammadan Law for the pre-emptor to make the second demand.

A right of pre-emption arises under the Muhammadan Law even where property is transferred by a husband to his wife in consideration of dower-debt. **A.** *Musammat* NATHU *v.* SHADI, 13 A. L. J. 714 **495**

— — *Recorded co-sharer, meaning of.*

Where a person has been a recorded co-sharer in possession of a property by virtue of a sale-deed and no steps have been taken for three years to set aside the sale, or to oust him from possession, he must be regarded as a co-sharer for the purposes of a pre-emption suit. **A.** MUNNA LAL *v.* RAM GULAM SINGH **549**

— — Right *given by* Wajib-ul-arz *on* rehan, *simple mortgage*, whether *rehan.*

Where a clause in the *Wajib-ul-arz* of 1875 gave a right of pre-emption in the case of "rehan" (mortgage):

Held, that the right could not be exercised if the transacion was a simple mortgage as defined in the Transfer of Property Act of 1882. **A.** MARRAM KHAN *v.* SAKHAWAT KHAN **554**

— — — *Right of pre-emption mentioned in* Wajib-ul-arz—*No incidents given—Muhammadan Law.*

Where a *wajib-ul-arz* provided that a right of pre-emption existed among the owners of the *khalsa* separately and among the owners of the *milak* separately but gave no incidents of the custom of pre-emption:

Held, that the right was co-extensive with that given by the Muhammadan Law. **A.** ZAMIR AHMAD *v.* ABDUL RAZZAK, 13 A. L. J. 704; 37 A. 472 **993**

— — — — , *suit for, maintainability of—Vendor's title—Whole property not pre-empted, effect of.*

A pre-emptor is not entitled in a pre-emption suit to put the vendor on proof of his title to the property which he purports to sell. The principle

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of pre-emption is substitution. A pre-emptor is bound to take the title which the vendee was ready to take.

A suit for pre-emption is not maintainable where the pre-emptor does not seek to pre-empt the entire property. **A.** SAHODRA BIBI *v.* BAGESHRI SINGH, 13 A. L. J. 711 **1000**

———————Wajib-ul-arz, *construction of—Rights* inter se—*Preferential claim.*

The *wajib-ul-arz* of 1833 of a village recorded the mere fact that the co-sharers had a right of pre-emption.

The *wajib-ul-araiz* of 1860 and 1869 recorded that a near co-sharer had a right of pre-emption, after him the co-sharer in the same *thok* and after him the co-sharers in other *thoks*:

Held, that the co-sharer in the same *thok* as the vendor had a preferential claim as against the vendee who was a co-sharer in a different *thok*. **A.** AUDH BIHARI PANDE *v.* JADUBANS MISIR **485**

———————Wajib-ul-arz—*Rights* inter se—*Construction*—Ek-jaddi *co-sharer—Preferential right.*

Where a *wajib-ul-arz* provided: "The right of purchase of the price, which a stranger may give, shall be prior in favour of the *ek-jaddi* co-sharer, after that with the co-sharers in the *mahal*, after they refuse the property may be sold to a stranger":

Held, that the *ek-jaddi* co-sharer had a preferential claim over a co-sharer in a the *mahal*. **A.** MUNNA LAL *v.* KALIKA BAKHSH SINGH **425**

———————Wajib-ul-arz—*Partition after preparation of* Wajib-ul-arz—*Co-sharer in one* mahal, *whether can pre-empt property in another* mahal.

A *wajib-ul-arz* gave right of pre-emption first to own brothers and nephews, and then to cousins who were co-sharers, then to co-sharers in the *patti* and then to co-sharers in the village. At the time the *wajib-ul-arz* was prepared the village was not partitioned into several *mahals*, but subsequently it was so partitioned. A co-sharer in one *mahal* sued to pre-empt property in another *mahal* where he was not a co-sharer:

Held, that he had no right to pre-empt. **A.** KHAYALI RAM *v.* KALI CHARAN, 13 A. L. J. 712 **1000**

———————**decree**—*Vendee applying to withdraw money, whether estopped from appealing—Appeal.*

In a pre-emption suit decree was passed in favour of the plaintiff. The plaintiff deposited the money to be paid to the vendee in Court. The vendee applied to withdraw the money so deposited but did not, as a matter of fact, withdraw it:

Held, that by making the application to withdraw, the vendee did not lose his right to appeal. **A.** KHELAWAN KOERI *v.* ABDUL RAHIM, 13 A. L. J. 677 **452**

Preliminary decree, suit, if continued till final decree after passing of—Suit by executors on mortgage in favour of estate of deceased testator—Death of executors—Right of widows to be brought on record as legal representatives of deceased testator—Application under O. XXII, r. 3—Order, whether appealable **142**

Prescription—Right to ply boat—Crown grant—Ferry **692**

Presidency Banks Act (XI of 1876), s. 37, *scope of—Third parties cannot take advantage—Directors, whether agents or trustees—Security to cover future advances, whether void—Provision merely directory.*

Section 37 of the Presidency Banks Act XI of 1876, must be regarded as containing instructions for the guidance and governance of the Directors and as defining the powers exercisable by them. If the Directors of a Presidency Bank act in disregard of those powers they render themselves liable to the Bank for any loss that it may sustain by unauthorised acts. The section does not enable third parties, with whom contracts have been entered into, to deny their liability to the Bank if the Bank chooses to act upon the contract of its Directors. The action of the Directors under such circumstances will not be *malum prohibitum.*

The Directors are not identical with the Bank. They fill a double character, (1) as agents of the Bank, (2) as trustees for shareholders of the power committed to them. Whatever may be the extent of liability *inter se* between the Directors and the Bank or the trustee and *cestui que trust*, it does not affect transactions with outsiders so as to enable the latter to claim exemption from the performance of their obligations.

The action of the Directors in taking the security to cover future advances, although it may be in excess of their powers, is not void *ab initio*. It is open to the Bank to have accepted such contract.

If a prohibition is in the interest of the shareholders and is based on considerations of public policy it must be regarded as *malum prohibitum.*

Under the Presidency Banks Act it is not the Bank that is prohibited from taking security in regard to future advances in the shape of immoveable property, but only the Directors. Section 37 only contains instructions to the Directors as to how they should manage the business of banking.

It is well settled that where there are provisions in an Act which are only directory and not mandatory, any disregard of those provisions will not make the transaction void altogether. Section 37 is only directory of the powers of the Directors. **M.** NAGAR DAMODAR *v* GUDLIMAR RAMA RAO, 28 M. L. J. 444; 17 M. L. T. 326; (1915) M. W. N. 316 **192**

Presidency Small Cause Courts Act (XV of 1882), s. 19 (s) **908**

Presidency Towns Insolvency Act (III of 1909)—*Entrustment of sovereigns and gold to jeweller—Conversion—Insolvency of jeweller—Relationship between parties constituted by transaction, nature of—Person entrusting, whether entitled to preferential payment or to rank* pari passu *with general body of creditors—Trust property, following of—Tracing and* quasi-*charge, doctrines of, if applicable.*

Where a jeweller, who was entrusted by the claimant with sovereigns and gold to be made into a jewel for him converted the same into cash and subsequently became bankrupt and after the Official Assignee took charge of his estate, the owner of the sovereigns and gold put forward a claim that he

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was entitled to a preferential treatment and to get out of the estate the full value of the sovereigns and gold entrusted by him to the bankrupt:

Held, that the transaction between the claimant and the jeweller amounted to a bailment and the jeweller became, in consequence, a trustee for the claimant in respect of the sovereigns and gold entrusted to him.

Held, further, that inasmuch as there was no evidence that the sovereigns and gold formed a portion of the estate taken possession of by the Official Assignee and as there was nothing to identify the same, the claimant was not entitled to the benefit of the doctrines of tracing and *quasi*-charge and, therefore, to any preferential payment, but was only entitled to rank *pari passu* with other creditors of the insolvent. **M.** MULRAZZU LAKSHMI *v.* OFFICIAL ASSIGNEE, 2 L. W. 312; 17 M. L. T. 247; (1915) M. W. N. 262; 28 M. L. J. 403 **37**

——— ——— ——— **ss. 52, 56**—*Sale by insolvent of stock-in-trade a few days before his insolvency—Possession of goods with insolvent—Sale, validity of—Fraudulent and void transaction.*

Where the goods sold by an insolvent prior to his insolvency are allowed to remain in the shops of the insolvent, until the date of his insolvency, they are "in the possession, order and disposition" of the insolvent within the meaning of section 52 of the Presidency Towns Insolvency Act.

Where the sale by an insolvent is to a thick friend of his, only a few days before his insolvency and consideration for the sale consists of moneys borrowed both by the insolvent and the vendee from a third person, the transaction must be looked upon with great suspicion, and where the goods sold are not removed from the insolvent's premises till the date of the insolvency, the sale must be deemed to be fraudulent and void under section 56 of the Presidency Towns Insolvency Act. The fact that there were other sales by the insolvent prior to the insolvency is immaterial.

Quære.—Where the sale by an insolvent is for a sum already due to the vendee, whether the vendee could rank as a secured creditor? **M.** AHMED ALLY AND CO. *v.* OFFICIAL ASSIGNEE OF MADRAS **947**

——— —— ——— ——— **s. 56** **947**

——— ——— ——— **s. 56**—*Vendee in good faith, when not—Sale, validity of—Official Assignee.*

Where a sale was made for a price appreciably lower than the real value of the property and the vendee was actuated by the intention to get a much larger benefit for himself than he was fairly entitled to as a diligent creditor and where he conspired with the vendor to assist the vendor to defraud or delay other creditors:

Held, that the vendee was not a vendee in good faith within the meaning of section 56 of the Presidency Towns Insolvency Act;

that the sale was void as against the Official Assignee. **M.** OFFICIAL ASSIGNEE *v.* BANGY ABDUL RAZACK SAHIB, (1915) M. W. N. 332 **204**

Press Act (I of 1910), ss. 4 (1), Expl. II, 20—*Particular passages, whether to be specified in notice—Evidence—Proof—Other articles in paper, admissibility of—Disaffection to be excited must be against Indian Government—Relevancy of disaffection excited against other authorities.*

The particular passage objected to in an article need not be specified in a notice issued under section 4 (1) of the Indian Press Act, 1910.

Explanation II to section 4 of the Act does not apply to a case where the gravamen of the charge made by Government against the article is not so much that it contains 'comments' on the acts of the authorities, as that it consists of an account of certain events so inaccurate, so misleading and so unfair to those authorities as to be likely, apart from all 'comments', to excite the feelings mentioned in the notice.

Other articles from other issues of the paper containing the article in question are admissible for the purpose specified in section 20 of the Act alone, *i. e.*, 'in aid of the proof of the nature or tendency' of the said article.

The hatred and contempt and disaffection likely to be excited must be shown to be against the Indian Government, and not against the Canadian authorities or the Governor of Hong Kong, is true in a sense, but where the article complained of in giving an account of the voyage and adventures of the "Komagata Maru" and of the Budge Budge riot, aimed at literary effect and worked up to a climax by narrating the alleged oppressive conduct of Canada and Hong Kong and distinctly leaving the impression of a massacre by the Police in India of a number of unarmed and helpless man, the inaccurate and unfair statement of that conduct becomes relevant. **P.** AMAR SINGH *v.* EMPEROR, 15 P. R. 1915 CR.; 16 CR. L. J. 555; 33 P. W. R. 1915 CR. **827**

Presumption. *See* AGRA TENANCY ACT, s. 201; BURMESE BUDDHIST LAW.

——— ——— Divorced woman remains unmarried until proved to be married **194**

——— ——— Encroachment of land by tenant **216**

——— — — Inheritance—Burden of proof **7**

——— ——— Jungle and uncultivated land, owner of **634**

——— ——— Land under water for certain period —Possession during such period **278**

——— ——— Open village sites—Title of Government **51**

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——— ——— Submerged lands, possession of **156**

——— ——— Tanks in villages, ownership in—Entry in papers on basis of possession—Evidence of permission to make tanks—Burden of proof **11**

——— — Tenant goes away on pilgrimage—Cousin cultivates and manages holding—Tenant does not return—Presumption of death—Co-sharing explained — Co-sharing possible, though tenant absent **427**

——— — Will not produced **807**

Primogeniture, law of—Oudh *taluqa* **651**

Principal and agent—*Joint property of brothers—Some brothers taking management of property—Relation created—Managers, duty of—Government Revenue, payment of, if for upkeep of estate.*

Where by agreement two of the five brothers agreed to take over the management of their joint property for a period of five years for the improvement and upkeep of the estate:

Held, that the relationship of principal and agent created by the agreement must not be overlooked and that the managers are under a legal duty to exercise reasonable care and diligence in the management of the estate.

A payment on account of the Government revenue of an estate is a payment for the upkeep of the estate. **C.** AMBICA CHARAN DAS *v.* HARINATH DAS **905**

——— Kabuliat *hypothecating property for defalcation executed by agent—Dismissal of agent—Re-appointment, defalcation after—Limitation Act (IX of 1908), Sch. I, Art. 89, applicability of.*

In a suit for accounts by the principal against his agent, a *kabuliat* was executed in 1305 B. S. by an agent in favour of his principal to the effect that certain immoveable property hypothecated therein would be answerable for any defalcation made by the agent or any damages suffered by the principal through his negligence. The agent was dismissed in 1306 but he was re-appointed in 1307:

Held, that his position in 1307 was not governed by the *kabuliat* of 1305 but that by the ordinary rules applicable between the principal and the agent, and that Article 89, Schedule I, of the Limitation Act, applied to the suit. **C.** BEHARI LAL ROY *v.* HARA KUMAR DUTTA, 21 C. L. J. 458 **748**

——— ——— Receipt of money after termination of agency—Money had and received **986**

——— ——— *Suit for accounts—Agreement—Immoveable property, hypothecation of—Transfer to wife—Re-transfer—Agent manager of properties—No demand—Suit within three years—Limitation Act (IX of 1908), Sch. I, Art. 89—Principal, right of.*

Where an agency was created on the 24th May 1896, for the management of a certain immoveable property, and in 1897 the principal transferred the property to his wife and two years later the wife re-transferred it to her husband, but the agent, continued to manage it as if no transfer had been effected and the agency was finally terminated in 1910, and the present suit was commenced on the 22nd March 1911 for accounts in respect of the years 1306 to 1317:

Held, that Article 89, Schedule I, of the Limitation Act, was applicable to the suit and that in the absence of any demand and refusal during the continuance of the agency as the suit was instituted within three years from the date of the termination of the agency, the plaintiff was entitled to the accounts claimed. **C.** SURES KANTA BANERJEE, *v.* NAWAB ALI SIKDAR, 21 C. L. J. 462 **848**

Privy Council appeal. *See* CIVIL PROCEDURE CODE, 1908, S. 110; LEAVE TO APPEAL TO PRIVY COUNCIL.

Probate—*Partial revocation, when allowable—Co-executor appropriating large portion of sale-proceeds of property—Liquidation of testator's debts—Probate and Administration Act (V of 1881), s. 50.*

The fact that a co-executor appropriated as legatee the whole or major portion of the sale-proceeds of a part of the estate before liquidating the testator's debts as provided in the Will is not sufficient to a partial revocation of the Probate as regards one of the executors, where the remaining assets far exceed the liabilities and particularly where none of the creditors has come forward to object to the acts of the said co-executor. **P.** ISHWAR SINGH *v.* HARKISHEN LAL, 84 P. W. R. 1915; 179 P. L. R. 1915 **754**

Probate and Administration Act (V of 1881), s. 4 **139**

——— ——— ——— **s. 50** **754**

——— ——— ——— **s. 50**—*Civil Procedure Code (Act V of 1908), ss. 114, 151—Inherent power of Court to set aside order made under Probate and Administration Act—Procedure—Notice—Person interested in estate of deceased*—Zemindar, *right of.*

An order granting Letters of Administration to a particular person should not be cancelled without giving him notice.

It is open to a District Judge to re-consider an order granting Letters of Administration, whether under the provisions of section 114 or under the inherent powers of the Court recognized by section 151 of the Code of Civil Procedure, apart altogether from the provisions of section 50 of the Probate and Administration Act itself.

A Court ought never to grant Letters of Administration to the estate of a deceased person without having good *prima facie* evidence that the applicant has such an interest in the estate of the deceased as would entitle him to a grant of Letters of Administration. A person who satisfies the Court that he is the heir or one of the heirs of the deceased, has such an interest. A creditor also has an interest. **A.** PARMA *v.* NEK RAM, 13 A. L. J. 441; 37 A. 380 **133**

——— ——— ——— **s. 58**—*Application for Letters of Administration with Will annexed—Heirs in existence—Government, whether has* locus standi *to oppose grant—Confidential proceedings, legality of.*

An application for Letters of Administration with the Will annexed was filed before the District Delegate and upon an objection being made by a third party, the case was sent up to the District Judge and taken up as a contested case. In the meantime the Chairman of the local Municipality made a report to the Sub-Divisional Officer that the Will was forged, whereupon the latter took some "confidential" proceedings and sent the record to the Collector asking him to oppose the grant of the Probate, who did so on behalf of Government:

Held, (1) that the "confidential" proceedings of the Sub-Divisional Officer were not in accordance with law;

(2) that at the inception of the proceedings the Government had a *locus standi* in the matter but that as soon as it appeared that there were "heirs" in existence, the Government ought to have retired. **C.** RAMA NATH CHAKRAVARTI *v.* COLLECTOR OF KHULNA **682**

——— ——— **s. 92** **139**

Probate and Administration Act—concld.

——————— **S. 92**—*Provision in Will that majority of executors should act—Contract by some executors, whether binds estate.*

Section 92 of the Probate and Letters of Administration Act has no application, where a Will overrides it and provides that it is only the opinion of the majority of the executors appointed under it that should bind the estate.

A contract, in such a case, entered into by some of the executors only without reference to the others will not, therefore, bind the estate of a deceased testator. **M.** ERA DODDA BASAPPA *v.* RAMA REDDI, **505**

Procedure. *See* CIVIL PROCEDURE CODE, O. IX, r. 8.

——————Execution sale—Occupancy holding not saleable—Sale held before application of objection heard—Irregularity—Proper procedure **616**

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——————Civil Procedure Code (Act V of 1908), O. XXI, r. 58—Mortgage-decree—Attachment of property—Claims, investigation of **941**

——————Mortgage-deed not attested by two witnesses—Invalidity of mortgage—Pleas raised in course of trial but not in pleadings—Court, duty of **991**

——————Order under section 146, Criminal Procedure Code, without taking evidence, if final **66**

——————Partition, suit for—Collection of rent by one of defendants subsequent to suit—Account **905**

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——————Summons case tried together with warrant case—Procedure to be followed—Warrant case dismissed during trial—Summons case proceeded with—Right of accused to re-call and cross-examine prosecution witnesses—Right to re-call and cross-examine—Right refused—Prejudice—Burden of proof **668**

Proceedings, revival of, after death of complainant **98**

Process-server, right of, to enter any house without permission **109**

Professional ethics—*Counsel appearing in a cause—Propriety of his giving evidence.*

Though it is no doubt desirable that Counsel ought not to appear in a case where it is probable that his evidence would be material, there is no inflexible rule that his evidence ought not to be taken, if at any stage of the suit, it becomes necessary to do so. To lay down such a hard and fast rule would often defeat the ends of justice. **M.** LODD GOVINDOSS *v.* RUKMANI BHAI, 17 M. L. T. 382 **135**

Promissory note, maker of, liability of—Continuing security — Indorsements, effect of—Fraud, person liable for **936**

——————, *sale of—Purchaser bound to make enquiries of executant*—Caveat emptor.

A person buying a promissory note must know that he is buying a mere claim and must make enquiries before buying. **P.** KISHEN SARUP *v.* TARA CHAND, 76 P. W. R. 1915; 150 P. L. R. 1915 **887**

Promissory note—concld.

——————*suit on—Amount claimed not found to have been actually advanced—Suit, if to be decreed for amount found.*

In a suit for recovery of the sum of Rs. 40 alleged to have been advanced on a hand-note with interest, the Judge found that the sum of Rs. 30, and not Rs. 40, was really advanced by the plaintiff to the defendant, but dismissed the suit on the ground that the plaintiff had failed to prove the advance of Rs. 40 claimed:

Held, that judgment ought to have been entered in favour of the plaintiff for the amount found to have been actually advanced. **C.** BENODE BEHARI PATRA *v.* JANKI KALWAR **468**

Proprietary title, *question of—Issue not decided—Appeal, whether lies to District Judge—Onus on wrong party—Finding based on no evidence—Revision, grounds for.*

Where an issue which affected the claim to proprietary right under section 158 was decided neither by the Assistant Collector nor by the Commissioner:

Held, that no appeal lay in the case to the District Judge.

The mistaken view that the burden of proof is on the defendant to show that the land should not be resumed and a finding arrived at without any evidence to support it constitute a gross and palpable error of law in justifying interference in revision. **U. P. B. R.** NARAIN DAS *v.* MIR KHAN **61**

Provincial Insolvency Act (III of 1907), S. 4 (b)—*Collusive suit—Subsequent withdrawal—Act of insolvency.*

A collusive suit and subsequent withdrawal from or compromising of the same, with the express object of putting another party in possession of immoveable property, amounts to a transfer of property by an insolvent within the meaning of clause (*b*) of section 4 of the Provincial Insolvency Act, 1907. **A.** PURAN NATH *v.* ATWARGIR, 13 A. L. J. 434 **217**

——————**S. 15 (1),** *scope of—Petition presented by the debtor—Dismissal on the ground of bad faith—Material irregularity.*

The concluding portion of sub-section (1) of section 15 of the Provincial Insolvency Act of 1907 refers only to cases in which the application has been made by the creditor and is opposed by the debtor.

Where, therefore, an insolvency petition presented by a debtor was dismissed under section 15 (1) of the Act, on the ground that the petitioner had been guilty of bad faith in having given undue preference to some of his creditors over others:

Held, that the District Judge acted with material irregularity in the exercise of his jurisdiction in dismissing the petition upon that ground. **P.** RATTAN MALIK *v.* TIRATH RAM, 28 P. R. 1915 **361**

——————**S. 16 (2) b)** **30**

——————**SS. 20, 22**—*Sale held by Receiver—Conditions of sale changed just before sale—Application to Court by creditor to set aside sale—Power of Court to set aside sale—'Person aggrieved,' meaning of.*

Provincial Insolvency Act—contd.

An Official Receiver, in whom the property of an insolvent vested under an order of adjudication, issued a proclamation for sale of certain properties, subject to two mortgages subsisting thereon. On the date fixed for the sale he varied the sale proclamation by noting that the properties would be sold free of the mortgages, and sold the properties accordingly. The respondent, a creditor of the insolvent, put in an application to the District Court to set aside the sale, on the ground that the action of the Receiver in varying the sale proclamation was irregular and that by reason of the irregularity the properties had fetched a very low price:

Held, that the Court had jurisdiction to set aside the sale inasmuch as under section 22 of the Provincial Insolvency Act it had an unfettered discretion to set aside any order passed by an Official Receiver.

Though a Court does not ordinarily interfere with an order passed by a Receiver in the exercise of his discretion, it will do so where proper reasons are shown that the action of the Receiver was irregular and has prejudiced the interests of the creditors.

Any person who is entitled to demand a decision of the Court in respect of the property of an insolvent and would be damnified if the decision goes against him, is a person aggrieved within the meaning of section 22 of the Insolvency Act. **M.** THIRUVENKATA CHARIAR *v.* THANGAYI AMMAL, 17 M. L. T. 432 **294**

——— **S. 22** **294**

——— **S. 31**—*Secured creditor, meaning of—Agreement appointing creditor sole agent for sale of debtor's goods—Sale-proceeds to be paid to creditor.*

Where an agreement was entered into between a debtor and his creditor whereby the latter was appointed the sole agent for the sale of all books already published or thereafter to be published by the debtor with a condition that the sale-proceeds, after deducting the commission, was to be credited towards the discharge of the debt:

Held, that the creditor was entitled to be regarded as a secured creditor.

Secured creditor means a person holding a mortgage, charge, or lien upon property of the debtor or any part thereof as security for the debt due to him from the debtor. **A.** ALLAHABAD TRADING AND BANKING CORPORATION *v.* GHULAM MUHAMMAD, 13 A. L. J. 521; 37 A. 383 **263**

——— **S. 34**—*Property attached but not sold before adjudication, effect of—Receiver, powers of.*

Section 34 of the Provincial Insolvency Act was intended to put creditors of an insolvent, who have not actually attached the property before the date of the order of adjudication in at least as good a position as creditors of the insolvent who, but for his insolvency, would have been entitled to claim a rateable distribution of the assets received on an execution sale.

A creditor instituted a suit against his debtor and attached his property before judgment. Subsequently the debtor was adjudicated insolvent. After the order of adjudication, the creditor who had attached the property proceeded to sell the property in execution of his decree. The Receiver objected and claimed the property for the general body of creditors:

Held, that the property not having been sold before adjudication was still the property of his insolvents and as such was available to the general body of creditors. **A.** KASHI NATH *v.* KANHAIYA LAL SHARMA, 13 A. L. J. 700; 37 A. 452 **990**

——— **S. 36**—*Burden of proof—Transferee to prove good faith and valuable consideration.*

Section 36 of the Provincial Insolvency Act lays the onus upon the transferee to prove that the transfer made by an insolvent was made in good faith and for valuable consideration. **C.** NILMONI CHOWDHURI *v.* BASANTA KUMAR BANERJEE, 19 C. W. N. 865 **814**

——— **S. 37 (1)**, *scope of—Transfer of property or any interest therein—Preference, fraudulent—Burden of proof—Dominant view—Proper test—Disposition, voluntary—Debtor's state of mind—Good faith no protection to creditor.*

Before a transfer by a debtor of any interest in his property is avoided under section 37 (1) of the Provincial Insolvency Act, four conditions must be fulfilled, namely *first*, the debtor must, at the date of the transaction, be unable to pay from his own money his debts as they fall due; *secondly*, the transaction must be in favour of a creditor or of some person in trust for a creditor; *thirdly*, the debtor must have acted with the view of giving such creditor a preference over his other creditors; and *fourthly*, the debtor must be adjudged an insolvent on an insolvency petition presented within three months after the date of the transaction sought to be impeached.

Where an act is impeached as a fraudulent preference, the onus of proof lies on the Receiver, even if the debtor was insolvent at the time of the payment and knew himself to be so.

In the determination of the question whether a person is able or unable to pay his debts, as they become due, from his own money, the fact that he has money locked up which, at a later period, may be available for the payment of his debts, is immaterial.

A particular transaction in favour of a creditor may be set aside as a fraudulent preference only if it is proved that it was carried out with the substantial or dominant view of giving the creditor a preference over the other creditors.

The proper test to ascertain the dominant view is the question, "was the act done voluntarily"?

A voluntary disposition is an act moving from the debtor spontaneously.

The use of the word "preference" implies an act of free will, so that there can be no preference where the act is the result of pressure.

In every case the state of mind of the debtor is the paramount consideration.

Under section 37 of the Provincial Insolvency Act (which is substantially identical with section 48 of 46 & 47 Vict. c. 52), good faith on the part of the creditor affords him no protection where

Provincial Insolvency Act—contd.

the intention of the debtor to give him a preference is established, although sub-section (2) of section 37 protects a person who, in good faith and for valuable consideration, has acquired a title through or under a creditor of the insolvent. **C.** NRIPENDRO NATH *v.* ASHUTOSH GHOSH, 19 C. W. N. 157; 21 C. L. J. 167 **128**

——— ——— ——— **s. 42**—*Annulment of adjudication, when and when not allowed.*

An adjudication can be annulled only under section 42 of the Provincial Insolvency Act when the conditions mentioned therein are fulfilled.

A Court while annulling an adjudication must find that the adjudication could not legally or properly have been made on the facts as existing at the time of the adjudication. Subsequent misconduct on the part of a petitioner should not lead to annulment of the adjudication.

An adjudication cannot be annulled because:

(*i*) the petitioner could subsequently pay his debts in full out of his assets;

(*ii*) a part of his property is subject to the Alienation of Land Act;

(*iii*) the debtor since his adjudication has not been giving any produce of his lands to the Receiver, or

(*iv*) he has not made over all his assets to the Receiver. **P.** JAM KHAN *v.* DEVI DITTA, 77 P. W. R. 1915; 152 P. L. R. 1915 **888**

——— ——— ——— **s. 43**—*Receiver's report as to fraud of insolvent, admissibility of, in evidence.*

The report of a Receiver of an insolvent's property to the effect that the insolvent had fraudulently transferred his property to his wife before declaration of insolvency, is not admissible in evidence to convict the insolvent under section 43 of the Insolvency Act. **A** NAND KISHORE *v.* SURAJ MAL, 13 A. L. J. 642; 37 A. 429 **998**

——— ——— ——— **Sch. II, art. 42** **247**

Provincial Small Cause Courts Act (IX of 1887), s. 25 **846**

——— ——— ——— **s. 25**—*Jurisdiction—No objection taken before lower Court—High Court, discretion of, to interfere.*

A revision application based mainly on the ground that the Small Cause Court had no jurisdiction to try the suit, an objection which was never taken in the lower Court, has no merits and the High Court will not interfere. **C.** NATIONAL INSURANCE AND BANKING CO. *v.* BISWAMBAR CHOWDHURY **566**

——— ——— ——— **s. 37**—*Small Cause suit—Transfer of case to regular side—Decision—Appeal, maintainability of.*

A suit of a Small Cause Court nature was filed before a Munsif, who had the powers of a Small Cause Court Judge, and was registered as a Small Cause Court suit. Subsequently the Munsif was succeeded by an officer who had no Small Cause Court powers. The latter officer ordered the case to be transferred to the regular side and tried it as a regular suit. An appeal against his decision was dismissed on the ground that no appeal lay:

Held, that an appeal did lie. **A.** SARJU PRASAD *v.* MAHADEO PANDE, 13 A. L. J. 639; 37 A. 450 **996**

Provincial Small Cause Courts Act—contd.

——— ——— ——— **Sch. II, art. 13**—*Suit by* malguzar *to recover value of manure under* — Wajib-ul-arz— *Small Cause—Second appeal, if competent.*

The plaintiffs, *malguzars* of a certain *mauza*, sued to recover from the defendant a sum of Rs. 34, on account of the wrongful removal of manure to which they set up title under a clause of the *Wajib-ul-arz*, which ran as follows:—

'In this village the *malguzar* takes according to long custom the manure of those who have no fields of their own: in return he shall allow them free grazing and *nistar*:

Held, that a second appeal in this case was barred under section 102 of the Code of Civil Procedure, as the suit was of a nature cognizable by a Court of Small Causes, because

(*a*) it was one for damages consequent on the wrongful removal of manure to which the plaintiffs were entitled, and not for delivery of that manure, or

(*b*) even if the claim were regarded as one for the manure itself as a 'due' within the meaning of that term as used in Article 13 of the second Schedule to the Provincial Small Cause Courts Act, 1887 that 'due' was not payable to the plaintiffs by reason of their interest in immoveable property.

The dues contemplated by Article 13 are payments to which a person is entitled as representing his interest in certain immoveable property, and not because he possesses some interest in immoveable property. **N.** JAIRAM *v.* DOMA, 11 N. L. R. 100 **815**

——— ——— ——— **Sch. II, arts. 15, 16**—*Suit for recovery of balance of mortgage-money, whether maintainable in Small Cause Court—Damages for breach of contract.*

A suit by a mortgagor for the recovery of the balance of the mortgage-money not paid to him, being a suit for the specific performance of so much of an agreement as has not already been performed, does not lie.

Such a suit or a suit for the rectification of the instrument is not cognizable by a Court of Small Causes.

It is, however, open in such circumstances to the plaintiff to sue in the Small Cause Court for damages for breach of contract provided the damages are within the pecuniary jurisdiction of the Court. **C** SHAIK GALIM *v.* SADARIJAN BIBI, 21 C. L. J. 532; 19 C. W. N. 1332 **621**

——— ——— ——— **art. 16** **621**

——— ——— ——— **arts. 41, 42**—*Decree on mortgage—Payment by one co-mortgagor—Suit for contribution—Jurisdiction.*

A suit by one co-mortgagor against the other co-mortgagors for contribution in respect of money paid by him to discharge a decree obtained on their joint mortgage is not cognizable by a Small Cause Court. **A.** TALAIMAND SINGH *v.* GOBIND SINGH, 13 A. L. J. 694 **247**

——— ——— ——— **art. 42**—*Suit for compensation—Jurisdiction.*

M and *R* mortgaged a property belonging to *H* for their own purposes. The mortgagee obtained

Provincial Small Cause Courts Act—concld.

a decree. *H* paid off the decree to save his property and subsequently sued *R* alone to recover the money:

Held, that the suit was for compensation for an impudent wrong committed against *H* by *M* and *R* and was cognizable by a Small Cause Court.

Held, further, that *M* was not a necessary party to the suit, as each of the two executants of the mortgage was jointly and severally responsible to recompense the plaintiff. **A.** RAZA HUSAIN *v.* HASAN JAN, 13 A. L. J. 632 **245**

Public highway, *right of user of—Religious procession, carrying of—Civil right—Special damages if necessary to maintain action—Injunction, grant of—Civil Procedure Code (Act V of 1908), O. I, r. 8—Amendment.*

Every citizen has an inherent right to conduct religious processions through the public streets. This natural right may be restricted in the interests of public safety or its exercise may be limited, so that it may not infringe rights of property possessed by others, and the burden lies upon those who claim to impose fetters upon the exercise of such rights to establish the limitation.

The right of every citizen to pass through public streets in procession is a civil right.

Where the suit is by a headman to declare the right of his community to pass through public streets in procession and where that right is denied, he can maintain a suit without alleging special damage to himself.

An original defect in the plaint can be cured by a subsequent order of amendment.

Where an injury is of such a character that pecuniary compensation will not afford sufficient relief or where it is necessary to avoid multiplicity of judicial proceedings, an injunction will be granted.

In cases where an actual offence is threatened, it is not necessary that recourse must be had to the Criminal Courts before seeking redress in the Civil Courts. **M.** ANDI MOOPAN *v.* MUTHUVIRAMA REDDY, 17 M. L. T. 453; 29 M. L. J. 91 **248**

Punjab Alienation of Land Act (XIII of 1900), s. 3 **751**

——————— **s. 9 (2), (3)**—*Mortgage by way of conditional sale—Mortgagor denying execution or pleading payment—Deputy Commissioner, whether can decide question of currency of mortgage.*

Where a holder of a mortgage by conditional sale applies direct to the Deputy Commissioner under section 9 (2) of the Punjab Land Alienation Act or where a mortgage by way of conditional sale is referred to a Deputy Commissioner by a Civil Court under section 9 (3) of the Punjab Land Alienation Act and the mortgagor on appearing before the Deputy Commissioner denies execution of the mortgage or pleads payment of the mortgage-debt, the Deputy Commissioner must decline to exercise the power conferred on him by section 9 (2) of the Act. **P.** LAKHMI DAS *v.* HAYAT, 2 P. R. 1915 REV.; 3 P. W. R. 1915 REV. **502**

Punjab Courts Act (IV of 1912), s. 41 (1) (a) **801**

——————— **s. 41 (1) (c)**—*Second appeal—Finding of fact—Substantial error in procedure—Court overlooking material evidence—Consideration—Legal necessity.*

A finding of fact arrived at by a lower Appellate Court can be assailed on second appeal only where it appears that in giving its decision the lower Appellate Court has not taken into consideration material evidence on the record and other material circumstances connected with the case.

In cases of old mortgages, where mortgagors have had subsequent opportunities of asserting want of consideration but expressly and impliedly admitted receipt of it in full, Courts will not expect mortgagees to give the same precise proof of payment and 'necessity' as in cases in which the transactions are of recent date. **P.** RANZOR SINGH *v.* GAYAN, 114 P. L. R. 1915 **785**

Punjab Courts Act (III of 1914), s. 41 (1) (c) **901**

Punjab Government Tenants Act (III of 1893)—*Re-grant of lapsed occupancy tenancy by Revenue Officer—Civil Court, whether can interfere.*

The Civil Courts have no jurisdiction to interfere with the arrangements made by the Revenue authorities in the matter of the re-grant of a lapsed occupancy tenancy which is covered by the Government Tenants Act, III of 1893. **P.** KESAR SINGH *v. Musammat* DAYALI, 38 P. R. 1915; 102 P. W. R. 1915 **570**

Punjab Land Revenue Act (XVII of 1887), ss. 115, 116—Wajib-ul-arz *prohibiting partition of* shamilat, *whether operates as a bar—Revenue Officer, duty of, to decide.*

An entry in the *Wajib-ul-arz* prohibiting the partition of *shamilat* lands does not necessarily operate as a bar, it being the duty of the Revenue Officer dealing with the partition to decide whether such a clause should prevail or not.

Where the *Wajib-ul-arz* of a village was drawn up to suit a time when the land was valued only for its pasture, but the land had since been broken up for cultivation and there had been a considerable reduction in the number of cattle kept by the community:

Held, that as the conditions had changed and a large section of the community contested the *Wajib-ul-arz*, the Revenue Officer was justified in sanctioning partition. **P.** LAKHI *v.* DOST MOHAMMAD KHAN, 1 P. R. 1915 REV. **498**

——————— **s. 116** **498**

Punjab Municipal Act (XX of 1891), s. 195—*Building erected in contravention of sanction—Notice to demolish building—Injunction against Municipality—Right of Court to interfere.*

The plaintiff sued for an injunction against the Municipality to restrain them from interfering with the *chabutra* erected by the plaintiff. The *chabutra* was admittedly constructed by the plaintiff in contravention of the sanction of the Municipality. It was argued for the plaintiff that the building as erected was in point of fact more advantageous to the public than would be the building as sanctioned. The contention was disallowed and the suit was dismissed:

Punjab Municipal Act—concld.

Held, that no second appeal lay in the case and the Courts were not competent to entertain the contention of the plaintiff. **P.** HARJI MAL *v.* MUNICIPAL COMMITTEE, DELHI, 107 P. L. R. 1915; 67 P. W. R. 1915 **766**

Punjab Pre-emption Act (II of 1905), ss. 10, 19—*Money deposited in Court by plaintiff-pre-emptor, attachment of—Liability of plaintiff to pay up deficiency.*

The plaintiff-pre-emptor deposited Rs. 400 in Court under section 19 of the Punjab Pre-emption Act of 1905, but during the pendency of the suit Rs. 297 were, without the knowledge of the parties to the suit, withdrawn under an attachment at the instance of a person who had a decree against the plaintiff. The suit being decreed in favour of the plaintiff, he paid in the balance of the price fixed over and above Rs. 400, but was ordered to pay Rs. 297 more before getting possession:

Held, that under section 10 of the Act the money deposited by the plaintiff could not be attached, but as he had presumably benefited by Rs. 297 being paid over to one of his creditors, he was in equity bound to make good the deficiency. **P.** PANNA LAL *v.* NATHA SINGH, 27 P. R. 1915 **354**

——— ——— ——— ——— **s. 19** **354**

——— ——— ——— ——— **s. 22 (2)**, *proviso, applicability of.*

The proviso to sub-section (2) of section 22 of Act II of 1905 is not applicable to a case, in which the price does not consist mainly of a debt greatly exceeding in amount the market-value of the property. **P.** FATEH CHAND *v.* GANDA MAL, 72 P. L. R. 1915; 94 P. W. R 1915 **150**

Punjab Tenancy Act (XVI of 1887), ss 77, 100—*Punjab Tenancy (Amendment) Act (III of 1912)—Jurisdiction of Civil and Revenue Courts*—Panahi *tenant, right of, to establish occupancy right.*

Act III of 1912 does not set up any bar to action under section 100 of the Tenancy Act.

A *panahi* tenant (protected for a term of years) is not debarred from establishing occupancy rights under the Tenancy Act, 1886. **P.** WADHAWA *v. Musammat* HASSI, 111 P. L. R. 1915; 64 P. W. R. 1915 **778**

——— ——— ——— **s. 100** **778**

Punjab Tenancy (Amendment) Act (III of 1912) **778**

Railway—*Goods consigned—Indemnity bond—Risk note form A—Goods, shortage of—Liability of Railway Company—Right of consignee.*

Where the sender of goods through a Railway Company signs "risk note form A", he indemnifies the Company and makes it free from all responsibility for the condition into which the goods may be delivered to the consignee at destination and for any loss arising from the same. The consignee, however, is entitled to have the consignment weighed on the spot in the presence of some respectable servant of the Railway Company and it is the duty of the Railway servants responsible for the delivery of the goods to offer reasonable facilities for this

Railway—concld.

operation. If the Railway servants do not allow the consignee to have the goods weighed at the time of delivery and thus let them remain lying in the Railway go-down to the detriment of the consignee, the Company is liable in damages.

A risk note in form A is simply an indemnity bond by the sender for the benefit of the Company. It cannot in itself affect the rights of the consignee who is entitled to receive the consignment as ordered by him and to claim compensation in the event of the consignment suffering loss or damage. **A.** ROHILKHAND AND KUMAUN RAILWAY CO. *v.* ISMAIL KHAN, 13 A. L. J. 417 **207**

Railways Act (IX of 1890), ss. 47 (1) (f), 72—*R.* (2) *of rules framed under s.* 47—*"Delivery to be carried by Railway", meaning of—Commencement of Company's liability, whether dependent upon issue of receipt.*

A "delivery to be carried by Railway" means something more than a mere depositing of goods on the Railway premises; it means some sort of acceptance by the Railway, a taking as well as a giving.

The commencement of the liability of a Railway Company for goods delivered to be carried under section 72 is in no way dependent upon the fact of a receipt having been granted and must be determined on the evidence in the case quite independently of rule 2 under section 47, sub-section (1), clause (*f*). **B.** RAMACHANDRA NATHA *v.* GREAT INDIAN PENINSULA RAILWAY, 17 BOM. L. R. 496; 39 B. 485 **545**

——— ——— **s. 72** **545**

Rateable distribution. *See* CIVIL PROCEDURE CODE, s. 73.

Receiver, *appointment of—Grounds—Poverty or insolvency, if grounds—Civil Court, jurisdiction of, to interfere in Magisterial proceedings under s.* 145, *Criminal Procedure Code—Management or malversation—Discretion of lower Court—Appellate Court, power of, to interfere.*

A Civil Court has jurisdiction to come to a different conclusion from that of a Magistrate under section 145, Criminal Procedure Code, but it has no right to sit in judgment over the finding of fact arrived at by the Magistrate, by a review of the evidence produced before the latter.

Poverty or insolvency of the defendant is no ground for the appointment of a Receiver unless there be in addition some danger to the estate.

Where no specific acts of mismanagement or malversation are proved against a defendant in possession, the Courts must be very slow to displace a party rightfully in possession by the appointment of a Receiver.

Where *prima facie* the title to the property in dispute is in him who is in possession of the property, his possession cannot be displaced by the appointment of a Receiver pending a suit before a Court.

As a rule, an Appellate Court will not interfere with the discretion of the lower Court ordering the appointment of a Receiver; but where the lower Court has based its order on a wrong view of the facts, it is the duty of the Appellate Court to interfere and set it right. **M.** SIVAJI RAJA SAHIB *v.* AISWARIYANANDAJI SAHIB, 29 M. L. J. 209; 18 M. L. T. 155 **485**

Receiver—concld.

——— ———, appointment of—Partnership, dissolution of—Purpose **684**

——— ———, order providing for appointment of—Appeal **504**

Recorded co-sharer. *See* AGRA TENANCY ACT, s. 201.

Rectification of sale-deed. *See* SALE-DEED.

Redemption. *See* AGRA TENANCY ACT, s. 158; MORTGAGE.

Reference. *See* CRIMINAL PROCEDURE CODE, s. 439.

Registration—*Receipt containing agreement to accept rent-deed, whether compulsorily registrable.*

A document which, besides being a receipt for money paid, contains an agreement to accept a rent-deed is an agreement to lease and is inadmissible in evidence without registration. **M.** SREEKISAN PITTY *v.* KOTA NAMALWARAYYA **246**

Registration Act (XVI of 1908)—*Deed in possession of mediators—One of the parties capable of presenting it for registration—Other party, when liable.*

Where a document is in the possession of mediators and could have been obtained and presented for registration by one of the parties, he cannot hold the other party liable unless the non registration was not due to any default on his part **M.** PONNUSAWMY MUDALIAR *v.* MUTHUSAWMY MUDALIAR **585**

——— ——— ——— **s. 17 (2) (i)**—*Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Compromise of suit—Razinama, if requires registration—Evidence, admissibility of razinama in.*

A *razinama* presented to a Court setting forth the terms on which the parties had come to terms does not require registration and is as such admissible in evidence. **P.** *Musammat* JEO *v.* JAIMAL SINGH, 90 P. W. R. 1915 **311**

Registration law, fraud on—Sale by registered instrument or by delivery of possession—Bond, where to be registered—Intention to sell or mortgage, want of **413**

Regulation XI of 1825, s. 4—*By gradual, slow and imperceptible means—Burden of proof—Small villages—Small river—Large accretions, if by gradual, slow and imperceptible means—Adverse possession—Land under water for certain period—Vis major—Possession during such period—Presumption.*

Where the question is of the manner in which land has been cut away from one village and thrown up on the other side of the river, the burden of proof is on the party who claims the accretion to show that the accretion to his tenure has been of the nature contemplated by the law as laid down in Regulation XI of 1825 and unless he can prove this satisfactorily, he cannot be said to have proved his title.

Where the villages are small in area and their common boundary but short in length and where there is a small river, shallow and fordable, which at one season of the year is liable to sudden floods cutting away a portion from the small estates;

Regulation—(XI of 1825)—concld.

Held, that under the circumstances the accretions of a few *bighas* per annum can hardly be said to be by gradual, slow and imperceptible means as contemplated by the Regulation.

A person cannot be said to have acquired a title by prescription to a land which remains covered with the flood water of a river for a certain period every year, as he must be deemed to have been dispossessed by *vis major* during the time of flood and as under law the possession during flood time is in the person who has title. **A.** BALDEO THAKURAI *v.* UGRA NATH **278**

Religious procession. *See* PUBLIC HIGHWAY.

Rent, *suit for*—Kabuliat, *construction of—Enhancement, no question of.*

Where on the face of a document which was to have effect for three years, it appeared that the rent fixed was a certain amount but that the landlord allowed a certain amount to be held in abeyance for three years, and for those three years, year by year a certain amount was to be paid by the defendant according to the instalments mentioned, and where the landlord sued for the arrears:

Held, that what the plaintiff sued for was not enhancement, no more than if a landlord gave a receipt for half the rent for the first year, half the rent for the second year, and half the rent for the third year, and subsequently sued for the whole rent. **C.** ROMESH CHANDRA BISWAS *v.* GHULAM NABI FAKIR, 19 C. W. N. 867 **807**

Res judicata. *See* CIVIL PROCEDURE CODE, 1908, s. 11.

——— ——— Estoppel—Test—Burden of proof—Demise questioned—Original ownership and derivative tenure admitted—Nature of proof required—Evidence Act (I of 1872), s. 90, presumption in, whether applicable to copies **386**

——— ——— Hindu widow, suit by, for maintenance—Subsequent suit by her for residence in family house, whether barred **25**

——— ——— *Suit for ejectment of tenant—Previous suit for arrears of rent—Relationship of landlord and tenant not found to exist.*

A *mahant* of a temple brought a suit for ejectment, on the ground that he was a *muafidar* of the land in question and the defendant his tenant paying him a cash rent. Defendant alleged that he was the *pujari* and held the land as such and had never paid rent. In a previous suit between the parties for arrears of rent, the Collector had decided that the relationship of landlord and tenant did not exist between the parties, as an agreement under which the defendant was alleged to have agreed to pay rent was not proved:

Held, that the former decision operated as *res judicata*. **U. P. B. R.** RAMANUJ DAS *v.* JANKI DAS **415**

——— ——— ——— Suit for mesne profits of land—Subsequent suit for possession of the same land, if maintainable **939**

Restitution *See* CIVIL PROCEDURE CODE, 1882, s. 583; CIVIL PROCEDURE CODE, 1908, s. 144.

Resumption. *See* AGRA TENANCY ACT, ss. 50, 154, 154 (*b*).

Re-trial—Enhancement of sentence, whether a fit ground for ordering re-trial **65**

Reversioner. *See* HINDU LAW.

———— ————, suit by **6**

Review. *See* CIVIL PROCEDURE CODE, 1908, O. XLVII, R. 1.

—— —— *Final judgment—Application for reception of new evidence—Sufficient reason not shown—Rejection of application, propriety of—Civil Procedure Code (Act V of 1908), s. 114, O. XLVII, r. 1.*

Where an application for the reception of new evidence was made to a High Court in a case which had lasted for over three years after a final judgment had been made in the case by that Court and no sufficient reason was shown why the proposed new evidence was not timeously submitted, and the High Court rejected that application:

Held, that the rejection of the application by the High Court was correct. **P. C.** SHIVALINGAPPA BASAPPA SHINTRE *v.* REVAPPA, 17 C. W. N. 762 **717**

Revision. *See* AGRA TENANCY ACT, s. 185; CIVIL PROCEDURE CODE, 1908, s. 115; U. P. LAND REVENUE ACT, s. 185.

—— ——Accidental slip—Error, correction of—Jurisdiction **50**

———— *, if allowed where appeal lies—Revision application treated as appeal.*

Where an appeal lies a revision application will not be entertained, but it may be treated as an appeal. **U. P. B. R.** SUNDAR SINGH *v.* SITAL PRASAD **678**

—— Letters Patent (Madras), cl. 15—Criminal trial—Appeal, if competent **96**

—— — , grounds for—Finding based on no evidence **61**

———— Service of summons—Defendant not found—Summons served by being affixed on defendant's door, whether sufficient service **564**

Right of way, *suit for establishment of—Limitation Act (IX of 1908), s. 23, applicability of Watercourse and way distinguished, obstruction to Continuing nuisance.*

The obstructions which interfere with the flow of water are in the nature of continuing nuisances, as to which the cause of action is renewed *de die in diem* so long as the obstructions causing such interference are allowed to continue.

There is no distinction between an obstruction to a water-course and one to a way, and wrongful interference with a right of way constitutes a nuisance.

Obstructions to easements other than water-courses may be treated as continuing nuisances. **C.** NAZIMULLA *v.* WAZIDULLA, 21 C. L. J. 640 **385**

Risk note, Form A. *See* RAILWAY.

Rules of Supreme Court, O. XLV, rr. 5, 6, scope of—Inherent power of Court **580**

Sale. *See* CUSTOM.

—— *Consideration—Kobala containing recital of payment of consideration—Benami, onus of proving—Defendant in possession—Presumption, whether arises—Admission of first evidence.*

In a suit for possession on the basis of a sale-deed the plaintiff (vendee) has to prove his title where the defendant (vendor) in possession pleads that he is only a *benamidar* but he shows a *prima facie* title by producing and proving his conveyance which contains a recital of receipt of the consideration.

In such a case the onus is upon the defendant (vendor) to show the non-payment of consideration.

Where after the close of evidence on both sides, the plaintiff applied to the Court to be allowed to adduce further evidence but the application having been disallowed, he applied to withdraw from the suit with liberty to bring a fresh suit but the order granting this latter application was set aside on revision, and the plaintiff then applied for summons on certain persons to prove a certain part of his case, but the defendants objecting, the Court did not allow these persons to be produced, though present:

Held, that under the circumstances the plaintiff ought to have been allowed to tender further evidence. **C.** DURGA CHARAN CHANDRA *v.* KHORDA COMPANY, LIMITED **696**

——Execution against wrong representative—Property in hands of usufructuary mortgagee—Reversioner, suit by—Decree-holder purchaser, whether protected **6**

Irregularity—Question relating to title or some interest in land—Civil Procedure Code, 1908, O. XXI, r. 90 **203**

— *Mortgagee selling mortgaged land—Covenant to transfer another land if vendee dispossessed by redemption—Statutory prohibition of transfer of land—Vendee, right of—Damages—Punjab Alienation of Land Act (XIII of 1900), s. 3—Contract Act (IX of 1872), ss. 2, cl. (g), 65*

The defendant sold certain mortgaged lands to the plaintiff under the impression that the mortgagor would not redeem it, and covenanted that in the event of the plaintiff losing the plot by redemption at the instance of the mortgagor, he would transfer to the plaintiff an equal area out of his own proprietary holdings. The mortgagor sued for redemption and recovered possession of the land from the plaintiff. The plaintiff sued the defendant for possession of an equal area and in the alternative for damages:

Held, that the covenant to transfer other land in lieu of the mortgaged property did not amount to an alienation *in præsenti*, but constituted an agreement to transfer in future the property specified therein on the happening of a certain contingency.

Held, further, that as the plaintiff was precluded by the Punjab Alienation of Land Act since coming into force from obtaining the land in suit in pursuance of the contract, the agreement became void, but that they were entitled to compensation. **P.** FAKIRA MAL *v.* NABBU, 83 P. W. R. 1915; 166 P. L. R. 1915 **751**

———, *oral—Receipt of earnest money—Out-and-out sale—Incorrect entry of mortgage amount on that property, effect of—Failure of prompt execution and registration of sale-deed, effect of—Purchaser of property under registered deed with notice of prior oral sale, right of—Mortgage—Equity of redemption, sale of—Purchaser, right of, to redeem.*

Where a receipt of earnest money for the sale of equity of redemption of a house distinctly mentions an

Sale—concld.

out-and-out sale as having been effected, the mere fact that it goes on to say that a sale-deed will be drawn up does not show that the sale contract is incomplete, nor is an incorrect entry of the amount of a mortgage on that property an indication of the incompleteness of the sale.

The fact that such a receipt is not promptly followed by the execution and registration of a formal sale-deed is not sufficient to warrant a finding that the intention of the parties was that title should not pass until the consideration money had been paid in full.

A subsequent purchaser of the equity of redemption of a mortgage under a registered deed, having notice of a prior oral sale of the same property, acquires no title and has no right to redeem the mortgage. P. HARDIT SINGH *v.* BEHARI LAL, 104 P W. R. 1915 **305**

Sale-deed, rectification of **588**

Sanction. *See* CRIMINAL PROCEDURE CODE, s. 195.

Search. *See* PENAL CODE, s. 323.

Security bond executed in favour of Court—No transfer of interest Document, whether creates charge or mortgage Limitation Act (IX of 1908), s. 31 (2) **605**

Second Appeal. *See* APPEAL.

Service of summons—*Defendant not found—Summons served by being affixed on defendant's door, whether sufficient service—Revision.*

In a suit for ejectment, the process-server, not meeting with the defendant, affixed the summons on his door:

Held, that this was not a good service, that it was the duty of the process-server to make reasonable endeavours and reasonable search for the defendant and that if the defendant was merely temporarily absent from his house it should not have been noted that he could not be found (*vide* rule 12, Board's Circular 2-11 .

Held, further, that under the circumstances of this case to hold the service on the defendant to be a sufficient service was gross and palpable error of law which caused substantial injustice and that this was a ground for interference in revision. **U. P. B. R.** LONHAR TIWARI *v.* JAGTOO TIWARI **564**

Settlement Records *and* jamabandis—*Presumption of correctness Gift of produce for charitable purposes—Impropriety of inventing technical names*—Malguzar.

In the absence of satisfactory evidence to the contrary entries in the Settlement Records and the annual *jamabandis* must be accepted as correct.

Where, therefore, the ancestors of the plaintiffs who were originally the absolute owners of the land in dispute made a gift of half the produce of the land to the ancestors of the defendants with the object of charitably supplying them with means of livelihood:

Held, that the plaintiffs having been in physical possession for a very long time and there being no intention of transferring ownership or possession to the defendants, the latter had no right to possession of the land.

Settlement Records—concld.

Where the rights and liabilities of the parties are perfectly well defined and both the parties have acted in accordance therewith for a long time, it is unnecessary for the Court to invent a legal expression by which the relationship existing between the parties should be described. P MILKHI MAL *v.* GULAB SINGH, 79 P. W. R 1915; 154 P. L. R. 1915 **853**

Sir Land. *See* MORTGAGE.

———— *Co-sharers—Share of one co-sharer sold—No separation—Exproprietary right*— Sir, *character of.*

S sold his share of 7 pies out of a 5 annas and 9 pies share in the *mahal* to the plaintiff long ago, but *S* neither claimed exproprietary rights in the *sir* to the extent of his 7 pies share out of the *sir* of the 5 annas 9 pies co-sharers, nor was this portion of land separated from the rest. The plaintiff brought the present suit for the ejectment of the tenant who claimed occupancy rights. The Courts below held that in consequence of this sale, the land lost its character of *sir* to the extent of 7 pies share and that the respondent who was the tenant of the *sir* land held partly as occupancy tenant and partly as sub-tenant and could not be ejected:

Held, that had the portion of the land, corresponding to *S*'s share, been divided off, it would have ceased to be *sir*, but this not having been done, it still retained its character as *sir*. **U P B. R.** KAMAL-UD-DIN *v* RAMZAN ALI **64**

Siyeeba. *See* MUHAMMADAN LAW.

Specific performance—*One contract alleged and different contract proved—Damages.*

Where a plaintiff has alleged a contract of which he seeks specific performance but fails to establish it, the Court will not make a decree for specific performance of a different contract.

Where there is a contract of which specific performance would not be decreed by the Court of Equity the plaintiff is entitled, owing to the wrongful repudiation of that contract by the defendant, to treat the contract itself as at an end and to recover damages for the loss of it, in addition to damages in respect of those breaches of it which may have been committed before repudiation.

To make a decree for damages for the breach of a contract which is not the subject-matter of the litigation, would be to assume that there has been a breach of that contract which has never been attempted to be specifically enforced.

The principle upon which the Court refuses specific performance of a contract not the subject-matter of the suit, is equally applicable to the claim for damages for breach of that contract. **C.** NILKANTA ROY *v.* LALIT MOHAN BANERJEE, 19 C. W. N. 933 **989**

Specific Relief Act (I of 1877), s. 9—*Suit for possession based on possessory title—Defence—Defendant's right to set up title.*

A suit in ejectment on the basis of possessory title is maintainable against any person who cannot show title in himself, apart altogether from the provisions of section 9 of the Specific Relief Act. The difference is that in a suit under the Specific Relief Act, the defendant will not be allowed to plead or to prove title in himself; whereas

Specific Relief Act—concld.

in a suit upon possessory title brought independently of the provisions of the Specific Relief Act, or even after the period of limitation prescribed for a suit under section 9 of that Act has expired, the defendant will be allowed to plead his title and to prove it, if he wants to do so. If he fails to do so, the plaintiff can get a decree, even though he has been able to prove nothing more than possession by himself of the property in suit up to the date of his wrongful ejectment by the defendants. **A.** MAKHDOOM BAKHSH SHAH *v.* HASHIM ALI **210**

——— ——— ——— **ss 15, 16**—*Contract to sell whole house—Vendor possessing only half share—Specific performance.*

The defendant No. 1 on behalf of himself and as agent of the defendant No. 2 agreed to sell a house, in which each of the two defendants had one-half share, to the plaintiff. Defendant No. 1 had no authority to sell the half share of defendant No. 2. The plaintiff sued for specific performance of the contract:

Held, that the plaintiff was only entitled to a decree for specific performance for half the house on condition of paying the full price agreed upon for the entire house. **A.** MAHMUD ALI *v.* YAWAR BEG, 13 A. L. J. 739 **628**

——— ——— **s. 16** **628**

——— ——— **s. 26 (e)** **449**

——— ——— **s. 31** **588**

——— ——— **ss. 38, 41** **804**

——— **s. 41** — *Discretion — Minor's mortgage, cancellation of, suit for—Decree—Consideration paid, if to be allowed.*

The discretion conferred upon the Court by section 41 of the Specific Relief Act must be so interpreted and exercised as only to impose upon a plaintiff seeking relief by way of cancellation of an instrument such conditions as the law would impose upon him if the position of the parties were reversed and he were the defendant in a suit brought to enforce the instrument according to its terms.

Where the plaintiff brought a suit for setting aside a mortgage-deed executed by him while he was a minor and his mother, who was his certificated guardian, and a decree was passed conditional on his paying the full consideration of the deed in suit:

Held, that as a minor's contract was void the plaintiff's suit should have been decreed as brought. **A.** GAYA PRASAD *v.* SARFARAZ CHAUDHRI **972**

——— ——— **s 42** **53**

——— ——— **s. 42**—*Fraudulent decree, suit to set aside, when maintainable—Consequential relief, necessity of—Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of plaint, when not permitted.*

A suit to declare that a decree is fraudulent and void will not lie unless followed up by a prayer for consequential relief, such as an injunction restraining the decree-holder from executing the decree.

A Court should not exercise its wide powers of amendment under Order VI, rule 17, of the Civil Procedure Code when the plaintiff has not availed himself of the other remedies open to him. **M.** RAMANADHAN CHETTIAR *v.* ANNAMALAI CHETTY **132**

Stamp Act (II of 1899), s. 14 **602**

——— ——— **ss. 33, 35**—*Instrument insufficiently stamped, examination of, optional—Stamped instrument admitted in evidence does not apply to criminal proceedings—Penal Code (Act XLV of 1860), s. 405—Breach of trust—Conversion, evidence of.*

Under section 33 of the Stamp Act it is optional to the Magistrate to examine or impound the instrument if it appears to be insufficiently stamped.

But the prohibition contained in the first part of section 35 that no instrument chargeable with duty shall be admitted in evidence for any purpose or acted upon unless it be duly stamped, does not apply to proceedings in a Criminal Court.

Where it is proved that the two accused or either of them were in fact entrusted with certain property as servants, and they set up a claim that it belongs to them, and refuse to return it, that in itself is evidence of conversion to justify a conviction under section 405, Indian Penal Code. **C.** JAGANNATH RAHATGIR *v.* DEOKINANDAN, 16 CR. L. J. 543 **671**

——— ——— **s. 35** **671**

——— ——— **Sch. I, Art. 1**—*Account book entries, if required to be stamped—Admissible in evidence.*

The account book entries are not liable to stamp duty and are admissible in evidence for what they are worth. **L. B.** RAMDAYAL *v.* KUMAR GANGADHAR BOGLA **943**

Statute, construction of **325**

Stridhanam. *See* HINDU LAW.

Subrogation. *See* MORTGAGE.

——— ——— , right of. *See* TRANSFER OF PROPERTY ACT, s. 53.

Succession. *See* AGRA TENANCY ACT, s. 22; CUSTOM.

Succession Act (X of 1865), s. 50—*Will—Valid execution, what is.*

Where the respondent applied for Probate of a Will and it appeared that the Will was wholly in the handwriting of the deceased and bore his signatures on the various pages thereof, and alongside his signature on the top left-hand corner of the 1st page were the signatures of four witnesses and on each of the other three pages the signatures of two out of those four persons:

Held, (1) that the signature of the testator on the first page was the operative signature by which he intended to make the document an effective one;

(2) that the witnesses put their signatures *animo attestandi* and the Will was properly executed by the deceased in the manner required by the Indian Succession Act. **C.** SABITRI THAKURAIN *v.* F. A. SAIN, 19 C. W. N. 1297 **743**

Suit *on a lost bond—Admission of execution—Plea of payment—Burden of proof.*

Where a suit was brought on a lost bond and the defendant admitted its execution but pleaded payment:

Held, that the question of loss of the document was not material and that it was for the defendant to prove payment. **A.** JHANDU MAL *v.* KARAN SINGH, 13 A. L. J. 567; 37 A. 426 **606**

Suit—concld.

—— to recover possession of trust properties—Management of temple transferred under agreement—Agreement found to be void—Suit to recover possession—Suit to set aside agreement, whether to be brought within three years 1

Suits Valuation Act (VII of 1887), s. 11, *rules under—Jurisdiction of Court—Waiver—Consent—Valuation of suit.*

The valuation of a suit, for a declaration that the plaintiff is the owner of a certain land assessed with land revenue for purposes of jurisdiction is governed by rules framed under the Suits Valuation Act, and the plaintiff cannot fix an arbitrary valuation and make the suit cognizable by a Court of a particular grade.

Neither waiver nor consent of parties can confer upon a Court jurisdiction to entertain a suit which is beyond its pecuniary limits. The fact that the defendant did not object to the jurisdiction of the Court does not validate the proceedings. **P.** GHULAM AKBAR KHAN *v. Musammat* BAKHAT BIBI, 116 P. L. R. 1915 796

Summons, service of, when complete 109

Surety. *See* CRIMINAL PROCEDURE CODE, s. 122.

——, when liable 149

——, qualifications of 825

Survey records, admissibility in evidence of 154

Tenant *goes away on pilgrimage—Cousin cultivates and manages holding—Tenant does not return—Presumption of death—Co-sharing explained—Co-sharing possible, though tenant absent.*

An occupancy tenant went away on a pilgrimage after arranging with his cousin for the cultivation of his holding and the payment of rent. During the absence of the tenant the cousin collected rent for the portion held in sub-tenancy and cultivated the remainder of the holding himself:

Held, that these facts amounted to a sharing with the tenant (though he was not present in the village), whose death must be presumed after a lapse of seven years from his leaving the village.

Sharing does not necessarily imply cultivation by two or more persons. **U. P. B. R.** DORI SINGH *v.* LOCHAN 427

——*Mortgagee—Rent-paying grove mortgaged—Suit for arrears of rent against mortgagor—Mortgagee not made party—Ejectment of mortgagee.*

A rent-paying grove-holder mortgaged his grove with possession. After the mortgage the *zemindar*, without impleading the mortgagee as a defendant, sued the mortgagor for arrears of rent, obtained a decree and ejected him for its non-payment. Then he sued to eject the mortgagee as a tenant from year to year, the mortgagor's rights having been extinguished:

Held, that the mortgage being with possession, the mortgagee was a necessary party to the suit for arrears of rent and that the landlord could not eject him so long as he did not pay up the mortgage-money or so long as the land retained the character of a grove. **U. P. B. R.** RISAL RAI *v.* NEPAL RAI 676

Theft, charge of—Identification doubtful—Verdict of Jury, when can be set aside 72

Title. *See* DECLARATION OF TITLE.

——Current coin, title to—Proceeds of cheating paid in satisfaction of debt—Right of creditors to retain money 92

——, *declaration of—Possession, recovery of—Mortgage, if can be questioned against a* bona fide *purchaser for value without notice—Estoppel—Limitation Act (IX of* 1908), *Sch. I, Art.* 137, *scope of.*

Those who have derived title subsequent to a mortgage cannot be permitted to impeach the genuineness of that transaction to the detriment of a *bona fide* purchaser, for value without notice from a purchaser in a Court sale.

A *bona fide* transferee for value from an ostensible owner is allowed to protect himself against a claim by the real owner. **C.** RAM SUMNUN PROSAD *v.* GENDA LAL RAI 841

——Exchange of *patta* and *muchilika*, whether confers title 12

——, proof of 154

Trade-mark, *infringement of—Advertisement—Publication of advertisements—Cause of action—Jurisdiction.*

A trade-mark can be infringed by means of advertisement. The cause of action for such infringement arises partly where the advertisement is published and distributed. **A.** KHESHTRAPAL SHARMA *v.* PANCHAN SINGH VARMA 987

Transfer of case. *See* CRIMINAL PROCEDURE CODE, s. 526.

Transfer of a civil case—*Judge's expression of opinion about plaintiff's paper, when not ground for transfer—Conduct of plaintiff.*

An expression of opinion by a Judge as to the character of the plaintiff or of his paper, is no ground for transfer when that expression of opinion was elicited by the conduct of the plaintiff himself. **M.** TANGUTURU SRIRAMULU, *In re* 29

Transfer of Property Act (IV of 1882), s. 6 (a)—*Contract Act (IX of* 1872), *s.* 23—*Agreement to sell by reversioner of an estate when it devolves upon him—Specific performance, if enforceable—Contract, validity of.*

A contract by an expectant reversionary heir to an estate to sell the same if and when it devolves upon him, is not specifically enforceable. The contract is prohibited by section 6 of the Transfer of Property Act and is also void under section 23 of the Contract Act. **M.** KAKARALAAPUDI LAKSHMI NARAYANA *v* KANDUKURI VEERA SARABHA, 17 M. L. T. 419; 28 M. L. J. 650 241

—— —— —— **s. 6 (a)**—Transfer of *spes successionis*—Restraint upon alienation 549

—— —— —— **ss. 6 (a), 43**—Transferor representing himself to be an absolute owner when he is not—Subsequent acquisition of title by inheritance—Transfer, validity of 439

—— —— —— **ss. 10, 12**—*Property given to widow for maintenance with no right to transfer—Condition, whether valid—Life-estate, whether property—Maintenance, right of, transfer of.*

A life-interest is just as much property as an absolute interest and any condition absolutely restraining the transferee from disposing of that property is void.

Transfer of Property Act—contd.

Where the plaintiff and the defendant No. 2 came to an agreement in a former suit that certain property should be given to the latter for her maintenance but that she should not be able to alienate it:

Held, that the restriction on the defendant No. 2's right to alienate the property was contrary to sections 10 and 12 of the Transfer of Property Act and, therefore, void.

A right to maintenance cannot be transferred under section 6 (*d*), Transfer of Property Act, 1882, but specified property given in lieu of maintenance can be transferred. **C.** RAM CHANDRA *v.* GOPI NATH **251**

——— s. 12 **251**

——— ss. 14, 54—*Contract for sale of immoveable property, whether creates vested interest—Rule against perpetuities—Contract, whether enforceable against survivors of joint Hindu family.*

Under section 54 of the Transfer of Property Act a contract for the sale of immoveable property does not by itself create any interest in the property. It does not run with the land and is not binding upon a purchaser without notice.

Nor does such a contract fall within the scope of section 14 of the Transfer of Property Act, but it is enforceable against the surviving members of a joint undivided Hindu family. **M.** RAJA OF KARVETNAGAR *v.* VELAYUDA REDDI, 18 M. L. T. 83 **435**

——— s. 43 **439**

——— s. 53—*Assignments in fraud of creditors—Part payment of consideration for a previous mortgage—Right of subrogation, whether exists.*

The fact that an assignment is set aside as being one in fraud of creditors under section 53, Transfer of Property Act, does not prevent the Court from declaring a charge upon the property assigned to the extent of the payment made by the assignee towards the redemption of a previous mortgage.

In the absence of any conflicting equities the mere fact that the consideration for the previous mortgage has not been paid in full does not prevent the assignee from claiming the right. **M.** UMMACHAKUTTI *v.* UMMERKUTTI HAJI **583**

——— s. 53—*Mortgage executed in order to defeat creditors if void—Consideration paid in part—Suit to enforce mortgage security—Lien.*

Section 53 of the Transfer of Property Act does not render a transaction void, but it is only voidable at the option of any person defrauded, defeated or delayed thereby.

In order to bring a case within the scope of section 53 fraudulent intention alone is not enough, there must also be evidence to show that there were other creditors at the time of the transaction who were intended to be defrauded or defeated.

A mortgage can be enforced for so much of the consideration as is proved to have been paid by the mortgagee to the mortgagor.

Where the defendant No. 1 executed a mortgage of two properties, a parcel of land and a hut on another parcel, in favour of the plaintiff and the defendant No. 2, a creditor of the defendant No. 1, obtained a money-

Transfer of Property Act—contd.

decree against him and in execution thereof purchased the hut; in a suit to enforce the mortgage security:

Held, (1) that defendant No. 2 as purchaser of the equity of redemption in the hut alone was in no way interested in the first parcel of land which belonged to the mortgagor and could not, therefore, object to the sale of that parcel by the mortgagee,

(2) that it being plain from the orders in the execution proceedings, wherein defendant No. 2 became the purchaser, that he acquired the hut subject to the lien of the plaintiff, he could get relief only on condition that he satisfied that lien. **C.** KRISHNA KUMAR NANDY *v.* JOY KRISHNA NANDY **690**

——— s. 53—*Right of simple mortgagee to bring suit under s. 53 of Transfer of Property Act to declare an alienation void—Creditor—Decree for sale of mortgaged property—Personal remedy if barred—Limitation Act (IX of 1908), Sch. I, Arts. 120, 91, 95—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 14.*

A simple mortgagee who has obtained a decree for sale and whose right to a personal decree is not barred, is a "creditor" within the meaning of section 53 of the Transfer of Property Act and can bring a suit to set aside an alienation made in fraud of creditors.

To such a suit Article 120 and not Article 91 or 95 of Schedule I of the Limitation Act, 1908, applies. **M.** AUTHIKESAVALOO NAICKER *v.* SHAH ABDULLA, 2 L. W. 479; (1915) M. W. N. 337 **62**

——— s. 53—*Subsequent transferee, definition of—Interest in property, existence of—Fraudulent transfer—Auction-purchaser, whether subsequent transferee.*

A person, who steps in by operation of law and not by any act of the owner, is not a subsequent transferee within the meaning of section 53 of the Transfer of Property Act. He is not a person having an interest in the property within the meaning of the section which refers to interest which exists at the time of the transfer objected to.

Where, therefore, *P* sold his interest in a certain land to plaintiff in 1906 and in execution of a money-decree passed against *P*, his rights in the property were sold at a Court sale on 22nd January 1909 to the defendant, and on the defendant being placed in possession of the property, the plaintiff sued to recover possession under the sale-deed of 1906:

Held, that the sale-deed was not voidable at the option of the defendant inasmuch as he was not a transferee nor a person having interest in the property within the meaning of section 53 of the Transfer of Property Act. **B.** VASUDEV RAGHUNATH OKA *v.* JANARDAN SADASHIV APTE, 17 BOM. L. R. 522; 39 B. 507 **497**

——— s. 54 **435, 886**

——— s. 54—*Sale by registered instrument or by delivery of possession—Bond, where to be registered—Intention to sell or mortgage, want of—Registration law, fraud on.*

Per *Sharfuddin, J.*—Under section 54 of the Transfer of Property Act the sale of immoveable property of value less than Rs. 100 may be made either by a registered instrument or by delivery of the property.

Transfer of Property Act—contd.

A Registrar has no jurisdiction to register a bond where the person giving the bond has no property in the district **C.** UDIT NARAIN *v.* MATHURA PRASAD **413**

s. 55 (1) (a) 394

s. 55 (2)—*Knowledge of vendor's defective title, whether bar to recovery of purchase-money.*

A vendee is entitled to rely on section 55 (2) of the Transfer of Property Act. His knowledge that the vendor's title was defective will not preclude him from suing for recovery of his purchase-money if he is deprived of the property sold. **M.** VELLAYAPPA ROWTHEN *v.* BAVA ROWTHEN **747**

s. 55, sub-sec. (4), cl (b)—*Charge, meaning of Debt and security, if can be transferred.*

The charge mentioned in section 55, sub-section (4) clause (*b*) of the Transfer of Property Act, is not a personal right of the seller himself, and, therefore, can be transferred to an assignee. The debt itself can be transferred and also the security for it. **C.** SHEO NANDAN LAL *v.* JAINUL ABDIN, 19 C. W. N. 899 **869**

s. 55 (6) (b) 886

ss. 58, 100—*Security bond executed in favour of Court—No transfer of interest—Document, whether creates charge or mortgage - Limitation Act (IX of* 1908), *s.* 31 (2).

Where a security bond, after reciting an order of the Court made upon an application that the possession of certain immoveable property should not be delivered over to the plaintiff, stated that "we have, for a sum not exceeding Rs. 300, made the properties mentioned below security":

Held, (1) that the document did not transfer an interest in the property nor was there any existing or future debt or an engagement which might give rise to a pecuniary liability within the meaning of section 58 of the Transfer of Property Act;

(2) that it merely created a charge and did not fall within section 31 of the Limitation Act. **M.** RAMACHARIAR *v.* DORASAMI PILLAI **605**

s. 59 886

s. 59—*Mortgage-deed not attested by two witnesses—Invalidity of mortgage—Pleas raised in course of trial but not in pleadings—Court, duty of—Procedure.*

Where in the course of the trial and not in the pleadings a defendant raises the plea that the mortgage is invalid because the signature of the mortgagor was not attested by two witnesses as required by section 59 of the Transfer of Property Act, the Court should not dismiss the suit for that reason. It is only upon a distinct and supplemental issue framed on the point and after giving both the parties an opportunity to adduce fresh evidence on it, that a Court should find for or against the invalidity of the document for that reason. **M.** RATNA NAIDU *v.* AIYANACHARIAR **991**

s 76 (c) — *Mortgagor bound to pay Government revenue Revenue falling into arrears —Sale of property, whether liable, to be set aside.*

Transfer of Property Act—contd.

Section 76 (*c*) of the Transfer of Property Act does not apply where the deed of mortgage distinctly provides that the Government revenue shall be paid by the mortgagor.

Where, therefore, it was an express condition of a deed of mortgage that the Government revenue need not be paid by the mortgagee and the property was put up to sale on account of the revenue falling into arrears, on a suit for redemption brought by the assignee of the mortgagor:

Held, that as the mortgagee was not bound by law to pay the revenue, the purchaser was not guilty of any fraud and the sale could not be set aside **M.** OOPPATH NARAMPARAMBATH KUTTAN *v.* KOYAKUTTY **344**

s. 82 — *Contribution — Properties of two owners mortgaged to secure one debt —One owner and his property, release of, on payment of one-half of debt—Major portion of property released—Liability of other mortgagor and remaining portion of mortgaged property.*

Where properties of unequal value belonging to two owners were mortgaged to secure a single debt and the mortgagee, on receiving one-half of the mortgage amount from one of the mortgagors released his portion of the mortgaged properties, which were of higher value, and sought to realise the balance of the mortgage amount from the remaining properties belonging to the other mortgagor:

Held, that he was entitled to do so and that the suit properties were liable to be sold for the whole of the balance remaining due upon the mortgage and not only to contribute rateably towards the mortgage-debt.

Per *Napier, J.*—A Court should not introduce such provisions as the Legislature has not thought fit to incorporate in Transfer of Property Act. **M.** THUVOOR VENKATASUBBA REDDY *v.* BAGIAMMAL, 2 L. W. 469; (1915) M. W. N. 339; 17 M. L T. 411; 29 M. L. J. 319 **113**

ss. 82, 101—*Usufructuary and simple mortgage in favour of same person —Mortgagee purchasing some of mortgaged property —Suit on simple mortgage—Liability of property purchased to rateable contribution.*

The defendant No. 1 and another mortgaged certain properties to the plaintiff with possession. Later on defendants Nos. 1 and 2 executed a simple mortgage in respect of the same lands as well as a house and a house site in favour of the plaintiff. The plaintiff then purchased the lands, the sale-deed expressly stating that the debt secured by the simple mortgage should stand. In a suit to enforce the mortgage security under the second mortgage:

Held, (1) that the plaintiff took the lands subject to all the incidental liabilities which attached to them by reason of their having been previously mortgaged under the simple mortgage and which were, therefore, liable to contribute to the debt secured by it;

(2) that the plaintiff's liability to contribute out of the value of the lands purchased by him arose not by reason of his position of usufructuary mortgagee but by his purchase of the mortgagors' equity of redemption.

Transfer of Property Act—concld.

Held, (per *Napier, J.*, dissenting), that the plaintiff mortgagee was entitled to enforce his claim for the whole amount of his mortgage against the property. M. ARUNAGIRI MUDALIAR *v.* KUPPUSAMI PILLAI 124

——— s. 83 929

——— s. 83 -- *Conditional deposit of mortgage money in Court—Condition requiring return of documents to which mortgagor not entitled, effect of — Tender conditional, whether valid.*

A condition requiring a return of certain documents to which the mortgagor is not entitled attached to a deposit by the mortgagor under section 83 of the Transfer of Property Act vitiates the tender. M. *In re* ACHATH SANKARAN 586

——— ss. 83, 84—*Deposit of mortgage amount, when valid—Interest, when ceases to run.*

It is only the actual payment of the full mortgage amount into Court that makes interest on the mortgage amount cease to run under section 84 of the Transfer of Property Act, and not a mere presentation of a petition for that purpose under section 83 of the Act. M. MUSALIUM VEETIL THEYATHIL MAHAMMADUNNI *v.* KUDUMPALATH PADINHARA PARAMBIL BAVA, 2 L. W. 408 145

——— s. 84 145

——— s. 85 752

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——— s. 107 797

Trespass—Ejectment, suit in—Tenant-in-common, right of one to sue alone 60

Trust - Expenditure incurred by *de facto* trustee during management, whether ground for retaining possession until payment of expenses 1

— property, following of—Tracing and *quasi*-charge, doctrine of, if applicable 37

Trusts Act (II of 1882), ss. 20, 23—*Agreement by lessee to deposit one year's rent with lessor—Lessor, whether trustee—Deposit of money by lessor in Bank at lessee's request—Failure of Bank—Lessor, whether liable for loss.*

Where a lessee deposited an amount equivalent to one year's rent with his lessor till the expiry of the lease or its cancellation and at his request the lessor deposited the money in a certain Bank and paid its interest to the lessee, but the Bank failed and the lessor's assignee sued the lessee for rent:

Held, that even if the lessor be assumed to be in the position of a trustee, he was not liable for the loss of the money and his assignee was entitled to sue for the rent. M. RAJARAM ROW *v.* VENKATACHELA CHETTIAR 997

——— s. 23 997

U. P. General Clauses Act (I of 1904), s 4 (23) 16

U. . Land Revenue Act (III of 1901), ss 106, 110, 111, 112, *applicability of—Imperfect partition—Proprietary title—Civil Court, jurisdiction of.*

Sections 110, 1 1, 112 of the Land Revenue Act do apply to imperfect partitions and, therefore, the rule to the effect that a party to a partition proceeding who has had the opportunity of pleading a question of title and has not availed himself of that opportunity, cannot maintain a suit in the Civil Court for the relief which he might have claimed in the partition proceedings, does apply to proceedings taken for imperfect partition. A. RAGUBIR *v.* TULSHI RAM, 13 A. L. J. 548 222

——— ——— ——— ss. 110, 111, 112 222

——— ——— ——— s. 172—*Mango trees—Standing timber—Sale whether can be set aside by deposit—U. P. General Clauses Act (I of 1904), s. 4 (23)—Immoveable property - Standing timber.*

The mango trees when sold with the intention that they should be cut down and taken away by the purchaser are standing timber. Under section 4, clause 23 of the United Provinces General Clauses Act immoveable property does not include standing timber and, therefore, a sale of them cannot be set aside by deposit of money under section 172 of the Land Revenue Act. U. P. B. R. JATA SHANKAR *v.* RAM DAT 16

——— ——— s. 185—*Revision, power of—Suit for profits—Claim admitted—Plaintiff absent—Suit dismissed—Order, legality of.*

Where in a suit for profits the plaintiff was absent on the date of hearing and the defendant who was present, admitted part of the claim but the Court dismissed the suit *in toto*:

Held, that the order was glaringly illegal and that the Board had jurisdiction under section 185 of the Land Revenue Act to set aside the order. U. P. B. R. RAFIULLAH *v.* AHMAD SALEH 33

U. P. (Local) Government Rules under s. 70, Civil Procedure Code, rr. 30, 31, 32 89

Upper Burma Land and Revenue Regulation, s. 53 (2) (ii), *whether* ultra vires—*Suit regarding State lands between private individuals—Jurisdiction of Civil Courts*

Section 53 (2) (*ii*) of the Upper Burma Land and Revenue Regulation is *ultra vires* of the Legislature, even in respect of suits regarding State lands between private individuals

Consequently a suit for a decree declaring that a house situate on Government land is not liable to be sold in execution is cognizable by a Civil Court. U. B. MAHOMED AMIN *v.* NACHIAPPA CHETTY, 8 BUR. L. T. 45 736

Vendor and purchaser—*Court auction-purchaser—Mortgage, existence of, undisclosed—Liability to pay, if non-existent—Purchaser from such purchaser compelled to pay mortgage amount—Liability of auction-purchaser to indemnify private purchaser.*

Where a person purchases certain immoveable property at a Court sale in execution of a money decree, in ignorance of the existence of a mortgage

Vendor and purchaser—concld.

upon the same, and subsequently sells it privately to a third party who also purchases without the knowledge of the existence of the mortgage, and where the mortgage is afterwards disclosed and the private purchaser is compelled to pay the amount thereof, the latter is not entitled to claim compensation from his vendor, as the purchaser of property in a Court sale takes it not only with all benefits but also subject to all liabilities. **M.** MUTHUSWAMY PILLAY *v.* MUTHUVEERAM PILLAY, 2 L. W. 517 **392**

———————*Obligation to secure quiet and peaceful enjoyment—Signing of sale-deed, if sufficient—Contract of sale and delivery of possession —Defence against ejectment—Specific performance—Claim for mesne profits, essence of.*

Per *Spencer, J.*—It is the duty of every seller of immoveable property to secure his purchaser in quiet and peaceable enjoyment of the subject of the sale. This obligation cannot be considered as discharged by the mere signing of the sale-deed, but will continue until the purchaser has got an indefeasible title to the property which the seller purported to convey.

A contract of sale followed by delivery of possession cannot be pleaded in defence to an action for ejectment where there is no registered sale-deed, but the defendant can avoid the difficulty by suing for specific performance and getting the action in ejectment postponed pending the result of the suit.

Per *Coutts-Trotter, J.*—A vendor is under no obligation to register the document he had given.

The essence of a claim for mesne profits is that it rests upon an agreement implied in law that when one person occupies property of another, he must be deemed to have tacitly assented to the condition that he is liable for an occupation rent in respect of that occupation. **M.** MANIYAM KUPPANNA *v.* KUPPANA GOUNDEN, (1915) M. W. N. 319 **195**

———————*Sale of land—Deficiency in extent—Transfer of Property Act (IV of 1882), s. 55 (a)—Covenant for title, meaning of—Compensation for breach of contract—Claim made after execution of conveyance.*

A covenant for title is only a contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that the seller has power to transfer the same.

A suit to recover compensation for deficiency in the extent of land purchased is not a suit for damages for breach of a convenant for title, but one for part failure of consideration and for compensation for failure to perform the vendor's part of the contract in full.

Where under the contract the part unperformed bears only a small proportion to the whole of its value, a suit for specific performance with a claim for compensation would lie for the unperformed part.

The same rule also holds good even where the mistake as to the extent is discovered after the execution of the conveyance, as the vendee before that date has no right to inspect the land except with the vendor's permission. **M.** JANGA VENKATAREDDY *v.* JAMAL AHMED SAHEB, (1915) M. W. N. 422; 29 M. L. J. 122 **394**

Village sites. *See* WASTE LAND.

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Waste land—*Title — Evidence — Possession — Quantum of evidence necessary—Bombay Land Revenue Code (Bom. Act V of 1879), s. 37—Open village sites, title of Government—Presumption.*

Section 37 of the Land Revenue Code does not confer title on Government and there is no presumption of title in favour of Government even as to open village sites.

Where there is already title in one party, the law is slow to infer that the physical acts of user were done with the intention of defeating that title or of laying claim to land already vested in another, but the same acts of user which do not suffice as evidence of actual possession might be adequate proof of possession when the title to the land is in doubt.

In such cases the quantum of evidence depends upon the character of the land and although in the case of waste lands, the Court would seize upon the slightest evidence of occupation, the occupation or the acts of user must be such as to indicate the intention to hold for oneself, for without such intention there is no possession. **S.** SULTAN MUHAMMAD *v.* SECRETARY OF STATE, 8 S. L. R. 331 **51**

Widow. *See* HINDU LAW.

Wild Birds Protection Act (X of 1887)—*Wild Birds and Animals Protection Act (VIII of 1912), s. 3—Rules framed under Act of 1887 not superseded by new rules under Act (VIII of 1912)—Old rules to be interpreted by sections of later Act—Burden of proof.*

Though the rules framed under the Wild Birds Protection Act of 1887 have not been superseded by the rules framed under Act VIII of 1912, they are to be interpreted by the sections of the later Act.

The burden of proving that the egrets whose feathers were alleged to have been imported into Monywa Municipality were captured or killed during the close season contrary to the rules lies on the prosecution and it is illegal to lay it on the accused. **U. B.** MAHOMED JAMAL *v.* EMPEROR, 8 BUR. L. T. 20; 16 CR. L. J. 550 **822**

Wild Birds and Animals Protection Act (VIII of 1912), s. 3 **822**

Will. *See* HINDU LAW.

———*Application for Letters of Administration—Institution of subsequent suit to contest validity of Will —Probate Court, if to stay proceedings—*Factum *of Will—Judgment* in rem*—Oral evidence as to execution of Will—Improbabilities.*

A Probate Court is bound to determine whether a Will was as a matter of fact made, and it cannot stay its proceedings and wait indefinitely for the decision of a suit subsequently instituted in regard to validity of the Will which decision may or may not be in favour of the caveator. The possibilit of a finding as to the

Will—contd.

invalidity of a Will, which finding can only be binding upon the parties to the suit, does not constitute a sufficient justification for a Probate Court to postpone its decision as to its due execution, more especially as the decision of the Probate Court on the point operates as a judgment *in rem*.

In order to conclude whether a Will is genuine, internal evidence is no doubt of great importance. But an improbability to prevail against direct evidence of disinterested witnesses must be clear and cogent. The incidents mentioned by a Court for raising a presumption of probability or improbability are of no value if they are either wrong on facts or capable of explanation by reference to other considerations which have been lost sight of by that Court. **P.** MAYA RAM *v.* MALAN DEVI, 66 P. W. R. 1915; 145 P. L. R. 1915 **687**

——— Custom—*Gulfarosh Arains* of Lahore City **382**

——— *not produced—Presumption—Secondary evidence, admissibility of—Estoppel.*

The rule of law that "when a Will is traced to the possession of the deceased and is not forthcoming at his death the presumption is that he has destroyed it", must be applied with considerable caution in India in view of the habits and condition of the people.

A Hindu *Jat* in 1884 executed a Will under which his surviving sons and a grandson whose father had died were to take equal shares. In 1898 he revoked that Will and executed another by which he excluded two of his sons. After his death mutation was made in accordance with the Will of 1884. The devisees under the second Will, except two of the grandsons, sued for the shares in respect of which the two excluded sons had been recorded as owners. Before the trial of the suit the parties agreed to refer the dispute to arbitration. Thearbitrators made an award and in accordance therewith the suit was dismissed. The plaintiffs applied for revision of the order and one of the plaintiff's thereafter applied to withdraw his application for revision. The Chief Court reversed the order of dismissal and remanded the case for trial. At the trial the original Will of 1898 was not forthcoming but a copy of that Will was obtained from the Registrar's Office and admitted in evidence without any objection:

Held, that the Will was admissible in evidence as the reasonable presumption was that the Will was mislaid and lost or else stolen by one of the defendants after the death of the testator.

Held, further, that the plaintiff who had withdrawn his revision petition was not estopped from claiming his share nor were those who had not joined in the suit. **P. C.** PADMAN *v.* HANWANTA, 19 C. W. N. 929; 13 A. L. J. 801; 17 BOM. L. R. 609; 18 M. L. T. 54; 2 L. W. 645; (1915) M. W. N. 500; 22 C. L. J. 172; 110 P. W. R. 1915; 29 M. L. J. 307 **807**

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